

Employment Group Of The Year: Covington

By Christopher Norton

Law360, New York (January 4, 2011) -- With victories under its belt for clients like Verizon Communications Inc. and Xerox Corp. that shaped precedent for litigation under the Employee Retirement Income Security Act, Covington & Burling LLP has nabbed a spot as one of Law360's Employment Groups of 2010.

The key to Covington's success has been its laser focus on a select number of vital cases with major implications for the future of ERISA, while other firms may focus on handling a greater volume of routine ERISA cases.

"We've played a major role in the important cases that have shaped the standards under ERISA," Covington ERISA litigation group head Jeffrey Huvelle told Law360. "Compared to other ERISA groups, I think we have a large number of experienced lawyers who have handled significant matters. We have depth in the group."

The Washington-based team includes six ERISA litigation partners and 10 other partners focused on providing ERISA advice.

The advisory lawyers work closely with the litigators and bring a great depth of experience with the statute, Huvelle said.

They "allow us to really focus on the important issues and provide the courts with an understandable explanation of how the statute is supposed to work," he said.

Perhaps the team's greatest victory in 2010 came in the U.S. Supreme Court for Xerox.

The case of Sally L. Konkright et al. v. Paul J. Frommert et al. presented the question of whether a court is required to defer to an ERISA plan administrator's interpretation of the terms of the plan after his or her initial interpretation has been found to violate the law.

Covington got involved after the U.S. Court of Appeals for the Second Circuit had already ruled against Xerox twice.

"The challenge was that Xerox had a very complicated pension plan with idiosyncratic provisions, and the claim itself was brought by employees who had worked for xerox and then left the company and taken their benefits, and then were rehired," Huvelle said.

Covington convinced the Supreme Court that the lower courts had erred in refusing to give deference to the plan administrator's reasonable interpretation of the plan, despite a prior mistaken interpretation that was allegedly adopted in good faith. The high court ruled in favor of the Xerox pension plan and the plan's administrator.

The Supreme Court's opinion, written by Chief Justice John Roberts, held that a court must defer to the plan administrator's interpretation so long as the plan grants the administrator authority to interpret the terms and the original, erroneous interpretation was adopted in good faith.

"Our real achievement in the case was [to be] able to identify, working below the surface, an important issue about how you interpret plans and the role of the plan administrator in interpreting the plan," Huvelle said. "I think it was a surprise to most people that we persuaded the Supreme Court to take the case."

Another major win for the ERISA group came in *Young v. Verizon's Bell Atlantic Cash Balance Plan*, a class action brought by 14,000 plan participants who asserted claims for additional benefits totaling nearly \$1.5 billion, based on the alleged miscalculation of their opening balances at the adoption of a cash balance formula.

Covington, representing Verizon, secured a court order reforming the \$1.7 billion drafting error that caused the alleged miscalculation, the first time a district court ever ordered reformation of an ERISA plan based on a so-called scrivener's error, according to Huvelle.

Such an error occurs when a writer, or scrivener, puts something down incorrectly, such as a typographical error or an incorrect decimal point.

In this case, a Verizon lawyer was revising a plan document in which the formula for benefits when it was converting to a new plan was "a multiplied by b," according to Huvelle.

The lawyer thought it would be clearer if he wrote "the product of b times a," but forgot to delete the "multiplied by b," so the passage read as a times b squared rather than "a times b," Huvelle said.

"That mistake had a \$1.7 billion consequence," he said.

The decision provided a comprehensive analysis of whether the scrivener's error doctrine applies to ERISA plans, according to Huvelle.

"What we did was work hard to establish a record that showed the participants understood the formula was supposed to be 'a times b' to explain what the cost would be if you enforced the mistake," he said. "The district court agreed that the error should be corrected and that people should not get benefits based on the error."

The U.S. Court of Appeals for the Seventh Circuit affirmed that decision last summer, and it is now before the Supreme Court, Huvelle said.

"It's the first real reformation correcting an error case under ERISA in the 36 years that ERISA has been around," he said. "A lot of people like that case, because all of us make mistakes, but not amounting to \$1.7 billion."

The firm also scored other important wins over the course of 2010, including a class certification ruling in *In re: Schering-Plough ERISA Litigation*.

In that case, the U.S. Court of Appeals for the Third Circuit vacated an order certifying a class in an ERISA stock drop case against Schering-Plough Corp., and remanded the action for an analysis of class action requirements.

The appeals court held that the release and covenant not to sue entered into by the named plaintiff when she left her employment were not invalid.

The Third Circuit then held that such a release and covenant must be considered in assessing the typicality and adequacy of representation requirements for a class action under Rule 23, and rejected the contention that certification should be nearly automatic in ERISA fiduciary duty cases.

The duo of Xerox and Verizon, however, formed the pinnacle of the Covington group's achievements in 2010, and promise to shape the nature of ERISA for years to come. And the group isn't planning to shake up its crack team anytime soon.

"We have a good team and we just want to proceed as is," Huvelle said. "We're very happy with our group."

Methodology: In mid-November Law360 solicited submissions from over 300 law firms for its practice group of the year series. The more than 400 submissions received were reviewed by a committee of four editors. Winners were selected based on the number of significant wins the group had in litigation or the size, number and complexity of deals the group worked on in 2010.