

## Guest Analysis: Employer Suffers Loss From Amended Stock Award Agreement Despite §409A Compliance

By Edward P. Smith, Chadbourne & Parke LLP  
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Employment lawyers and benefit consultants have been scrambling during the past few years to ensure that employment arrangements providing for nonqualified deferred compensation, such as restricted stock unit agreements, comply with Internal Revenue Code §409A. A very recent court decision emphasizes that amending or preparing documents for technical compliance with §409A should be only part of the objective. It is also necessary that §409A documents set forth clearly the contractual rights of the parties. The decision is *Graphic Packaging Holding Co. v. Humphrey*, No. 10-12015, 2010 WL 4608775, decided by the Eleventh Circuit on November 16, 2010.

Graphic Packaging maintained a stock incentive compensation plan providing for various types of stock awards, including restricted stock units (RSUs), for eligible employees. Stephen Humphrey, CEO of Graphic Packaging, received RSU awards. Humphrey's RSU award agreements provided for payment to him one-half in shares of company stock and one-half in cash. Each RSU was intended to be the value of one share of stock.

The cash payment was based on the value of the shares represented by the RSUs. As Humphrey was a "key employee" for purposes of §409A, he could not be paid his RSUs at retirement, but was required to wait for a six-month period after retirement before he could receive his payment. Humphrey retired on December 31, 2007, but was not entitled to receive payment until June 30, 2008. The RSU award agreement failed to specify whether the cash portion of the RSU payment was to be calculated based on the date of retirement (December 31, 2007) or the date of payment (June 30, 2008).

Humphrey received a cash payment on June 30, 2008 in the amount of approximately \$1.2 million based on the \$3.69 per share value on December 31, 2007, the date of retirement. Graphic Packaging thereafter determined that this payment was an "administrative error" and should have been based on the value of stock (\$2.02 per share) on June 30, 2008, the date of payment. The company sent Humphrey a letter demanding repayment of over \$540,000. When Humphrey refused, Graphic Packaging sued.

The United States District Court for the Northern District of Georgia granted summary judgment to Humphrey on the ground that "Graphic Packaging could not show that it made a mistake by valuing the RSUs as of the date of Humphrey's retirement." The Eleventh Circuit upheld the judgment in favor of Humphrey on appeal as Graphic Packaging, which had brought the claim, did not overcome its burden of proof. The Eleventh Circuit said that §409A does not suggest that the valuation date for RSUs is the expiration of the six-month waiting period and that Graphic Packaging could not point to any language in the RSU award agreement specifying that the RSU value was to be the end of the six-month waiting period.

The *Graphic Packaging* decision emphasizes the importance of preparing documents not only for §409A compliance but also to set forth clearly the intent of the parties.

### **About the Author**

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