Is There a Scrivener's Error Doctrine in ERISA?

Rosina B. Barker

When a draftsman's error creates unintended rights in an ERISA pension plan, can the mistake be corrected retroactively? If it is assumed that the ERISA answer to this question lies in the common law of contracts, then correcting the error requires a showing that the plan document does not reflect the understanding of either party to the agreement. But how can this be shown in a plan which is drafted and amended unilaterally by the employer? This article discusses two lines of ERISA cases that the plan sponsor might in some circumstances look to in order to justify retroactive correction of mistaken plan terms.

Consider the mighty typo:

> We the people, in order to form a more perfect onion...
> We band of bothers...
> The Feminine Mystaque
> Call me, Ishmael.

For the editor, the stray punctuation mark, the wrong or omitted word, can turn sense to nonsense, *le mot juste* to just mess. For the lawyer it can turn contracts to conflicts and—the topic of this article—an ERISA plan into an ERISA pain.

The author wronged by the negligent proofreader (Hail to thee, blithe spigot) can await the second printing. But can the sponsor of an ERISA plan? If the careless scrivener scrivens a material error into an ERISA pension plan document—one that confers rights on participants not intended by the plan sponsor—can the mistake be corrected retroactively? Or are the (mistaken) rights part of the plan, and thus protected from retroactive elimination by the anticutback rule of Section 204(g) of ERISA?

To focus the question, let's say the mistaken provision is clear on its face, and cannot colorably be corrected merely by the administrator's authority to construe ambiguous plan terms. For example,

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an enhanced early retirement benefit, intended for participants who had attained age 55 by December 21, 1993, is provided for a "participant who is at least age 55," without the date cutoff.

The Eighth Circuit recently considered just this mistake in *Wilson v. Moog Automotive, Inc.*, 193 F.3d 1004 (8th Cir. 1999). The court affirmed the district court in finding that because the expanded class reflected a "serious draftsman's error," the plan could be reformed to incorporate the December 21, 1993, cutoff date.

Unfortunately because the *Moog* court's reasoning is so muddled, it does not advance the doctrine of scrivener's error. We discuss it here because its very confusions point to the analytical difficulties in finding a scrivener's error doctrine in ERISA. We end our brief review of this problem by concluding that there is a scrivener's error doctrine in ERISA, albeit limited, and in some circuits perhaps unavailable.

ERISA SCRIVENER'S ERROR: TRUST OR CONTRACT LAW?

The first question is: If a scrivener's error doctrine applies to an ERISA plan, does it originate in the law of trusts or contracts? The *Moog* court decided it comes from the law of trusts, citing *Jensen v. SIPCO, Inc.*, 38 F.3d 945, 950 (8th Cir. 1994), certiorari denied, 415 U.S. 1050 (1995). *Jensen* in turn cites the Supreme Court in *Firestone Tire & Rubber Co. v. Bruch*, 489 U. S. 101 (1989), which in turn cites Restatement (2d) of Trusts Section 4.

If the *Moog* court were right, it would be good news for the plan sponsor's unhappy scrivener. In the case of a donative trust, the document is construed only to determine the intent of the *settlor*. This is indeed the holding of the *Bruch* passage cited by *Moog* and *Jensen*, which states that the terms of the trust are determined by the instrument "as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible."[1]

As the trust's meaning is determined only by reference to the settlor's intent, *trust* law permits a trust to be reformed to correct a scrivener's error if the draft reflects a unilateral mistake on the part of the settlor. It is "immaterial that the beneficiary did not know" the erroneous provision was a mistake.[2]

The scrivener's error doctrine of *contract* law is different on this salient point. In contrast with the law of donative trusts, contract law has developed to enforce and protect bargained-for exchange between two parties. Consistent with this goal, the scrivener's error rule

of contract law is a subset of the doctrine of "mutual mistake." This doctrine permits a contract to be reformed only when "clear and convincing evidence" shows that because of a drafting error the written instrument fails to express the true agreement of *both* parties to the agreement.[3]

If applicable to ERISA, the contract law doctrine of mutual mistake presents substantive problems for the sponsor of the ill-drafted ERISA plan. It is not enough to show that the sponsor intended and believed the plan to confer rights other than those written. It must also be shown that the plan's participants shared in the mistake. On its face, the scrivener's error doctrine of contract law requires double the work of that of trust law.

ERISA DOCTRINE STARTS IN CONTRACT LAW

Does this mean that careless ERISA plan drafters should be happy with *Moog*?

No. Unfortunately for the beset scrivener, the *Moog* theory that ERISA adopts the scrivener's error doctrine of *trust* law is almost certainly wrong and cannot be relied on—not even in the Eighth Circuit where *Moog* was decided.

First, nearly every other case that has examined the possibility of a scrivener's error doctrine under ERISA has found it (if at all) in contract law. In these cases, an error is grounds for reformation of the plan only if it reflects a mistake on the part of sponsor and participants alike.[4]

Second, a closer reading of *Moog* shows that, while invoking trust law, the court actually decides the case under facts and principles applicable to contract law.

The *Moog* plan was collectively bargained. The collective bargaining agreement itself appeared to contemplate the December 21, 1993, cutoff date that was inadvertently omitted from the plan draft. The *Moog* court started its analysis by deciding that the collective bargaining agreement was itself part of the plan document, and concluded that "taken together the writings [*i.e.*, the plan and the collective bargaining agreement] create an ambiguity concerning employee eligibility for early retirement." Because of the ambiguity in the document, the court decided it could consider extrinsic evidence to determine the intent of the "parties to the agreement," plural. The court considered the course of negotiations between union and employer, and concluded that "when all was said and done and the agreement ratified, neither Union representatives nor company representatives believed" that the December 21, 1993, cutoff date did not apply.

This is just straightforward contract analysis: On the basis of an intrinsic ambiguity in the contract, the court considered extrinsic evidence—most especially the course of prior negotiations—to consider the intent of both parties to the agreement.

It must be concluded that in citing *Bruch v. Firestone* to invoke trust law principles, the *Moog* court picked up the doctrinal confusion displayed by the Supreme Court in that case. As Professor John H. Langbein has discussed at length, the Court in *Bruch* purported to apply trust law to interpret an ERISA plan, but actually applied principles more typical of contract law. It would appear that the *Moog* court, like the Court in *Bruch*, "may have thought contract while it talked trust." (See Langbein, "The Supreme Court Flunks Trusts," 1990 S.Ct. Rev. 207.)

In short, it would appear that the scrivener's error doctrine in ERISA is a creature of contract law. This means that mistakes in the plan document can be shown to exist and corrected only by reference to the intent of *both* parties to the agreement.

PROBLEM: FINDING MUTUAL MISTAKE IN A UNILATERAL DRAFT

In the ERISA context, the need to show both parties' intent gives rise to an immediate and obvious problem. Reforming a contract by extrinsic evidence of the parties' intent is governed by the parol evidence rule. Admissible evidence for this purpose includes, for example, the course of prior negotiations between the parties.

But in an ERISA plan, this kind of evidence is unlikely to exist. Unless the plan is collectively bargained, the terms of the plan are typically not negotiated. The plan can be created and amended without the consent or knowledge of the participants.

As the Seventh Circuit has observed, the ERISA right of unilateral amendment confers on the plan drafter powers that go beyond even those of the commercial contract of adhesion.[5] The process of unilateral creation and amendment means that typically no prior negotiations occurred to show the participants' understanding of the plan's real terms. For this reason, ERISA cases where the scrivener's error doctrine is successfully invoked are more likely than not to include a collective bargaining agreement, where actual negotiations preceded drafting of the disputed plan terms.[6]

Moreover, the common law of contracts is only the starting point for determining an ERISA scrivener's error doctrine. The ERISA rule must be found in "a body of federal common law tailored to the

policies of ERISA."[7] These special ERISA considerations may vary somewhat from court to court. But even courts that have allowed an ERISA scrivener's error doctrine have done so cautiously, noting that the doctrine is "at odds with" ERISA's statutory purpose of allowing an employee to determine his or her rights under the plan merely by reference to the plan document.[8]

Even with these cautions in mind, however, we can conclude that there is at least in some circuits a limited scrivener's error doctrine in the law of ERISA contract.

MURATA AND *MATHEWS*: ONE OUTCOME, TWO THEORIES

For the plan sponsor who seeks to correct a unilaterally drafted plan, perhaps the seminal case on ERISA scrivener's error is the Third Circuit's decision in *International Union of Electronic, Electrical, Salaried, Machine & Furniture Workers v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992). In addition, we discuss a functionally similar case decided by the Seventh Circuit, in an opinion that never employs the term "scrivener's error" or "mutual mistake"—*Mathews v. Sears Pension Plan,* 144 F.3d 461 (7th Cir.), certiorari denied, 525 U.S. 1054 (1998). We discuss both *Mathews* and *Murata* in order to illustrate the point that, in the ERISA world of unilaterally drafted contracts, there may be more than one theoretical approach to achieve the same practical outcome: retroactive correction of the drafter's error.

IUE v. Murata Erie North America, Inc.

In *Murata*, a plan drafted pursuant to a collective bargaining agreement expressly included the employer's right to a reversion of excess funds upon plan termination. The plan was restated in 1977, however, and the 1977 restatement omitted the reversion clause. The 1977 restatement was drafted to conform the plan to ERISA, and was not negotiated. When the plan was terminated, with a surplus, employees argued the 1977 (and subsequent 1978) restatement did not permit the employer to recoup the surplus. The employer argued the omission of its reversion right in the 1977 (and 1978) restatement was merely a drafting error.

In examining whether the employer's reversion right was part of the plan, despite its omission in the 1977 and 1978 restatements, the Third Circuit started by invoking the textbook scrivener's error

doctrine of contract law. But the court went on to recognize that the doctrine may be different under ERISA. As applied to an ERISA plan, the court held, the doctrine is applicable if the error would create a "windfall" for one party or the other—in this case, a surplus remaining in the plan that "neither side could have reasonably expected." Second, the doctrine is applicable if the participants could not have relied on the erroneous provision on reading the plan document. The court reasoned the no-reliance prong was met: "Nor is it likely that reading the Plan documents would have led participants to believe that if any excess funds remained after termination, that excess would be distributed to them."

The *Murata* court concluded that the employer presented enough evidence to show the possibility of mistake, and remanded the case to the district court for possible reformation of the plan to reincorporate the employer's right to surplus assets on plan termination.

Other than its two-prong test (no-reliance and windfall), the *Murata* court sets forth a more or less plain vanilla contract analysis. Among other pieces of evidence, the court directed the district court to consider the parties' 1984 collective bargaining negotiations as evidence of their understanding of the 1977 plan provision. Under the textbook parol evidence rule, negotiations conducted *after* drafting of the instrument in question are not admissible to show mutual mistake, so possibly this is a departure from standard contract law. More plausibly, however, the *Murata* court's directive can be shoehorned into the doctrine of "course of conduct"—that is, the parties' dealings with each other *after* the drafting of the agreement, which are admissible to show the parties' anterior understanding of its terms.

Mathews v. Sears Pension Plan

Another case we believe useful in the emerging scrivener's error doctrine of ERISA is the Seventh Circuit's opinion in *Mathews v. Sears Pension Plan*. In *Mathews*, the plan provided that lump-sum benefits would be calculated using the PBGC interest rate "as of the date of distribution." As a matter of practice, the plan calculated lump sums using the PBGC interest rate as of January 1 of the plan year of the distribution. After some years, the employer amended the plan retroactively to insert the January 1 date, consistent with plan practice.

Like the *Murata* court, the *Mathews* court starts with the premise that contract law controls the question. Also like the *Murata* court, but with its analysis more explicit, the *Mathews* court notes that the

federal common law of contracts under ERISA may differ from that of contract law generally, to fit ERISA's special statutory goals.

With these ruminations as its starting point, the *Mathews* court then notes that the plan language is "unambiguous" in favor of the participants. Ordinarily, the court continues, if the contract is clear, complete and unambiguous on its face, no additional evidence is permitted to alter its terms. But under the doctrine of "extrinsic ambiguity" (called "latent ambiguity" in some textbooks), the parties may introduce extrinsic evidence to show that a provision seemingly unambiguous is in fact ambiguous in light of all the circumstances surrounding the contract's formation. The limitation on the evidence admissible under this doctrine is that it be "objective"—that is, not dependent on the testimony of either party.

The *Mathews* court found three such pieces of objective extrinsic evidence to show the contract to be ambiguous despite its facial clarity: First, the summary plan description (SPD) contained the January 1 rate. Second, Treasury regulations defined the statutory terms incorporated into the plan—"date of distribution"—to mean either the actual date of distribution or, alternatively, January 1 of the plan year in which the distribution occurs. Third, the January 1 rate was the rate actually used during the period in question and "nobody complained."

The court further noted that the plaintiffs did not claim reliance on the language of the plan, and stated it would treat any such claim with skepticism: "Workers rely on the summary plan documents, not on the bulky and legalistic plan itself." Finally, the court reasoned that participants' argument would result in a "windfall" to them, and an unreasonable financial burden on the plan.

PRACTICAL SIMILARITIES BETWEEN *MATHEWS* AND *MURATA*

It may be seen that despite differences in their terminology and theoretical approach, *Mathews* and *Murata* are functionally similar in their application of contract law to provide authority for the drafter seeking retroactively to correct an error in a plan document.

Most significantly, both *Mathews* and *Murata* admit extrinsic evidence to show that a clear and unambiguous plan term is not part of the ERISA contract. The admissibility of extrinsic evidence is important because in both cases—as in the kind of error this article is concerned about—the plan terms were *clear on their face*. As we discuss below, many courts are reluctant to open up an ERISA plan when the

terms are not intrinsically ambiguous or incomplete. The sponsor seeking to correct a drafting error, where the plan document does not otherwise support the sponsor's interpretation, may therefore find one or both of these cases useful.

We want to stress that the similarity between the two cases on this point is a *practical* one. They are alike in that they admit extrinsic evidence to justify alteration of a clear plan term. But the *Murata* doctrine of mutual mistake has a different theoretical basis from the *Mathews* doctrine of extrinsic ambiguity. And the difference in their underlying theories has practical implications, which we discuss below. But we lump the two cases together on this point, because their functional outcome is so similar: The plan sponsor may use evidence outside the plan to amend the actual plan language, retroactively to the date of its drafting.

We would note parenthetically that *Moog* (which, recall, we discuss above) is distinct from both *Murata* and *Mathews* on this important practical point. Though *Moog* invokes "scrivener's error," and *Mathews* does not, the latter is much more helpful to the erring scrivener. As we noted in our discussion above, the *Moog* court incorporated a number of conflicting documents (including the collective bargaining agreement) into the "plan," so that it was able to find intrinsic ambiguity within the four corners of the plan document. In essence, the *Moog* court reformed a contract for intrinsic ambiguity. *Moog* does not provide the authority of *Murata* and *Mathews* in justifying the use of extrinsic evidence retroactively to amend a clear plan term.

The second similarity between *Murata* and *Mathews* is that both admit actions posterior to the contract's negotiation, or "course of dealing," as evidence of the parties' intent. We find this point striking in the ERISA context, because it seems to imply that the longer it takes for the mistake to be discovered, the easier it is to correct. Recall that the *Mathews* court observed that "no one complained" about the plan's use of the January 1 rate. As a result, when someone finally complained, his unhappiness was discounted to a nullity.

Third, both cases accept extrinsic evidence as bearing on the understanding of both plan sponsor and plan participants, despite the fact that the term in question was not negotiated.

Fourth—less helpfully to the plan sponsor, but consistent with ERISA cases generally—both limit the scope of the doctrine by applying it only after expressly finding that participants did not actually rely on the mistaken term in question.

Fifth, both cases invoke "windfall" analysis, although in differing degrees. We find the practical use of this doctrine unclear, as we discuss below.

DIFFERENCES BETWEEN *MURATA* AND *MATHEWS*

Despite their kinship, the two cases differ in some factual and theoretical respects. The sponsor seeking to justify correction of a plan mistake may prefer to lean more on one case than the other, depending on the facts involved in the error.

Mutual Mistake versus Extrinsic Ambiguity

First, we have already observed that the two cases are similar in admitting extrinsic evidence to allow retroactive amendment of a plan's terms. We repeat here our earlier caution that the similarity of the two cases on this point is merely practical. They reach this result from the starting point of two different doctrines.

The common law doctrine of mutual mistake cited by *Murata* rests on the notion that the written instrument may not reflect the parties' actual agreement. The judicial remedy is reformation of the contract by a court of equity.[9] In all courts extrinsic evidence is admissible to show mutual mistake.[10]

The doctrine of extrinsic or latent ambiguity cited by *Mathews* is an aspect of the parol evidence rule governing contract *interpretation*. The party claiming extrinsic ambiguity technically seeks not reformation of the disputed contract terms, but interpretation of its meaning.

The extrinsic ambiguity doctrine lies at the heart of a dispute about whether courts can admit extrinsic evidence to interpret plan terms that are clear on their face. The older view holds that if the words of the contract are unambiguous, the court "will not even admit evidence of what the parties may have thought the meaning to be."[11] Under this older view, the court will accept extrinsic evidence only to construe contract terms that are ambiguous or incomplete within the "four corners" of the plan document. (By contrast, and as we have noted, extrinsic evidence is always admissible to show mutual mistake.)

The modern textbook view holds that even if the words of the contract are clear on their face, the court may admit extrinsic evidence to show that the terms are in fact ambiguous when considered

in light of the circumstances surrounding the agreement's creation. This doctrine, as we have seen, is referred to in *Mathews* and some other courts as the doctrine of extrinsic or latent ambiguity. A court that uses this doctrine to conclude that a contract's facially clear terms are in fact ambiguous will then—just as if it found the terms intrinsically or "patently" ambiguous—use extrinsic evidence to interpret their meaning.[12]

The two cases' different theoretical grounds for admitting extrinsic evidence to alter a clear plan term have practical implications. The plan sponsor seeking retroactively to change a plan term may prefer one to the other depending on its own facts.

The doctrine of extrinsic ambiguity, for example, may not be accepted in all circuits, or if accepted for contracts generally, may not be accepted as applied to an ERISA plan.

Even in those circuits where the doctrine is accepted and incorporated into ERISA, the doctrine is bound by the rules of parol evidence generally applicable to contract *interpretation* (as opposed to reformation for mistake). For example, in interpreting a plan a court may not use extrinsic evidence to *contradict* a written plan term.[13] We illustrate this by returning to our first example of the employer that intends to restrict an early retirement enhancement to participants who turn age 55 before December 21, 1993. The plan sponsor may want to invoke *Mathews* as authority if the plan (as in *Moog*) merely omits the December 21, 1993 date, but might prefer to avoid *Mathews* if, for example, the plan specified "before December 21, 1999."

"Windfall" Theory of Murata

Second, *Murata* relies more heavily than *Mathews* on its finding that the plan provision in question was a "windfall" to one party or the other. The *Murata* court reasoned that neither party could have expected a surplus, so allocation to one party or the other would necessarily be a windfall either way. It is not entirely clear what provisions of a plan might give rise to "windfall," or indeed why a provision that could be a windfall to either party is grounds for opening up an ERISA plan in favor of one of those parties.

The "windfall" analysis of *Murata* also seems to beg the question of why, once a provision is in the ERISA plan document even by mistake, participants should not be able to rely on it. If this entitlement is assumed, there is no "windfall." One instance of this contrary reasoning is set forth in a pre-*Murata* decision by the Fourth Circuit,

Audio Fidelity Corp. v. Pension Benefits Guaranty Corp., 624 F.2d 513 (4th Cir. 1980). The *Audio Fidelity* court refused the employer's request to reform an ERISA plan document to include an employer's reversionary right that was not written in the plan document. Rejecting the employer's argument that distributing the reversion would be "unjust enrichment" to participants, the court observed that the plan was "available for inspection by the participants," that "some, in fact, examined it," and that inspection would reveal participants' rights to surplus plan assets on termination. The court concluded that distribution of the surplus assets was therefore not "unjust enrichment," but fulfillment of the employer's contractual obligation under the plan.

Moreover, even if a court recognized that in some instances a clear plan provision might give rise to a "windfall," it is unclear what a windfall might be. One possible clue comes from a Ninth Circuit case that actually rejected application of the scrivener's error doctrine, *Cinelli v. Security Pacific Corp.*, 61 F.3d 1437 (9th Cir. 1995). In *Cinelli*, the court held that a provision was not a windfall under *Murata* as it involved "fundamental provisions of the plan document." While not entirely clear, it would appear the *Cinelli* court believed a provision to be a windfall if contingent on an unpredictable event. For example, distribution of surplus assets in the *Murata* plan was contingent on there being a surplus.

On the other hand, every benefit in a pension plan has some degree of contingency: A defined benefit plan provides retirement benefits to participants who happen to live until retirement age, survivor benefits to those who do not. So the "windfall" analysis is not entirely clear, nor is it necessarily helpful to the plan sponsor who seeks to justify a retroactive plan correction.

Nonetheless, drafters of mistaken benefits that are arguably "contingent" or not "fundamental"—such as, for example, lump-sum benefits, disability benefits, plant shutdown benefits, and the like—may wish to use the *Murata* windfall analysis to bolster the authority for their ability to correct the error.

Subjective versus Objective Evidence

A third difference between the two cases is based on the kinds of evidence they would admit to show that a mistake had been made in a seemingly clear plan provision. To show the possibility of a mistake, the *Murata* court would admit the testimony of a company officer, who testified on affidavit that in 1977 the company did not

intend to delete its reversion rights in the 1977 plan draft. The *Murata* court admitted such post hoc oral testimony to show that doubt was raised about a seemingly clear plan provision, albeit discounted heavily for its "self-serving" nature.

Under the extrinsic (or latent) ambiguity doctrine set forth by the *Mathews* court, such oral testimony would not be permitted to open up examination of a clear plan term. Rather, only "objective" evidence would be permitted to show latent or extrinsic ambiguity. As we have noted, the *Mathews* court found such objective evidence in the SPD, Treasury regulations, and the subsequent course of dealing of the parties.

It is not entirely clear under *Mathews* what additional evidence would be "objective" for purposes of admission under the extrinsic ambiguity doctrine. Let's say the mistaken plan provision has not yet been implemented, and no communications have been sent to participants. Would internal memoranda preceding drafting of the provision constitute objective evidence? Contemporaneous notes of meetings that preceded drafting? Minutes of prior Board meetings? The answer is unclear, but plan sponsors whose scribes have set their plan draft adrift would be advised under *Mathews* to look for all such evidence.

Does Murata *Mean What It Says?*

A fourth difference between the two cases is the uncomfortable fact that the *Murata* plan was collectively bargained. As we have said, the 1977 (and 1978) restatement at issue was drafted unilaterally to conform the plan to ERISA, without negotiation. But earlier plan documents were the subject of collective bargaining, and included an employer's reversion right that was negotiated.

That is, while the *Murata* court talks about evidence of the parties' posterior understanding, it decides the case in light of a substantial record as to the parties' anterior understanding of the plan's intent. Therefore, despite the stricter evidentiary standards set forth in the extrinsic (or latent) ambiguity theory of *Mathews*, some sponsors may prefer to rely on *Mathews* in the absence of collective bargaining negotiations to show the parties' intent.

Mathews *and Corrections of Defined Benefit Plan*

A fifth difference between the two cases is that the *Mathews* court expressly imports a greater number of special doctrines applicable to interpretation of ERISA plans. One of the most helpful of

these is the court's concern that any interpretive rule applicable to an ERISA defined benefit plan be designed to protect plan solvency. For example, citing other cases, the *Mathews* court notes that the ERISA rule forbidding oral modification of pension plans is a rule "designed to protect that plan's solvency and . . . is not part of the common law of contracts."[14]

In concluding that the participants' position would yield them a windfall, the *Mathews* court further notes that "there is no way that Sears can recoup the millions of dollars . . . in extra benefits that it paid to other plan beneficiaries because of the interpretation that the class is challenging."[15] Evidence of this financial threat to the plan was a factor in the court's decision. The sponsor of an error-beset defined benefit plan, where error would result in larger benefit payouts than intended, may wish to make use of this prong of *Mathews* as part of its authority for a retroactive plan amendment.

LIMITATIONS OF ERISA SCRIVENER'S ERROR DOCTRINE

In light of the difficulty of showing mutual mistake in a unilaterally drafted ERISA plan, *Murata* and *Mathews* are helpful. But they are not a panacea for correcting erroneous plan provisions, for several reasons.

First, contrary to *Murata* and *Mathews*, many federal courts are unwilling to accept extrinsic evidence to show latent ambiguity or even mistake when the terms of an ERISA plan document are clear on their face. For example, the Second Circuit has held that it will consider parol evidence of a scrivener's error in an ERISA plan, but only when ambiguity is apparent within the four corners of the document, in *Aramony v. United Way Replacement Benefit Plan,* 191 F.3d 140, 150 (2d Cir. 1999). Under *Aramony* the scrivener's error doctrine is not applicable when the plan's terms are clear on their face. The Ninth Circuit has similarly refused to apply the scrivener's error doctrine of *Murata*, or the doctrine of extrinsic ambiguity, when the written terms of the ERISA plan document are clear and unambiguous on their face. (See *Cinelli.*)

Similarly, in a pre-*Murata* decision we discussed briefly above, *Audio Fidelity*, the Fourth Circuit declined the employer's request to reform an ERISA plan document to include a reversionary right that did not appear on the face of the document. The *Audio Fidelity* court observed that the participants' right to surplus was part of the document available for inspection by participants. Payment of the surplus

would thus "simply discharge the employer's contractual obligation for which the participants have rendered service." Under the *Audio Fidelity* reasoning, the unambiguous provisions of the plan document prevent any contrary evidence as to the drafter's intent.

As we have mentioned above, the Eighth Circuit in *Moog* was able to avoid the question of whether the scrivener's error doctrine applies to a facially clear ERISA plan provision. This is because the court first held that the collective bargaining agreement was part of the plan, and was thus able to find intrinsic ambiguity in the plan's terms when all the documents—including the collective bargaining agreement—were read together.

A second and obvious limitation of the two cases is that their reliance prong may in many cases halt application of the basic doctrine.

The reliance test of course cuts both ways, and in these cases was helpful. As we have already noted, the *Mathews* court was influenced partly by the fact that participants had not actually relied on the erroneous plan provision, and even more by the fact that the correct provision was in the plan's SPD. But, as the court recognized, had the erroneous term been in the SPD—the document on which the court assumed participants rely—the case might well have gone the other way.

Another pro-employer use of the *Murata* reliance doctrine arises in the recent case, *Air Line Pilots Association v. Shuttle Inc.,* 55 F.Supp. 2d 47 (D.D.C. 1999). *Shuttle* involved disability benefits in a pension plan adopted by the buyer of a bankrupt company. In revising the plans, the buyer's plan drafters mechanically substituted the buyer's name for the seller's name throughout the plan document. (As cautious users of the global find-and-replace function in our word processing program, we have a pretty good hunch of what happened here.) This mechanical substitution resulted in the plan promising on its face the more generous disability benefits of the buyer's other plans—rather than the less generous benefits of the seller's plans.

The *Shuttle* court allowed reformation of the document to substitute the less generous disability benefits of the seller's plan. Basing its conclusion in part on the reliance prong of the *Murata* test, the district court reasoned that no participant could have relied on the plan language, "because no person plans to become disabled."

In short, the doctrine of actual reliance is a limitation on the scrivener's error doctrine of ERISA. But as seen in *Murata*, *Mathews*, and *Sears,* its practical effect is not invariably fatal. And for contingent benefits, like disability benefits, under the reasoning of *Shuttle* it may even be helpful.

SCRIVENER'S ERROR CUTS BOTH WAYS

We have discussed the scrivener's error doctrine from the point of view of the ERISA plan sponsor seeking to correct the mistake of its own drafters. But once set loose, the doctrine is equally available to participants seeking to enhance benefits by correcting "mistakes" in the document. Judge Heaney's concurring opinion in *Moog* seems to recognize this danger of introducing a scrivener's error doctrine in ERISA:

> In this case, there does not seem to be a problem with correcting the lawyer's error . . . This will not always be the case when a drafting error is made and becomes a part of a written agreement covered by ERISA. Now, as I understand the opinion, the court will be able to look behind the written agreement to attempt to find the true intent of the parties. This may raise serious problems in the future.

The double-edged nature of the scrivener's error doctrine is illustrated by two pre-ERISA cases applying state contract law—specifically, the doctrine of extrinsic ambiguity—to employer retirement plans.

In *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980), the plan document provided credits for employment with the "Company." The term "Company" was defined as Glendenning Motorways, Inc., with no reference to a predecessor employer. There was no collective bargaining agreement. The Eighth Circuit recognized that on its face the plan unambiguously provided credits only for "employment by Glendenning," and not for employment with a predecessor. But applying Minnesota contract law, the court used the doctrine of extrinsic ambiguity to show that the term "employment by Glendenning" was ambiguous. Specifically, the court noted that the term "Glendenning" did not expressly exclude predecessor companies. The court further referred to evidence on the record that one company official had assured one plan participant that service with Glendenning's predecessor company would be credited. The court concluded that plan term "employment by Glendenning" included employment by Glendenning's predecessor employer.

In *Bolton v. Construction Laborers' Pension Trust*, 56 F.3d 1055 (9th Cir. 1995) (*Bolton II*), the Ninth Circuit sets forth a telling gloss on its earlier decision in *Bolton v. Construction Laborers' Pension Trust*, 954 F.2d 1437 (9th Cir. 1992) (*Bolton I*). Despite the date of the decision, *Bolton I* applied to events before 1975, and was decided under pre-ERISA state contract law. The pension plan at issue

in *Bolton I* required 15 years of credited service for pension rights to vest. Under the *Bolton* plan, any years of vesting service were cancelled after a two-year break in service. In *Bolton I*, the Ninth Circuit held that the two-year break did not cancel prior service credits unless the break was incurred *voluntarily*.

As the court explained in *Bolton II*, "in essence, our holding in *Bolton I* amounted to a determination that the Plan contained a latent ambiguity as to whether the break in service rule applied to involuntary breaks." Applying this doctrine, the court explained that "in the present case, the Plan contained a latent ambiguity in that the break-in-service rule as written did not exempt involuntary breaks, yet anyone familiar with the fact that the rule's purpose was to reward participants who remained in the industry would wonder whether it applied to [the participant] if his break was involuntary."

In short, while the plan document contained an unambiguous two-year-break-in-service rule, the Ninth Circuit imported the rule's ostensible purpose to change it into a two-year-*voluntary*-break-in-service rule.

A third illustration of the double-edged nature of any scrivener's error doctrine arises in the parties' "course of conduct" under the plan—evidence admissible by both *Murata* and *Mathews* to show the parties' understanding of its terms. What if, over some period of time, a plan mistakenly paid out some type of benefit in amounts greater than those strictly provided by its terms? Under the kinds of evidence admitted by *Murata* and *Mathews*, participants would have an argument that the plan's more generous practice was in fact the plan's actual terms.

Plan counsel will of course want to employ any legitimate doctrine to protect the interests of its client plan when the plan contains a mistaken term. But as a policy matter we would do well not to delude ourselves that expanding the availability of doctrines to undo clear ERISA plan terms will in the long run benefit plan sponsors vis-à-vis plan participants, or vice versa.

ADDITIONAL ISSUES

The ambit of the scrivener's error doctrine goes well beyond the scope of this article. The most important omitted issue is whether the doctrine exists under the Internal Revenue Code.

The Internal Revenue Service would appear to have taken the position that there is no scrivener's error doctrine for qualified plan

purposes. According to the Service, any employer seeking to correct disqualifying discrepancies between plan practice and plan document must do its best to correct the nonconforming *practice*. Retroactive amendment of the *document* is not effective to correct the error.[16] This means that even if not barred by the anti-cutback rule of Section 204(g) of ERISA, a retroactive amendment might still disqualify the plan under its mirror provision, Section 411(d)(6) of the Code. Whether the Service's position is supported by the law on this point is the topic of another article.

The scrivener's error doctrine is also related to the far larger question that lurks beneath many ERISA controversies: What is the ERISA plan? Specific questions that arise under this topic include: Is there an ERISA doctrine of promissory estoppel? When does the SPD or other plan communications trump the plan? When is oral modification of the plan permitted? What role in expanding plan rights is played by the emerging fiduciary duty of disclosure under ERISA? To what extent is the plan a contract, to what extent a trust? Like the question of scrivener's error doctrine under the Code, these are questions for a more ambitious article.

PRACTICAL APPLICATION

Despite their limitations, *Murata* and *Mathews* offer some relief for the drafter of the botched ERISA plan. Where there is a mistake, and prior writings, previous negotiations, or other "objective" evidence exist to show the plan's intended meaning; the mistake has not been broadcast to employees through the SPD or other communications; or subsequent uncontested plan practice is consistent with the sponsor's intended provision; then those who seek to clean up after the messy scrivener may plausibly argue that the mistaken plan term was never part of the plan document.

The question is necessarily fact specific, and any one fact may cut different ways. If the error has existed long enough, under *Mathews* and *Murata* it may be that a course of uncontested plan practice at odds with the document has affirmed the "true" plan term. On the other hand, if a subsequent SPD or other employee communications replicate the error in the plan document, even long-standing plan practice may not be enough to show that the mistake is not the real plan term.

What if the error is so fresh that there is no course of conduct at all on which to hang the real plan term? Let's say, for example, that

the flawed plan document is drafted, signed and executed, and sits in the plan administrator's "In" basket. No actions have been undertaken under the new plan document, the new document has not been distributed, and no employee communications incorporating its terms have been disseminated. Is the mistake a part of the plan?

The answer under *Mathews* and *Murata* is not entirely clear. Both cases, however, suggest that if the plan sponsor can make the case that the plan provision is "mistaken" or "latently ambiguous," and can produce prior or contemporaneous written evidence to demonstrate its case (in *Murata* a good idea, under *Mathews*, required), retroactive correction is permitted without violating participants' ERISA rights.

Depending on the circumstances of the error, other considerations may help as well. For example, if the mistaken provision arises in a defined benefit plan document, and extra benefits would arise if it were considered part of the plan, *Mathews* suggests that additional grounds exist for amending it. If the error involves only a contingent benefit, such as a plant shutdown benefit, the "windfall" doctrine of *Murata* arguably supports the sponsor's decision to amend it.

CONCLUSION

In short, there is a scrivener's error doctrine in ERISA. It is limited, it is evolving, it may have more than one theoretical basis, and it may as a practical matter be unavailable in some courts under any theoretical rubric. Moreover, to the extent it exists, it would appear available to plan sponsor and plan participant alike. With these points in mind, we can conclude that those seeking to justify retroactive amendment of mistaken ERISA plan terms have support in an emerging body of case law that under some circumstances these amendments are permitted.

NOTES

1. See also Restatement (Second) of Trusts §4; George G. Bogert, *The Law of Trusts & Trustees* §182 (Rev. 2d Ed. 1979 & Supp. 1993).

2. See, e.g., *In re Estate of Duncan*, 426 Pa. 283, 232 A. 2d 717 (1967); cf. *Jonas v. Meyers*, 410 Ill. 213, 101 N. E. 2d 509 (1951) (donor's mistake, whether or not shared by donee, may justify reformation if donor seeks to reduce gift).

3. Restatement (Second) of Contracts §155. See, e.g., *Shuttle* (cited on p. 72); *Maland v. Houston Fire & Cas. Ins. Co.*, 274 F.2d 756 (8th Cir. 1926); *Snipes Mountain Co. v.*

Benz Bros. & Co., 162 Wash. 334, 298 P. 714 (1931) (contract for sale of potatoes omitted words "grown during the year 1929 on the following described premises.").

4. See, e.g., *Shuttle* (cited on p. 72); *Aramony* (cited on p. 71); *Murata* (cited on p. 63); *Audio Fidelity* (cited on p. 69).

5. *Mathews* (cited on p. 63) at 461, 465.

6. See, e.g., *Shuttle* (cited on p. 72) (collective bargaining negotiations before plan amended supported company's argument that disability benefits less generous than those drafted); *Murata* (cited on p. 63); *Moog* (cited on p. 60).

7. *Mathews* (cited on p. 63) at 465.

8. See, e.g., *Murata* (cited on p. 63); *Shuttle* (cited on p. 72).

9. See E. Allan Farnsworth, *Contracts* §7.5 (1st Ed. 1982).

10. See, e.g., *Williston on Contracts* §33.23 (4th Ed. 1999); Restatement (Second) of Contracts §215(d).

11. See, e.g., *Williston on Contracts* §95 (3d Ed. 1957).

12. See, e.g., *Pierce v. Atchison, T. & S.F. Ry.*, 65 F.3d 562, 568 (7th Cir.1995); *Bolton v. Construction Laborers' Pension Trust,* 56 F.3d 1055, 1059 n. 2 (9th Cir. 1995); *Landro* (cited on p. 73) at 1344, 1352.

13. See, e.g., Restatement (2d) of Contracts §215.

14. *Mathews* (cited on p. 63) at 465 (cites omitted).

15. Id. at 467.

16. See, e.g., Rev. Proc. 98-22, 1998-12 I.R.B. 11, *modified, amplified,* Rev. Proc. 99-13, 1999-5 I.R.B. 52.