April 17, 2025

The Hon. Michael M. Baylson (via e-mail)

Re: Cockerill, et al. v. Corteva, Inc., et al. CA No. 21-3966

Dear Judge Baylson:

Justican Mediation, LLC is engaged primarily in mediation of employee benefits disputes, and the principals are occasionally engaged as expert witnesses in situations where we both agree on the issues and opinions we are asked to express.

In this dispute, we were originally contacted by counsel for Plaintiffs to ask if we would be willing to be nominated for appointment as a special master. Believing that to be consistent with our mission, we agreed. The Court then appointed Richard Bazelon as special master, but suggested our appointment to assist the special master and/or the court. We were subsequently retained by order of the Court as a technical advisor, with me to provide the primary input, with the understanding that I may consult with my colleague, Marc Machiz, as I deem necessary.

It has been my understanding that, after I have reviewed the materials submitted by the parties with respect to potential remedies and attended the oral argument on April 9, the Court would be looking to me solely to advise on the crafting of remedies with respect to our experience with the practicalities of administration of remedies and, if necessary, to explain the

submissions provided by the parties' actuarial experts. Accordingly, this Report addresses the questions raised by the Court at the oral argument on April 9, and outlines the options for crafting remedies, as I see them. Mr. Machiz has reviewed this report and provided some input.

My Professional Background

From 1974 until 2016, I was engaged in the full-time practice of law. Initially, I concentrated my practice in the field of traditional labor law, but because I had worked as an actuarial clerk during college (performing pension plan actuarial valuations, among other tasks), I gradually moved into a full-time employee benefits law specialty. I represented primarily employers, service providers, and multiemployer plan trustees. During 2016, I moved to a semi-retired status at Littler Mendelson LLC, and then retired from that firm in March 2018, and moved to retired status under both the Pennsylvania and Massachusetts bars. Shortly thereafter, I joined with Marc Machiz (who formerly represented plaintiffs in benefits litigation, and also worked for the United States Department of Labor, including as Associate Solicitor of Labor, Plan Benefits Security Division from 1988-2000, and Regional Director EBSA, Philadelphia Region from 2012-2015) to form Justican Mediation, LLC.

I received my B.A. in economics from Lake Forest College in 1970, and my M.B.A. and J.D. from the University of Pennsylvania in 1974. I am a Fellow of the College of Labor and Employment Lawyers, and a Charter Fellow of the American College of Employee Benefits Counsel.

Introduction

In preparing this report, I have reviewed various submissions from the parties (in the record), questions presented to the parties by the Court, and my notes from the hearing held on April 9, 2025. This report takes into account the decisions reached by the Court, and is designed to address options the Court may have in structuring an appropriate remedy. I also recognize that in general, the Plaintiffs' counsel have argued for the maximum benefits for the class members and the Defendants' counsel have argued for the minimum benefits for the class members (as would be expected, and which is perfectly appropriate). My task is to present the Court with options that may reflect both of those positions, as well as options that may fall between those extremes.

This report assumes that the reader is familiar with the facts in the case and the decisions reached by the Court with respect to liability. Accordingly, I will refer to the Optional Retirement Class as including participants in the Plan who had attained age 50 with 15 or more years of service as of the spinoff date, who were found by the Court to have become eligible for Optional Retirement Benefits under the Plan on account of the spinoff, and who also were found by the Court to have been affected by a breach of fiduciary duty on account of misrepresentations or omissions relating to that eligibility. [1]

[1] I recognize that there may be some dispute as to whether the Certified Class includes individuals whose Early Retirement Benefit (or any other payable benefit under the Plan) became equal to or greater than their Optional Retirement Benefit at some point after the spinoff (this issue is the subject of a pending "Motion to Clarify" filed March 10, 2025). Because that is a legal issue for the Court, I will not address that issue in my report. If the Court determines that they are to be included in the Certified Class, they would receive the remedy applicable to their situation under the Court's order, and if the Court determines that they are not to be included in the Certified Class, they would not receive any remedy.

I will refer to the Early Retirement Class as including participants in the Plan who had not attained age 50 as of the spinoff date, but who had sufficient years of service so that they would have expected to become eligible for Early Retirement Benefits under the Plan if they had continued in service with an employer participating in the Plan until attaining age 50 and then subsequently elected to retire (terminate employment) and receive an Early Retirement Benefit.

I believe that it is helpful to consider structuring remedies in this case by dividing each class of participants into a number of sub-classes, because the remedy may be different for each of these sub-classes.

Optional Retirement Class #1 (ORC-1):

Participants who were eligible for an Optional Retirement Benefit as of the spinoff (according to the Opinion) but who have not yet applied for any benefit from the Plan.

Optional Retirement Class #2 (ORC-2):

Participants who were eligible for an Optional Retirement Benefit as of the spinoff (according to the Opinion) and who submitted an election for an Optional Retirement Benefit (which was denied).

Optional Retirement Class #3 (ORC-3):

Participants who were eligible for an Optional Retirement Benefit as of the spinoff (according to the Opinion) and who have commenced receiving deferred vested benefits, Early Retirement Benefits, or normal retirement benefits on or after the spinoff date.

Optional Retirement Class #4 (ORC-4):

The beneficiaries or estates of Participants who were eligible for an Optional Retirement Benefit as of the spinoff (according to the Opinion) and who died on or after the spinoff date. It is possible, of course, that members of ORC-3 may have died after commencing benefits, and that there may have been benefits continuing to a contingent annuitant after the date of death. In that event, I believe that it would be appropriate to treat those Participants and their contingent annuitants as members of ORC-3 rather than ORC-4, because of the necessity (as described below) of addressing the interplay between any retroactive benefits awarded, and the benefits actually received.

Early Retirement Class #1 (ERC-1):

Participants in the Early Retirement Class who cease to be employed by New DuPont[2] before attaining age 50.

Early Retirement Class #2 (ERC-2):

Participants in the Early Retirement Class who cease to be employed by New DuPont after attaining age 50, and who have not yet commenced receiving benefits under the Plan.

Early Retirement Class #3 (ERC-3):

Participants in the Early Retirement Class who cease to be employed by New DuPont after attaining age 50 and who have commenced receiving benefits under the Plan.

[2] By "New DuPont," I am referring to the entity that continued to employ the Class Members after the spinoff.

Early Retirement Class #4 (ERC-4):

Participants in the Early Retirement Class who are still employed by New DuPont.

Early Retirement Class #5 (ERC-5)

The beneficiaries or estates of Participants in the Early Retirement Class who died on or after the spinoff date. It is possible, of course, that members of ERC-3 may have died after commencing benefits, and that there may have been benefits continuing to a contingent annuitant after the date of death. In that event, I believe that it would be appropriate to treat those Participants and their contingent annuitants as members of ERC-3 rather than ERC-5, because of the necessity (as described below) of addressing the interplay between any retroactive benefits awarded, and the benefits actually received.

Issues Applicable to Both Classes:

1. Will benefits be awarded immediately, or only after an award is finalized?
    a. The Court could order that class members should be notified of their rights under the Plan as soon as possible after the issuance of the final opinion at the District Court level. That notice would include materials describing the Participant's benefit options (including any applicable commencement date), with payments to be made as soon as possible after receipt of appropriate election forms.
    b. Or the Court could order that class members should be notified of their rights under the Plan as soon as possible after the issuance of the final opinion at the District Court level, as described in 1(a), above, but Participants would be advised that the case may be appealed, and that any payments pursuant to the

Participant's election would be held by the Plan pending a final judgment on appeal.

c. Or the Court could order that class members not be notified until the final award is upheld, reversed, or remanded on appeal.

Discussion: If benefits can be elected prior to the date a final award is upheld, reversed, or remanded on appeal (or reversed), it is possible that participants can begin to receive a benefit that is higher than the one the appeals court determines they were actually entitled to. Under the IRS correction program, there are at least two ways to correct an overpayment. One is to seek repayment of the excess benefits. The other way, in the case of a defined benefit plan where participants have an accrued benefit, is to adjust future payments to a lower amount, to reflect the actuarial value of the overpayment.[3]

In this case, so long as the participant (or beneficiary in pay status) is alive as of the date the decision becomes final, it would appear that the Plan could recover any overpayment by means of an actuarial adjustment to future benefits. In my experience, defined benefit plan administrators prefer to adjust future benefits rather than seek reimbursement from participants.

Remedy Options With Respect to the Optional Retirement Class

1. Will benefits be awarded retroactively?

[3] ERISA and the correction programs were recently modified to allow for no recoupment in the case of an inadvertent overpayment. In this situation, however, I am not sure whether the overpayment could be considered inadvertent. This is a legal issue on which I have no opinion.

a. If benefits are not awarded retroactively, the Court could order that these class members will only be able to elect a commencement date as of (1) the date the Participant receives notice of the right to elect the benefit, or (2) the date the final award is issued, or (3) the date the award becomes final.

Discussion: This is the option proposed by the Defendants. Non-retroactive benefits, with commencement dates on or after the date of the notice of the benefit, is the simplest remedy to administer. Any award that includes retroactive benefits carries with it the possibility that participants will make elections different from the elections they would have made in the past, because of changed circumstances.

b. Even if the Court does not award retroactive benefits, the Court could choose to allow ORC-2 class members to receive benefits as of the date specified in their (previously-denied) applications for Optional Retirement Benefits, on the theory that these benefits are not retroactive, but simply the benefits at issue in this case. The reason for this is that it is typical in any benefit claim case to award the benefit retroactive to the date of the application.

2. If benefits are awarded retroactively, what options does the Court have in structuring a remedy?

a. The Court could allow all ORC class members who are still alive to elect an Optional Retirement Benefit as of any commencement date (probably the first day of a month) on or after the date of the spinoff.

Discussion: This is the option proposed by the Plaintiffs. Defendants object that this allows Participants to manipulate their commencement dates (and benefit options) to reflect changed circumstances and would provide them with benefits greater than those they would have otherwise been entitled to.

For example, an unmarried participant might have been inclined to elect a single life annuity at a deferred retirement date, if given that option as of the spinoff date. But since that time, this participant may have been diagnosed with an illness that will shorten his or her life expectancy, so now the participant will elect a joint and survivor annuity (with a relative as joint annuitant) commencing at the earliest possible retirement date. If every participant makes an election based on changed circumstances that are now known, this group is likely to cost the Plan more than the actuarial assumptions would have anticipated.

On the other hand, any time a participant is wrongfully denied the opportunity to make an election, and a court awards a retroactive election (which is not unusual), this "adverse selection" issue arises. The only difference here is that most of the class members did not actually attempt to make an election, because of the misrepresentations and/or omissions that the Court found to have occurred.

Defendants also object that this option would impose an administrative burden on the Plan Administrator, which would have to provide detailed disclosures for every alternative commencement date a participant asked about.

b. Alternatively, the Court could allow ORC-1 class members to elect an Optional Retirement Benefit as of the first of the month on or after the spinoff, or as of any date on or after receiving notice of the right to elect a benefit. In other words, under this alternative, the only available retroactive commencement date would be the spinoff date. This alternative would minimize the administrative burden on the Plan Administrator of having to provide benefit disclosures for multiple commencement dates.[4]

c. The Court could allow ORC-2 class members who had attempted to apply for Optional Retirement Benefits to receive those benefits as of the date requested in their applications, or as of the spinoff date (as in 2(b) above), even if no other class members have the option of electing a commencement date other than the spinoff date. The reason for this is that it is typical in any benefit claim case to award the benefit retroactive to the commence date requested in the application.

d. The ORC-3 class members' situation is somewhat more complicated. One option is to simply increase their monthly benefits to the amount that would have been payable as of the same commencement date, had the retirement been recognized as an Optional Retirement Date rather than a deferred vested or early retirement date (with a lump sum payment to reflect the higher amount due on benefits previously paid).

[4] The election materials provided to participants must include very detailed information on each optional form of benefit. This information (the amount that can be received under the optional form) will vary with each alternative commencement date.

It is possible, however, that one or more of these class members timed his or her retirement based on the amount of the pension to be received (rather than the date of commencement). If that is the case, it could be argued that in order to make this class member whole, the Participant should be able to revise the retirement date to a commencement date that would produce a similar monthly benefit under the Optional Retirement formula.[5]

The first alternative (keep the same commencement date) is probably the easiest to administer. But if the Court is going to give the ORC-1 class the option of picking any commencement date after the spinoff, it may be possible to give this ORC-3 class a similar option, which is the alternative requested by the Plaintiffs.

If a member of ORC-3 has died, the simplest approach is to (1) pay any back payments due to the deceased annuitant to the estate, and (2) adjust any contingent annuity to reflect the higher amount (if any).

e. The Plaintiffs have argued that the ORC-3 class members should be given the option of electing an Optional Retirement Benefit as of the spinoff date (or any later date). If the Court allows this alternative, an ORC-3 class member who

[5] To illustrate this situation (these amounts are totally fictional and just to illustrate the point) – suppose Participant A has an accrued normal retirement benefit of $1,000 per month. She elected to receive a deferred vested benefit as of January 1, 2022 in the amount of $900 per month. As of the spinoff, the deferred vested benefit would have been only $700 per month. The Optional Retirement Benefit would have been $800 per month as of the spinoff, but would have been $900 per month as of January 1, 2021, and $925 per month as of January 1, 2022 (her actual commencement date). Should Participant A be allowed to keep her benefit at $900 per month, but provide a lump sum payment to reflect the benefits that would have been paid between January 1, 2021 and January 1, 2022? Or should her benefit be increased to $925 per month going forward (and with a lump sum payment to reflect the increased amount since January 1, 2022)? Or should she have the option of choosing which of these approaches to elect?

elects an Optional Retirement Benefit could receive back payments reflecting the benefits that would have been paid from the spinoff date to the date of payment, reduced by the present value of deferred vested benefits already received, with the higher amount payable going forward.

f. ORC-4 class members who have died prior to a final award in this case, and prior to electing to commence benefits, presumably died with a deferred vested benefit. It is possible that a Plan benefit was payable to a surviving spouse or beneficiary, and that benefit could have been paid as a lump sum or as an annuity.[6]

If the Court has provided ORC-1 members the option of commencing benefits as of the date of the spinoff, the Court could order that the Plan assume that the deceased participant in ORC-4 would have elected this option. However, there is no way of knowing if the participant would have received benefits in the form of a joint and survivor annuity or a single life annuity.[7] So the award would have to address this question as well – perhaps by assuming benefits would have been payable in the default form (single life annuity for an unmarried participant, joint life for a married participant).[8]

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[6] See P. I-12 of the Plan, for example.

[7] If a participant is married as of the date of retirement, benefits must be paid in the form of a joint and survivor annuity (with the spouse as joint annuitant) unless the spouse consents to another form of benefit (such as a single life annuity).

[8] If a participant had divorced, it is possible that there was a qualified domestic relations order in effect which could have required the participant to elect a joint and survivor annuity with the ex-spouse as joint annuitant. More commonly, however, the ex-spouse receives a separate annuity that is actuarially equivalent to the spousal share of the participant's benefit. In that case, the Court can probably ignore this issue because for any pre-spinoff divorce, the possibility of an Optional Retirement triggering event would not have factored into the calculation of the ex-spouse's share. If the divorce occurred after the spinoff, however, that becomes an issue that probably should not

Remedy Options With Respect to the Early Retirement Class

1. This section of this report assumes that the Court intends to order reformation of the Plan as a remedy for the breach of fiduciary duty.[9] It is my understanding that the primary disagreement between the Parties is whether to require Early Retirement Class members to terminate employment in order to receive an Early Retirement Benefit.[10] This issue affects only ERC-3.
2. I believe the Parties are in agreement that ERC-1 class members are not entitled to any recovery because they terminated employment before attaining age 50.
3. ERC-2 class members cease to be employed by New DuPont after attaining age 50. They would have been eligible for an Early Retirement Benefit at any time after termination of employment, if they had remained employed by an employer participating in the Plan after the spinoff. The Court should decide whether or not these class members will be able to elect a retroactive retirement date and, if so, whether that date should be only the date of termination of employment (similar to option 2(b) for the ORC-1 class members) or, as with option 2(a) for the ORC class members, any date on or after the termination of employment.

be addressed by this Court at all – leaving it to the Plan Administrator and the parties to divide up the award, if at all.

[9] If reformation is not awarded under Count IV, the only remedies available under ERISA for a breach of fiduciary duty are those deemed by the courts to be "equitable". Plaintiffs have suggested disgorgement or surcharge as alternatives to reformation. Neither of those alternatives need to be addressed in this report, since they reflect only monetary amounts – the Parties' respective actuarial experts are in the best position to address those issues.

[10] I recognize that the Defendants do not believe reformation is appropriate at all in this case. But I also understand their position to be that if it is to be awarded, termination of employment should be required as a condition of receipt of these benefits.

If the Court decides that termination of employment is not required for receipt of these early retirement benefits (as discussed in the section relating to ERC-4), the commencement date could be as early as the Participant's attainment of age 50.

4. ERC-3 class members cease to be employed by New DuPont after attaining age 50, and are currently receiving deferred retirement benefits. This group is similar to ORC-3, and the same issues apply. Should they simply receive the difference between their deferred vested benefits and their early retirement benefits, or should they be given the option of changing their commencement date retroactively?
5. ERC-4 class members would receive a potential immediate benefit only if the Court allows the Plan to be reformed such that they do not have to terminate employment with New DuPont in order to receive early retirement benefits.[11] In that event, they would be treated the same as ERC-2 class members.

   If the Court reforms the Plan such that termination of employment with New DuPont is required for receipt of early retirement benefits, ERC-4 class members would only receive notice of their eligibility for Early Retirement Benefits upon termination of employment.
6. ERC-5 class members are those who died after the spinoff but before commencing benefits under the Plan. If they were employed by New DuPont as of the date of their death, and if they had been employed by an employer participating in the Plan

[11] As I understand it, this issue turns on (a) the Court's finding that ERC class members were misled into believing that they continued to be employed by an employer participating in the Plan, and therefore could "age into" Early Retirement eligibility under the Plan, and (b) the fact that they would have been eligible to commence Early Retirement Benefits only by terminating employment with such a participating employer. Plaintiffs argue that because some employees were able to receive benefits but continue working for New DuPont (because New DuPont was not, in fact, a participating employer), ERC class members should be able to do the same.

(as they believed they were, under the Court's finding on Count IV), it appears that their beneficiaries would have received a benefit described on page I-12 of the Plan. This could have been more valuable than any deferred vested survivor benefit that might have been payable, so the reformation of the Plan could include reference to eligibility for survivor benefits if applicable.

If the ERC-5 class member died after terminating employment with New DuPont after attaining age 50, the Court could determine that the Plan should assume that the Participant would have elected Early Retirement Benefits as of the date of termination of employment, and presume that it would have been payable in the default form (joint and survivor annuity for a married participant, life annuity for an unmarried participant). Accordingly, back benefits would be paid to the estate and/or the surviving spouse, and in the case of a joint and survivor annuity, future benefits would be continued to the surviving spouse.

If any benefits under the Plan were paid on account of the death, the payments to the estate and/or surviving spouse would be actuarially adjusted to reflect the prior payments.

Implementation of Award

This section of my report assumes that the Court will order payment of benefits to class members, in the form of lump sum payments, annuity paytments, or some combination of those. It has been my experience that when a class action involving payment of benefits is settled or resolved, the initial administration of benefit payments (including the application

process) is handled by the plan administrator. Notices, however, are generally sent through the usual class action notification process.

Where a special master has been appointed (as in this case), it would not be unusual for the parties to meet with the special master to work out the content of the notices, the most expeditious procedure for sending the notices, the process for implementation of elections, and a procedure for resolving disputes.

The content of election forms for pension benefits is largely dictated by regulations and by the terms of the plan itself. These forms, however, would be modified so that participants could be notified of the lawsuit and its resolution, and their options (if any) under the award of benefits. One approach, for example, might call for a "cover letter" that describes the litigation, enclosing the standard benefit election form.

Typically, benefit elections would be returned to the plan administrator (perhaps with copies provided to plaintiffs' counsel).

Ordinarily, in my experience, the plan administrator (with the plan's actuary, if necessary) will make the initial calculation of benefit amounts (including any options), subject to review and/or consultation with plaintiffs' counsel. While the special master would oversee any disputes over eligibility or the amount of any class member's benefits, it would not be unusual for a dispute to be referred first to the claims procedure under the benefit plan, with final disputes relating to the litigation going to the special master (and any disputes that are purely related to the participant's benefit unrelated to the litigation, such as a dispute over service credits, remaining in the standard ERISA claims procedure).

If there is any adjustment of future benefits required (for example, to apply rewarded benefit improvements to monthly benefits already being received, or to implement a recovery of any overpayments that might result from an appeal), it would be typical for the plan administrator (with actuarial advice) to make the initial calculations, with any disputes subject to the claims procedure as previously described.

Summary of Report

The two certified classes can be divided into sub-classes for purposes of crafting a remedy.

The Court may wish to determine whether benefits will be awarded and payable immediately, or not until any appeal is resolved.

The Court should determine whether class members will be able to select a retroactive benefit commencement date. Even if class members are not provided with retroactive benefits, it would be typical to award retroactive benefits to any class member who had actually filed an application for the denied benefits.

If retroactive benefits are awarded, the Court should determine what options class members will have – any retroactive date? Or only the earliest applicable retroactive date?

The Court should determine whether class members who are already receiving benefits will simply have their benefits increased to the higher amount reflecting the remedy (with retroactive payments for those past due), or whether they will have the opportunity to select a different commencement date.

The Court should determine what benefits are payable to the beneficiaries or estates of class members who have died.

The Court should determine whether reformation of the Plan will be awarded for the breach of fiduciary duty finding with respect to the Early Retirement Class.

If so, the Court should decide whether the reformation of the Plan will require termination of employment with New DuPont as a condition of receiving Early Retirement Benefits.

Implementation of the remedy would normally be handled by the plan administrator (in consultation with the plaintiffs' counsel and special master), with a special notice of the remedy (as in any class action), and with disputes handled initially by the plan's claims procedure.

Respectfully submitted,

s/Susan Katz Hoffman

Susan Katz Hoffman