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BENEFITS LITIGATION UPDATE

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A Short Message from ERIC President Scott Macey:

Recent experience and the nightly news tell us that much of our government has turned dysfunctional and perhaps non-functional in recent years. Our government has three branches and we know that Congress and the federal agencies can have a significant impact on our activities when they do act. However, it is perhaps the courts that have had the greatest impact on our society and our benefit system in recent times. The Supreme Court and the lower courts continue to issue rulings in a variety of cases that directly and indirectly affect employee benefit plans. Over the last several years, the Supreme Court has issued such important decisions as ones upholding the ACA individual mandate and overturning key provisions of the Defense of Marriage Act. Plan sponsors continue to grapple with such rulings.

ERIC recognizes the importance of the courts to the design, administration and communication of benefit plans. We have an active Legal Committee (and, if you are not a member, we invite you to join). We recently had a day long legal seminar where we offered CLE credit and were joined by several of our law firms who led interactive discussions on a variety of critical legal and litigation issues. ERIC also continues to file amicus briefs in important benefit cases, such as ones involving equitable remedies, deference to administrator decisions, and vesting of bargained for retiree health benefits. We discuss the most recent briefs and cases in this Benefits Litigation Update.

Recently, the Supreme Court issued its controversial ruling regarding the contraceptive mandate under the ACA and its decision holding there is no presumption of prudence for fiduciaries who manage stock funds under 401(k) plans when the stock has fallen in value. We will review these decisions and their likely impact in this issue. The limitation of the contraceptive mandate when it conflicts with religious rights may not directly impact most ERIC members, but its potential for broader lower court rulings in response could. The loss of the presumption of prudence seems adverse on its face, but the Court in its decision also outlined several key hurdles that plaintiffs must overcome to escape a motion to dismiss. We also address in this issue the meaning of the ruling and several related cases involving employer stock investments.

In the last issue of the Update, we included an article summarizing the developments regarding equitable remedies since the Supreme Court's 2011 decision in *Amara v. Cigna*. We include an update on that summary in this issue. And, we have included an editorial from one of our senior law firm colleagues focusing on possible challenges to the basic deference principle.

As with prior issues of the Update, we are joined by our colleagues from Epstein Becker Green. Debra Davis, my colleague at ERIC, and I join in hoping that you find this issues informative and interesting and we also invite you to register for our Focus On call on July 23 during which counsel from Epstein Becker, Debra and I will discuss the issues and cases addressed in this issue of the Benefit Litigation Update.

ERIC members and trial members can register for the call at **http://bit.ly/BLU-Call**. Epstein Becker Green clients who are not members of ERIC can register for the call by sending an email to acooper@eric.org.

FEATURED ARTICLES

Recent Supreme Court Decisions Revise Rules for Stock Drop Cases

By: Debra Davis

Retirement plans that invest in company stock are subject to the rules under the Employee Retirement Income Security Act of 1974 ("ERISA") and securities laws. The U.S. Supreme Court has recently issued two opinions that impact litigation involving these plans under both ERISA and securities laws. In *Fifth Third Bancorp v. Dudenhoeffer*, the Supreme Court analyzes ERISA's fiduciary requirements where the value of the company stock in the plan declined (known as "stock drop cases"). In *Halliburton v. Erica P. John Fund*, the Supreme Court analyzes stock drop cases with respect to securities law issues. Both cases are likely to have significant impacts on plans that invest in company stock. (*Fifth Third Bancorp v. Dudenhoeffer*, No. 12-751 (June 25, 2014); *Halliburton v. Erica P. John Fund,* No. 13-317 (June 23, 2014).)

Overlap of ERISA and Securities Law Claims

In cases where the value of company stock in a retirement plan has declined, participants often allege both the breach of fiduciary duties under ERISA and violations of securities laws.

Under ERISA, the participants typically allege that the fiduciaries breached their duties by allowing participants to invest their plan accounts in employer stock. They often argue that the company stock became an imprudent investment alternative because of circumstances adversely affecting the company and that the fiduciaries should not have continued to allow investments in the stock. They may also allege that the fiduciaries knew or should have known about these circumstances and that they either misled or failed to warn participants about the risks.

Participants often also include allegations of securities law violations. They frequently argue that they should be able to recover damages in a securities fraud action because they relied on the defendant's alleged misrepresentation in deciding to buy or sell a company's stock. About 25 years ago, in *Basic v. Levinson*, the Supreme Court made class action lawsuits in securities fraud cases easier to proceed when it held that each individual plaintiff does not have to provide direct proof that he relied on the alleged misrepresentation. (*Basic v. Levinson,* 485 U.S. 224 (1988).) Instead, the Court held that a plaintiff can invoke a rebuttable "presumption of reliance" using the "fraud-on-the-market theory". Under this approach, a plaintiff is presumed to have relied on any alleged misrepresentation because the market price of all shares on a well-developed market is presumed to reflect all publicly available information, including misrepresentations.

For example, in *Harris v. Amgen*, retirement plan participants filed a class action lawsuit against the company and the plan fiduciaries, among others. (*Harris v. Amgen, Inc.*, 738 F.3d 1026 (9th Cir. 2013).) After the value of the company stock declined, the participants alleged that the defendants breached their fiduciary duties under ERISA.

In a separate class action simultaneously pending before the same district judge, the investors in the company stock claimed violations of federal securities laws based on the same alleged facts as in the ERISA matter. The Ninth Circuit Court of Appeals, in the ERISA case, held that the defendants' preparation and distribution of summary plan descriptions, which incorporated the company's SEC filings by reference, were actions that they performed as fiduciaries. As a result, the Court held that these documents may be used by participants to show that the defendants knew or should have known that the stock was artificially inflated. Furthermore, the Court held that these documents (which the plaintiffs alleged were inaccurate and misleading) could also be used to show that the participants relied on the defendants' statements under the fraud on the market theory.

The *Amgen* defendants sought review in the U.S. Supreme Court. On the last day of the Term the Court granted Amgen's petition for a writ of certiorari, vacated the Ninth Circuit's decision, and remanded the case back to the Ninth Circuit for further consideration in light of the Court's new decision, *Fifth Third Bancorp v. Dudenhoeffer* (discussed in the next section).

Thus, fiduciaries of plans which invest in company stock need to be prepared to potentially defend against allegations of both violations of ERISA and securities laws.

Supreme Court Rejects Presumption of Prudence in ERISA Case But Provides Helpful Guidance

The U.S. Supreme Court recently decided the case of *Fifth Third Bancorp v. Dudenhoeffer*, which clarified the rules under ERISA for fiduciaries of retirement plans that invest in company stock. The case examined the requirements for employee stock ownership plans ("ESOPs"), including stock funds under 401(k) plans, where the plan requires investment in company stock and the stock has declined in value (known as "stock drop cases"). In the *Fifth Third Bancorp* case, the company sponsored a retirement plan where the plan's assets were invested in mutual funds and an ESOP. Consistent with the Tax Code requirements regarding ESOPs, the plan required the ESOP's funds to be invested primarily in the company's stock.

Prior to the Supreme Court's decision, a number of Circuit Courts of Appeal had provided that plan fiduciaries should be cloaked with a presumption that they acted prudently when deciding to buy or hold employer stock (known as the "presumption of prudence") if the plan directed the fiduciary to invest in company stock.

The ERISA Industry Committee ("ERIC") filed an amicus brief in the case that urged the Supreme Court to apply the presumption of prudence at the pleading stage of the litigation.

The Supreme Court rejected the presumption of prudence, stating that no provision of ERISA conferred any special presumption on ESOP fiduciaries. The Court stated that all of ERISA's fiduciary requirements (including the basic prudence requirement) apply to ESOP fiduciaries, except for the requirement to diversify the plan's investments. They further noted that ERISA provides that a fiduciary is required to comply with the terms of the plan document, only insofar as it does not conflict with ERISA.

However, the Supreme Court also noted that the motion to dismiss for the failure to state a claim may be an important mechanism for fiduciaries to weed out meritless claims. The Supreme Court directed the lower courts to carefully consider whether a complaint states a claim that the fiduciaries have acted imprudently. Since a claim would arise either from publicly available information or inside information regarding the stock, the Court examined each of these sets of circumstances separately.

First, as the Supreme Court noted in the *Halliburton* case (discussed in the next section), where stock is publicly traded, a fiduciary should typically be considered unable to recognize from publicly available information that the company stock is over- or under-valued, except in special circumstances. In other words, absent some special

circumstances, the fiduciaries can rely upon the market price of the stock as properly representing its true value. Claims grounded in the assertion that "the fiduciaries should have realized, from publicly available information, that the stock was over-valued" thus would rarely, if ever, survive a motion to dismiss.

Second, the Court stated that a participant who attempts to state a claim for breach of fiduciary duty on the basis of inside information must plausibly allege an alternative action that the fiduciary could have taken. This alternative must not violate securities laws and must not be more likely to harm the investment than help it. The Court notes that a fiduciary's decision to stop purchases or to disclose negative information about the company stock could be more detrimental to the plan by causing a drop in the value of the price of the stock held by the plan.

The Court remanded the case to the Sixth Circuit Court of Appeals for further proceedings. That court's decision will be a good bellwether of how the Supreme Court's revised approach is received.

Supreme Court Also Provided Guidance on How Securities Law Claims May be Dismissed

The U.S. Supreme Court also recently decided the non-ERISA case of *Halliburton v. Erica P. John Fund*, which significantly impacts retirement plans that invest in company stock in securities law cases. The *Halliburton* case examined the "presumption of reliance" in securities fraud cases (including cases involving stock drop claims under retirement plans). This was the second time that the case came before the Supreme Court.

As discussed above, plaintiffs in securities fraud cases must show that they relied on a company's alleged material misrepresentation when deciding to buy or sell the company's stock. The most direct way plaintiffs can demonstrate that they relied on the alleged misrepresentation is to show that the plaintiff was aware of the company's statement and engaged in a relevant transaction (such as buying the stock) based on that specific misrepresentation. Such proof, however, is not always available, and it involves such individualized proof that it could foreclose class action prosecution of claims.

In *Basic v. Levinson* the Supreme Court endorsed the "presumption of reliance" means of showing reliance. Under the presumption of reliance, investors who buy or sell stock at the market price are considered to have relied on the information in the marketplace, which includes the company's alleged misrepresentation. In order to use the presumption of reliance, an investor has to show that: (1) the company's alleged misrepresentations were publicly known, (2) the alleged misrepresentations were material, (3) the stock traded in an efficient market, and (4) the investors traded the stock between the time the alleged misrepresentations were made and the truth was revealed.

In *Halliburton*, the Supreme Court held that a defendant may try to rebut the presumption of reliance and prevent class certification by introducing evidence that the alleged misrepresentation did not impact the market price of the stock. The Court explained that, while plaintiffs who satisfy the *Basic* criteria receive the presumption at the class certification stage that the misrepresentation affected the stock price, the company can rebut the presumption at the class certification stage by providing direct evidence that the stock price was not, in fact, affected.

However, the Supreme Court distinguished the issue of whether the alleged misrepresentations were "material" from the issue of whether the stock price had been affected and held that materiality cannot be rebutted at the class certification stage.

Notably, a substantial effort had been mounted in *Halliburton* to persuade the Court to abandon the presumption of reliance endorsed in *Basic* and to declare that the efficient markets thesis did not deserve to be the default position of the courts. The Court refused to move from *Basic* or from efficient markets. Ultimately, ERISA fiduciaries gained the benefit of the Court's willingness to stand by efficient markets and the reasonableness of investor (and fiduciary) reliance on the market price of a stock.

Conclusion

The Supreme Court has provided companies with tools for defending meritless stock drop lawsuits. While companies and fiduciaries are no longer able to use presumption of prudence, they may be able to have non-meritorious claims dismissed early in litigation by showing that they relied on public information, that the alternative options were not reasonable, and when applicable, that any alleged misrepresentation did not impact the market price of the company's stock.

Hobby Lobby and the Questions Left Unanswered

By: John Houston Pope

The Supreme Court closed out its most recent Term with a political bombshell case, *Burwell v. Hobby Lobby Stores, Inc.*, No. 13-354 (June 30, 2014), in which the Court held that religious objections to aspects of the contraceptive mandate imposed through regulations promulgated pursuant to the Affordable Care Act could be raised successfully by a for-profit closely held corporation. Benefits administration, it appears, has been enlisted in the culture wars. Unfortunately, the case left unanswered more questions than it answered.

Hobby Lobby raised two questions: (1) could for-profit corporations assert rights under the Religious Freedom Restoration Act (RFRA); and (2) if so, did the contraceptive mandate infringe on the religious freedom (protected by RFRA) of Hobby Lobby (and Conestoga Wood Specialties Corp., the plaintiff in a companion case heard at the same time)? In a 5-4 decision, the Court answered both questions in the affirmative.

(Background aside: RFRA is a statute that passed Congress twenty years ago, with huge margins of bipartisan support, as a response to a Supreme Court decision that narrowed the ability of religiously observant persons to claim exemptions from laws of general application. RFRA conferred a statutory right to insist that government show a compelling interest and a narrowly tailored approach in regulating conduct that substantially burdened their ability to exercise their religious freedom. In an irony worthy of O Henry, the Supreme Court subsequently held that, for federalism reasons, RFRA could not be constitutionally applied to the States, the primary concern of the legislation, and therefore it has become important largely only for federal statutes, like ACA.)

In an attempt to narrow the principle established by its opinion, however, the Court restricted its ruling on the applicability of RFRA to closely held corporations. It emphasized that "[t]he companies in the cases before us are closely held corporations, each owned and controlled by members of a single family, and no one has disputed the sincerity of their religious beliefs." Unfortunately, the Court went no further in providing any guidance regarding how to define "closely held" for purposes of applying RFRA.

The distinction between closely held and publicly traded entities arose when the government argued that the Court should not apply RFRA to for-profit corporations because determining the sincerity of the beliefs of corporations would be difficult as a practical matter. The government hypothesized that divisive and polarizing proxy battles might erupt over conferring a religious identity on large, publicly traded corporations. (The government gave IBM and General Electric as examples for this hypothetical.) "These cases," the Court responded, "do not involve publicly traded corporations, and it seems unlikely that the sort of corporate giants to which [the government] refers will often assert RFRA claims. [The government] has not pointed to any example of a publicly traded corporation asserting RFRA rights, and numerous practical restraints would likely prevent that from occurring." The Court thought it "improbable" that "unrelated shareholders – including institutional investors with their own set of stakeholders – would agree to run a corporation under the same religious beliefs".

Unfortunately, the "improbable" outcome that the Court forecast does not foreclose the prospect that the strong-willed activists in this area will not stage the proxy battles that the government feared. It's notable that eleven years ago Berkshire Hathaway terminated its shareholder-directed charitable contribution program in response to the introduction of shareholder resolutions and commencement of a religiously motivated boycott directed against one of its subsidiaries by activists who opposed the fact that some of the donations had been designated by shareholders to go to Planned Parenthood (which the activists equated with support for abortion). That real world example suggests that culture war battles over the offering of benefits potentially may intrude on the C-suites in large corporate America.

The second question handed the Court the task of deciding whether the contraceptive mandate substantially burdens the exercise of religion. It had "little trouble concluding that it does." The reasoning on this issue is enlightening.

The Court concluded that the plaintiffs had been left with an unpalatable choice: (1) offer plans that did not comply with the mandate but which satisfied their religious scruples and pay substantial tax penalties, or (2) drop insurance coverage altogether and force their employees to obtain health insurance through an ACA exchange. The Court considered the state of the record regarding whether it would be more or less costly to Hobby Lobby to send its employees to the exchanges, if penalties were to be imposed for doing so. It was abysmal and left the Court to assume that Hobby Lobby would be worse off. The Court then set aside that aspect of the argument and examined the "cost" to Hobby Lobby of dropping its insurance. This is where the opinion becomes a veritable brief lobbying on behalf of all employers who value providing benefits to workers.

The Court intoned: "Health insurance is a benefit that employees value. If the companies simply eliminated that benefit and forced employees to purchase their own insurance on the exchanges, without offering additional compensation, it is predictable that the companies would face a competitive disadvantage in retaining and attracting skilled workers." The Court then considered how companies might make up for the elimination of group health plans. "Group health insurance is generally less expensive than comparable individual coverage, so the amount of the salary increase needed to fully compensate for the termination of insurance coverage may well exceed the cost to companies of providing the insurance. In addition, any salary increase would have to take into account the fact that employees must pay income taxes on wages but not on the value of employer-provided health insurance." Together with the penalties, which are not tax deductible for the employer (in contrast to the premiums of group health insurance), these costs would appear to wipe out any potential financial advantage to an employer that dropped health insurance coverage to comply with its religious principles. At least on this point, the Court, it seems, understands the employer's case for employment-based group health coverage.

At bottom, the government lost in *Hobby Lobby* because the Court decided that the government could find less restrictive alternatives to accomplish its goal of promoting women's reproductive health choices. The Court suggested a new, government-funded program for contraception coverage or, alternatively, something akin to the accommodation extended by the government to religious nonprofit organizations with religious objections, by which written certification of an objection to contraceptive coverage exempts an employer from paying for that coverage, although the insurer, or the third-party administrator for a self-insured plan, must still make the coverage available to employees.

In considering the potential accommodations that the government could extend to religious objectors, the Court also considered the possibility that a religious exemption for the contraceptive mandate might lead to "a flood of religious objections regarding a wide variety of medical procedures and drugs, such as vaccines and blood transfusions[.]" The Court insisted that its "decision in these cases is concerned solely with the contraceptive mandate" and that it

"should not be understood to hold that an insurance-coverage mandate must necessarily fall if it conflicts with an employer's religious beliefs." Choosing immunizations, the Court noted a coverage mandate "may be supported by different interests (for example, the need to combat the spread of infectious diseases) and may involve different arguments about the least restrictive means for providing them." The Court did not follow through on its examples to explain how a transfusion coverage mandate might be justified. The principal dissent, moreover, pointed to a much broader universe of potential religiously grounded objections to medical treatments, adding antidepressants (anathema to Scientologists) and medications derived from pigs, such as anesthesia, intravenous fluids, and pills coated with gelatin (rejected by certain Muslims, Jews and Hindus).

The Court also addressed "the possibility that discrimination in hiring, for example on the basis of race, might be cloaked as a religious practice to escape legal sanction." Again, the Court stated that its "decision . . . provides no such shield. The Government has a compelling interest in providing an equal opportunity to participate in the workforce without regard to race, and prohibitions on racial discrimination are precisely tailored to achieve that critical goal." The recognition of the compelling interest in fighting race discrimination unfortunately allows a negative implication regarding the level of the government's interest in fighting other forms of discrimination. The principal dissent identified religious objectors who have claimed a religiously based right to discriminate based on race, gender, marital status, and sexual orientation. The narrow response of the majority opinion to the dissent's argument leaves the status of these other grounds (gender, marital status, and sexual orientation) unanswered. Notably, in the wake of *Hobby Lobby*, a request has been conveyed to the President to insert a religious exemption provision into a planned Executive Order providing employment protections for the LGBT community working for government contractors. There appear to be at least some who have read a potential negative implication about such protections into the *Hobby Lobby* opinion. If this implication turns out to be accurate, it will provide a basis to employers protected by *Hobby Lobby* to challenge the IRS requirements for marital equality in benefit offerings.

Adding to the flurry of activity around the *Hobby Lobby* decision, just three days later the Supreme Court enjoined enforcement of the accommodation program specially created to manage the contraceptive mandate for religiously oriented nonprofit employers. (*Wheaton College v. Burwell,* No. 13A1284 (July 3, 2014).) This elicited howls from three of the dissenting justices in *Hobby Lobby*, who felt that the Court had reneged on its apparent endorsement of that program as a potential less restrictive alternative to the original mandate that could fulfill the government's interest without trammeling religious liberty. The *Wheaton College* injunction surely has teed up a second round of the battle over benefits.

Hobby Lobby thus settled the most immediate question before it and, in doing so, left many more questions unanswered. Businesses and the courts will now struggle with answers. They also are likely to face regulatory changes from the government designated to address the immediate concern to extend coverage for contraceptive services to women.

Post-Amara Landscape Continues to Evolve

By: Scott Macey

As we discussed in the last issue of ERIC's Benefits Litigation Update, one of the most challenging areas of litigation for plan sponsors is the area of equitable remedies. The term "equitable remedies" refers to types of relief that typically were available in courts of equity, such as reformation, surcharge and disgorgement of unjust gains. In the last issue, we focused on the evolving landscape following the 2011 Supreme Court decision in *Cigna v. Amara* in which the Supreme Court enunciated a standard allowing for a broad range of traditional equitable remedies in fiduciary breach litigation.

This article will no doubt be the first in a continuing summary in future issues of the Benefits Litigation Update of developments regarding equitable remedies. This topic is of significant interest to plan sponsors, fiduciaries, administrators and insurance company – claims administrators because the broadening of available equitable remedies can now result in significant litigation and financial risk to those involved in maintaining benefit plans caused by even the most innocuous administrative mistakes or innocent communication errors or ambiguities.

Updates on Key Cases

The article in the last issue touched upon a number of the cases and situations that have arisen resulting in potentially large monetary awards.

Since that article, the courts continue to grapple with the issue of when equitable remedies should be available to litigating participants, and the Department of Labor continues to file amicus briefs urging for the broadest interpretation and availability of such remedies.

ERIC has filed amicus briefs in several of these cases given the significant impact they can have on our members, including *Cigna v. Amara, Osberg v. Foot Locker,* and *Frommert v. Conkright*.

In *Cigna v. Amara*, the Supreme Court concluded that ERISA permits a variety of common law equitable remedies, not limited to injunctive relief. (*Cigna v. Amara*, 131 S. Ct. 1866 (2011)) The case was remanded from the Supreme Court ultimately to the district court. After the district court again held Cigna liable for its allegedly intentional misrepresentation regarding the impact of a cash balance conversion, the case was appealed again to the Second Circuit. A decision is currently pending from the Second Circuit. The Department of Labor has again filed an amicus brief urging the Second Circuit to award the plaintiffs broad equitable relief.

Another key case is *Osberg v. Foot Locker,* which involved whether plan reformation was available where there was an alleged miscommunication of a cash balance conversion. ERIC filed an amicus brief in this case. The Second Circuit recently remanded the *Foot Locker* case to the district court for it to determine if the plaintiffs had satisfied the conditions required in order to obtain plan reformation. (*Osberg v. Foot Locker,* Case No. 13-187-cv (2d Cir. Feb. 13, 2014) Such reformation would provide the participants with the benefit that they alleged they understood the amended plan to provide rather than the actual terms of the plan. The Second Circuit pointed out that plaintiffs need not show that they relied upon or were actually harmed by any alleged miscommunication in order to gain the reformation they were seeking.

In the latest *Frommert* case decision, reported in the last issue of the Update, the Second Circuit held that traditional deference to the plan administrator's interpretation of a possibly ambiguous plan provision was appropriate, but that the interpretation itself was unreasonable. (*Frommert v. Conkright* 738 F.3d 522 (2d Cir. 2013) ERIC filed an amicus brief with the Second Circuit in this case. The Court remanded the case to the district court for consideration of an appropriate equitable remedy, which will effectively set the terms of the plan regardless of what its actual terms or the sponsor's intent were.

The Startling Breadth of Possible Equitable Remedies in the Sixth Circuit

A recent Sixth Circuit case illustrates the ultimate extent of the breadth of possible equitable remedies. (*Rochow v. Life Ins. Co. of America* 737 F.3d 415 (6th Cir. 2013, subsequently vacated en banc with full panel decision pending)) The claimant was president of a company and covered by its disability plan insured by the defendant. The president encountered an increasingly serious brain disease which affected his performance. He was ultimately terminated by the company and shortly thereafter claimed disability benefits arguing that his problems were caused by a serious illness. He ultimately died and the lawsuit he brought for benefits was pursued by his estate.

A split Sixth Circuit panel awarded the estate not only the claimed benefit but approximately $4 million dollars of supposedly unjust earnings the insurance company made by allegedly improperly denying the benefit. The decision was startling because the customary measure of damages for the loss of the use of money is the prevailing or statutory interest rate. Here, two judges on the panel accepted expert testimony as to what the insurance company theoretically made by investing the insurance proceeds based on the insurer's overall return on its investment portfolio. In a rising market environment, this was many multiples of the interest rate on money judgments. The vacated panel's decision, seems to be the furthest reach of the impact of the Supreme Court's *Amara* decision. The full Sixth Circuit panel recently held a hearing on the case and a decision is pending.

Ninth and Tenth Circuits Provide Some Hope

On the other hand and somewhat surprisingly, the usually participant friendly Ninth Circuit continues to apply reasonable limits to the reach of equitable remedies. As reported in the last issue of the Update, the Ninth Circuit has held that reformation is not available absent fraud or a mistake in the plan itself, and surcharge is not available absent reliance and actual harm. (*Skinner v. Northrup Grumman Retirement Plan*, 673 F.3d 1162 (9th Cir 2012). The Ninth Circuit (in a 2 to 1 decision) more recently rejected a participant's claim for equitable relief when he claimed a multi-employer pension plan was obligated to keep paying him a mistaken pension benefit that he had been receiving for years, but that he was not actually eligible for because of a lack of sufficient vesting service. (*Gabriel v. Alaska Electrical Pension Fund*, __F.3d__ (9th Cir. June 6, 2014)) The plan had mistakenly credited the participant with more hours than the plan terms would recognize. The court's grounds for rejecting the participant's claims were essentially the same as in the *Skinner* case - the plaintiff showed no fraud by the defendant, no unjust enrichment, no mistake in the plan itself, and the operational error was or should have been known by the plaintiff. The law, thus, seems to be evolving consistently in the Ninth Circuit with a reasonable limitation on the reach of *Amara*, but some other circuits are taking a more expansive view of *Amara*.

In a somewhat similar situation to that in *Skinner*, the Tenth Circuit (addressing an appeal in the case for a second time) held that participants who were claiming both 204(h) notice and general disclosure violations were not entitled to equitable relief because the defendant had not intentionally deceived participants who the court felt really knew the impact of the plan amendment in question despite the possible miscommunications and were not substantively harmed. (*Jensen v. Solvay*, 2013 WL 3306356 (10th Cir. 2013).) This puts the Tenth Circuit more in line with the Ninth Circuit in circumscribing the impact of *Amara* in situations involving alleged good faith miscommunications.

Courts Award Equitable Remedies Where Reliance Found

A district court in Pennsylvania recently awarded the beneficiaries of a deceased life insurance plan participant a surcharge amount equal to the life insurance benefit the deceased participant thought she had purchased, in lieu of simply a refund of the premiums. (*Weaver Bros. Ins. Assocs. Inc. v. Braunstein*, 2014 WL 2599929 (E.D. Pa. June 10, 2014)). The court held that the defendant had failed to properly notify the participant of the need to convert her policy upon taking a disability leave. This holding is consistent with others mentioned in the last Benefits Litigation Update involving alleged misrepresentations regarding claims involving both life insurance and retiree health coverage and eligible health expenses.

Another similar decision was reached by the Seventh Circuit when it determined a surviving spouse was entitled to equitable relief effectively in the form of a surcharge when his deceased wife was misinformed about the network status and pre-certification approval for a provider under a health plan. (*Killian v. Concert Health Plan*, 2013 WL 5942703 (7th Cir. 2013)) In this regard, the post-*Amara* cases seem to be generally consistent, holding administrators liable for oral or written errors in communication or failures to fully or accurately disclose relevant

information regarding plan coverage or administrative rules when participants have acted upon that misinformation, even if such errors are inadvertent.

Plans Can Seek Reimbursement of Overpayments

One aspect of equitable remedies pursued by plan administrators rather than participants is subrogation, generally under health plans, of third party awards to plan participants or recoupment of mistakenly paid benefits. In an interesting recoupment case, the Second Circuit held that an insurer could seek restitution of an overpaid disability benefit without having to trace the specific funds to specific assets or accounts held by the participant. (*Thurber v. Aetna Life Ins. Co.*, 712 F.3d 654 (2d Cir. 2013), cert. denied June 9, 2014). The court held that the fact that the participant had spent the proceeds was irrelevant because the plan effectively created an equitable lien by agreement as soon as the participant received the award. This ruling is not followed by some other circuits and the Department of Labor continues to argue that tracing to the specific funds received by the participant is required. In fact, the Department of Labor disagreed with the Second Circuit's holding, but successfully argued on other grounds against the Supreme Court taking the case.

Conclusion

The net direction of the evolving post-Amara landscape seems to be that clear miscommunications or administrative errors that result in adverse actions by participants will likely lead to an equitable remedy, generally either surcharge equivalent to money damages or plan reformation. On the other hand, there seems to be some split in the circuits regarding what plaintiffs must show to recover in cases involving general communication mistakes or ambiguities (such as alleged misrepresentations in SPDs). Some courts have held and the Department of Labor continues to argue that one or another equitable remedy should be available even absent fraud or ill intent and any actual direct harm to participants. Other courts, especially the Ninth Circuit and somewhat the Tenth Circuit, have required something more than just the misrepresentation or ambiguity in order for plaintiffs to recover.

It is likely that the law and standards in this area will continue to evolve and it is not unlikely that another case could find its way to the Supreme Court in the future. Plan sponsors, administrators and fiduciaries have a lot riding on the ultimate outcome as they certainly don't want to be shackled with something equivalent to strict liability for every good faith mistake or ambiguity in their communications.

Supreme Court to Decide Whether A Failed Class Action May Extend Deadline to Bring Follow-on Claims By Individual Plaintiffs

By: John Houston Pope and Debra Davis

This Fall the U.S. Supreme Court will hear *Public Employees' Retirement System of Mississippi v. IndyMac MBS, Inc.* ("IndyMac"), a case involving the timing of the subsequent right to sue by claimants who were not named representatives in a proposed class action lawsuit that failed to achieve class certification. The U.S. Court of Appeals for the Second Circuit refused to allow this "tolling" of the statute of repose in a securities fraud lawsuit and therefore barred interested claimants from filing untimely actions of their own when a class action was not certified. (*Police & Fire System of the City of Detroit v. IndyMac MBS, Inc.,* 721 F.3d 95 (2d Cir. 2013)) Although the IndyMac case focuses on a securities law claim, it will influence how courts will construe the deadlines for bringing suit under ERISA Section 413, which governs actions for breach of fiduciary duty.

As background, it's helpful to distinguish the types of statutes at issue. A statute of limitations creates a time limit for suing in a civil case, based on the date when the claim accrued. A statute of repose, on the other hand, places an outer limit on the right to bring a civil action. Statutes of limitation exist to prompt plaintiffs to be diligent in bringing their claims to court. They are usually considered procedural, and subject to many exceptions. Statutes of repose, in contrast, exist to terminate the potential liability of defendants, and they generally are strictly enforced.

Statutes of repose have received special solicitude from the courts. The Supreme Court has refused to allow the doctrine of equitable tolling to apply to a statute of repose under the securities law. (*Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350 (1991).) And, just this past Term, the Supreme Court held that congressional preemption of state tort statutes of limitations under the Comprehensive Environmental Response, Compensation and Liability Act of 1980 (CERCLA) did not preempt state tort statutes of repose. (*CTS Corp. v. Waldburger,* No. 13-339 (June 9, 2014).)

In *IndyMac*, a retirement system sued several defendants for violations of a securities law and sought certification as a class action lawsuit, to allow it to represent all affected shareholders. A class was not certified. When other plaintiffs who would have been potential class members then attempted to intervene in the suit, the court held that it was too late for them to file. The securities law under which they were sued included both a statute of limitations and a statute of repose. The statute of limitations required suit within one year of discovery of the securities law violation forming the basis for the lawsuit. The statute of repose, in contrast, provided that any claim would be considered extinguished three years after the sale of the security.

Class actions have had an unusual relationship with statutes of limitations. The Supreme Court in *American Pipe & Construction Co. v. Utah* held that the commencement of a class action suspends the statute of limitations for all asserted members of the class who could have been members of the class if the suit was allowed as a class action. (*American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974).) The cases after *American Pipe*, however, could not settle on the rationale for why that was the case. A securities law case out of the Tenth Circuit, *Joseph v. Wiles* (223 F.3d 1155 (10th Cir. 2000)), coined the phrase "legal tolling" to describe the type of tolling arising in class actions and to distinguish it from the equitable tolling doctrines that failed in *Lampf*.

In *IndyMac*, the district court and Second Circuit Court of Appeals explored whether the *American Pipe* rule would also apply to a statute of repose. Both courts held that it did not, creating a split with other courts, including the Tenth Circuit case, *Joseph*. The Second Circuit explained that a statute of limitations impacts the availability of remedies to plaintiffs, while a statute of repose impacts the underlying right to sue. It also said that if the basis for the so-called "legal tolling" was Rule 23 of the Federal Rules of Civil Procedure, any extension to the statute of repose would be barred by the Rules Enabling Act as it would enlarge a substantive right. The Rules Enabling Act provides the Supreme Court with "the power to prescribe general rules of practice and procedure," as long as they do not "abridge, enlarge or modify any substantive right."

The Supreme Court has agreed to hear the issue of whether a statute of repose can be tolled for asserted class members under *American Pipe*.

ERISA's Section 413 is squarely affected by the outcome of this case. Breach of fiduciary duty claims must be brought within three years of actual knowledge of a violation or within six years of the last act which constituted part of the breach or violation, whichever is earlier. Courts have consistently held that the longer, six-year period is a statute of repose because it is measured from the date of the defendant's act, not from plaintiff's discovery of an injury or violation. One federal district court in Massachusetts examined the *American Pipe* rule applied to an ERISA breach of fiduciary claim, where an initial suit failed to achieve class action status and the follow-on suit

was filed more than seven years after the last act constituting the alleged breach. It held that *American Pipe* "legal tolling" allowed this otherwise untimely lawsuit to go forward. (*Arivella v. Lucent Technologies, Inc.*, 623 F. Supp. 2d 164 (D. Mass. 2009).) The court also said that the tolling occurred on day-for-day basis, meaning that if the failed class action had been pending two years before class certification was denied, two years would be tacked on to the statute of repose (extending it to eight years). That ruling did not receive appellate review because the defendants prevailed on the merits at trial. It was, however, mentioned by name in a footnote in a Supreme Court opinion two years ago, to define the difference between "legal" and "equitable" tolling. (*Credit Suisse Securities (USA) v. Simmons*, 132 S. Ct. 1414, 1419 n.6 (2012).).

Thus, *IndyMac* stands to impact whether fiduciaries of ERISA plans can be sued more than six years after the breach or violation pursuant to ERISA section 413. If the Supreme Court holds that tolling applies to the statute of repose under *American Pipe*, the time for suing ERISA plan fiduciaries could be tolled for the potential follow-on suits by asserted members of a class while the fiduciaries are defending a class action lawsuit.

Supreme Court Indicates That It Will Review "*Tibble*"

By: Kenneth J. Kelly

The plaintiffs in *Tibble v. Edison International*, having lost on virtually all of their claims and theories before the District Court and the Ninth Circuit, petitioned the U.S. Supreme Court for certiorari last fall, and on March 24, 2014, the Court invited the Solicitor General to file a brief expressing the views of the United States on the case. If the recent past is any guide, such an invitation indicates a likelihood of granting cert. This was the outcome in the *Dudenhoeffer* case, which was decided on June 25, 2014, in which the so-called "Moench presumption" was rejected.

The issues in *Tibble* will likely cause the U.S. Department of Labor ("DOL") to side with the plaintiffs-petitioners. The Ninth Circuit principally held (a) the six-year statute of limitations for challenging the fiduciary's selection of investment options runs from the date of the fiduciary's decision, and (b) the Firestone deference principle applies to all otherwise lawful fiduciary decisions, not just benefits determinations (a Circuit split). In their cert petition, the plaintiffs argued that because 401(k) plan fiduciaries have "ongoing" fiduciary duties, the statute of limitations should not "immunize" them for retaining imprudent investments that continue to cause the plan losses merely because the investments were made more than six years ago. The petition cites to amicus briefs of the DOL supporting plaintiffs' "continuing violation" theory.

The plaintiffs also assert that Firestone deference should not apply where the fiduciaries are alleged to have breached fiduciary duties but their interpretation of the plan exculpates them. Their position is that *Firestone* itself was a benefit determination case and that the various Circuits that have expanded the Firestone rule have disregarded the fundamental difference between a deferential interpretation as to a participant's claim for benefits (which impacts solely the plan) and as to a claim of fiduciary breach (which principally impacts the fiduciaries). In the words of the petition, fiduciaries should not be permitted to "interpret their way out of a § 1104(a)(1)(D) violation" (at 33).

As of this writing, the Solicitor had not yet filed comments. Our bet is that he sides with the petitioners on both arguments and the Court grants cert. on both questions, especially to resolve the Circuit split on the second. (*Glenn Tibble, et al. v. Edison International, et al.*, No 13-550.)

Challenges Could Threaten Individual Subsidies and Employer Mandate Penalties in States with Federal Exchanges

By: Adam C. Solander

For most employers, the Supreme Court's *National Federation of Independent Business v. Sebelius* decision signified the end of legal challenges to their core responsibilities under the Affordable Care Act ("ACA"). Employers have since focused primarily on implementing the law's requirements. While employer interest in the judicial challenges to the ACA has certainly ebbed, there are nonetheless significant cases still working their way through the courts that could drastically impact employers' responsibilities under the ACA.

Perhaps most significant is a series of cases that challenge the Adminstration's ability to implement the ACA's individual subsidies and, consequently, the employer mandate penalties in the states that did not establish their own exchanges. Specifically, the plaintiffs in *Halbig v. Sebelius* (and several other similar cases) challenge regulations implemented by the IRS which authorize the provision of individual subsidies in both federal and state exchanges. The plaintiffs argue that the statutory text of the ACA only allows for subsidies in state-based exchanges, and, therefore, that a 2012 IRS regulation allowing for subsides in both federal and state exchanges exceeds their authority under the Administrative Procedure Act.

The heart of these disputes revolves around the IRS' ability to interpret the ACA to allow for subsidies in exchanges created under section 1321 of the ACA. In general, the employer mandate requires that "applicable large employers" offer their full-time employees minimum essential coverage or potentially pay a tax penalty. However, according to the statutory text of the ACA, the penalties under the employer mandate are triggered only if an employee receives a subsidy to purchase insurance "through an Exchange established by the State under section 1311..." of the ACA. (26 U.S.C. § 36B(c)(2)(A)(i) (emphasis added).) If a state elected not to establish an exchange or was unable to establish an operational exchange by January 1, 2014, the Secretary of HHS was required to establish a federal exchange under section 1321 of the ACA.

In the preamble to the regulations, the IRS recognized this discrepancy and noted that "[c]ommentators disagreed on whether the language in [26 U.S.C. §] 36B(b)(2)(A) limits the availability of the premium tax credit only to taxpayers who enroll in qualified health plans on State Exchanges." (77 Fed. Reg. 30378.) The IRS, however, rejected these comments and stated that "[t]he statutory language of section 36B and other provisions of the Affordable Care Act support the interpretation that credits are available to taxpayers who obtain coverage through a State Exchange, regional Exchange, subsidiary Exchange, and the Federally-facilitated Exchange. Moreover, the relevant legislative history does not demonstrate that Congress intended to limit the premium tax credit to State Exchanges. Accordingly, the final regulations maintain the rule in the proposed regulations because it is consistent with the language, purpose, and structure of section 36B and the Affordable Care Act as a whole."

It is unclear how the courts may ultimately rule in this series of cases and whether these cases will be appealed. The D.C. Circuit is expected to issue its opinion in *Halbig* in the coming days and the Fourth Circuit Court of Appeals will be deciding this issue in the near future as well. What is clear, however, is that should the courts invalidate the IRS' interpretation, the future of the individual mandate subsidies and employer mandate penalties will be in jeopardy.

NOTEWORTHY PENDING CASES

Supreme Court Accepts Cert. in Retiree Health Vesting Case

The Supreme Court recently agreed to hear the Sixth Circuit case of *M&G Polymers USA, LLC v. Tackett,* 733 F.3d 589 (6th Cir. 2013) regarding the vesting of collectively bargained retiree health benefits. Unlike other circuits, the Sixth Circuit has applied a presumption of vesting of retiree health benefits for union retirees and held this presumption applied in this case. The case arose when retirees sued after the company announced it was going to impose premium cost-sharing on them. The Sixth Circuit, consistent with their long-standing policy view, held that the company and the union had intended to provide for premium free lifetime health benefits for covered retirees. The Sixth Circuit's standard essentially presumes vesting unless there is a clear durational clause specifically applicable to retiree health benefits in the bargaining agreement regardless of whether (i) the agreement has a general durational clause and no mention of vesting and (ii) the underlying plan contains a reservation of rights clause (i.e. reservation of right to amend or terminate the plan).

Other circuits have adopted a variety of standards for evaluating whether the benefits are vested, but no other circuit has adopted a presumption of vesting standard. For example, the Third Circuit effectively presumes that no vesting is intended without clear evidence to the contrary. Unfortunately, this circuit split also means that the same contract can be interpreted differently in different courts. The Sixth Circuit presumption also means plaintiffs generally forum shop to file litigation in that circuit.

ERIC will file an amicus brief with the Supreme Court in the *M&G* case at about the same time as this issue of the Benefits Litigation Update is published. ERIC's brief will argue that the Court should reject the Sixth Circuit approach and adopt a clear rule that vesting does not apply unless the bargaining agreement specifies such.

Third Circuit Urged to Correct Misapplication of Fiduciary Deference Standard

The Third Circuit Court of Appeals is poised to hear a case, *Cottillion v. United Refining Company*, which addresses the fiduciary deference standard set forth by the U.S. Supreme Court in *Conkright v. Frommert*. (*Cottillion v. United Refining Company*, Nos. 13-4633 & 13-4743 (on appeal to 3d Cir. from W.D. Penn.); *Conkright v. Frommert*, 559 U.S. 506 (2010))

In *Conkright*, the Supreme Court held that when authorized by the plan, a plan administrator's interpretations are entitled to deference even when its initial interpretation is incorrect. The case involved a dispute over the company's use of an offset to calculate the benefits of employees who were rehired after they had previously received lump-sum distributions of their pension benefits. The plan administrator's interpretation of the plan was rejected by the Second Circuit Court of Appeals. On remand to the district court, the plan administrator proposed an alternative interpretation of the plan language, but the district court failed to give it deference. (ERIC filed an amicus brief, with other associations, with the U.S. Supreme Court in this case.) The Supreme Court held that the lower court should have given deference to the plan administrator's second interpretation. The Court explained "People make mistakes. Even administrators of ERISA plans."

The Third Circuit is now preparing to hear the case of *Cottillion v. United Refining Company,* which applies *Conkright* to a case involving an operational plan failure. The *Cottillion* case explores the extent to which a plan administrator should be entitled to deference when it determines that its prior interpretation was erroneous. In this case, some participants terminated employment after satisfying the plan's vesting requirement. They began receiving unreduced early retirement benefits even though they had not met the age eligibility requirement for subsidized early retirement when they terminated. After the plan changed actuaries, the plan administrator realized that the participants' early retirement benefits should have been reduced. The company utilized the IRS's Voluntary Correction Program to correct the operational failure. The IRS approved the suggested correction and the plan sponsor amended the plan to clarify that early retirement benefits for the participants involved were subject to actuarial reduction. The plan also notified the participants of the reduction of future pension payments and sought reimbursement of the overpayments. The participants sued for benefits based on the unreduced payments they had been receiving.

The District Court held that the administrator's corrected interpretation was not entitled to any deference. Furthermore, the court agreed with the participants' claim that the plan administrator's prior interpretation of the plan (which provided for unreduced benefits) was reasonable under the arbitrary and capricious standard and thus entitled to deference.

The district court failed to properly apply the deference standard under *Conkright* to the subsequent interpretation of the plan by the plan administrator when it indicated it was correcting a prior mistake. Furthermore, the court found that the administrator's reinterpretation of the plan was a plan amendment that resulted in an impermissible cut-back to participants.

ERIC and several other associations filed an amicus brief with the Third Circuit Court of Appeals in *Cottillion*. The amicus brief argues that under *Conkright*, the administrator was entitled to correct a prior incorrect plan interpretation and its corrected interpretation should be given deference (unless it was unreasonable). The brief explains that plan administrators are better situated than courts to understand the plan sponsors' intent, are knowledgeable about prior plan interpretations, and are familiar with the operations of the plan. The brief also argued that an administrator's reinterpretation of a plan to correct an operational error should not be considered a plan amendment. The brief reminded the court that plans are voluntary and judicial decisions that ignore the deference principle discourage companies from adopting and maintaining these plans and that the Supreme Court has noted that deference supports "the interests of efficiency, predictability and uniformity" in plan operations.

The *Cottillion* case is an important follow-up to the *Conkright* case as it reflects the manner in which district courts may apply the Supreme Court's decision in *Conkright*. However, we are hopeful that the Third Circuit Court of Appeals' decision will be consistent with the Supreme Court's holding in *Conkright*.

PERSPECTIVE OF COUNSEL

Will the Plaintiffs' Bar Ask the Courts to Declare Deferential Judicial Review of ERISA Benefits Denials Unconstitutional?

The following article is an opinion piece, solely reflecting the views of John Houston Pope of Epstein Becker Green.

The first issue of this newsletter (in April 2012) opened with an exhaustive (and exhausting) look at the impact of *Metropolitan Life Insurance Co. v. Glenn*, the Supreme Court's 2008 decision addressing the role of a "conflict of interest" in the benefit claims process. We concluded that *Glenn* had not greatly changed the legal landscape. Most claims decisions that had been insulated by the abuse of discretion standard of review before *Glenn* still survived scrutiny in the courts after *Glenn*.

To be frank, no one becomes a federal judge in the hopes of deciding entitlement to long-term disability benefits or healthcare coverage disputes. The opinions of the federal courts repeatedly convey their strong preference that the claims processes of the various plans resolve benefit decisions. The reluctance of these judges to defer to fiduciaries, however, diminishes when they feel the claimant was treated unfairly or indifferently. The presence of an actual, discernible conflict of interest that appears to have altered the fiduciary's view of the claim will drive the court toward concluding that an abuse of discretion occurred, but a close read of the decisions leave one with the impression that a ruling against the plan could have been made without having to have reached that conclusion.

After *Glenn* was decided, the plaintiffs' bar seemed convinced that they had turned the corner on the conflict of interest issue. Many expressed optimism that more suits over claim decisions would go their way in federal court. But it was not so. To the contrary, the court's decision in *Glenn* put an end to more plaintiff-friendly approaches to review in some jurisdictions without giving back a plaintiff-advantage anywhere else.

In response to these developments after *Glenn*, two experienced practitioners on the plaintiffs' side, Jonathan Feisenbaum and Scott Reimer, published a provocative article in the newsletter of an ABA Section entitled "Did The Supreme Court Flunk Constitutional Law When It Permitted Discretionary Review of Insured ERISA Benefits Cases?" The article may indicate the

next generation attack on deferential review in ERISA benefit cases. For that reason, I describe this new argument here and evaluate its strength.

The central premise in this constitutional law challenge is that a litigant in challenging a benefits denial asserts a "private right" and argues that a federal court must fully and finally decide this "right" because the process of claims determination under a typical plan (especially insured plans) does not utilize a neutral tribunal or decision maker. In essence, this theory elevates the "conflict of interest" in *Glenn* to one of constitutional significance. The plaintiffs argue that the "taint" of potential self-interest renders the decision maker incapable of rendering a decision to which a federal judge might defer to any degree. While the authors of the ABA article write their thesis narrowly, only for application to insured plans, anyone familiar with the development of the case law after *Glenn* will recognize the implication that all plans could eventually be drawn within the coverage of the argument.

The argument admittedly is longer on rhetoric than on reasoning. The authors implore their readers to adopt the proposition that a litigant's right in the federal judicial system to have an Article III (lifetime appointment) judge preside over final decisions "includes having an Article III judge render an independent decision." The cases supporting this proposition came from the bankruptcy law context, where the Supreme Court has struggled with the allocation of power between bankruptcy judges (who are not appointed for life) and federal district judges (who are).

But benefit claim decision making is not like bankruptcy. The cases coming out of bankruptcy may provide good "pound the table" quotations, but they add little guidance to answering the question whether a benefit plan may insist that its plan or claims administrator get first crack at finding the facts and interpreting the plan.

The authors implicitly recognize the weakness of the bankruptcy analogy and offer comparisons to the adjudication of Social Security claims and to arbitration, both areas where courts deferentially review the outcomes. The key difference between these processes and ERISA plan claims administrator, the authors urge, is the presence of a neutral decision maker. It's interesting that they draw that particular distinction, because the Administrative Law Judges at the Social Security Administration have, from time to time, drawn criticism for being biased against claimants (as government employees trying to control the costs of the program), and arbitration has been attacked by some as being less than neutral. For example, professional athletes often are contractually bound to submit disputes with their clubs to the League commissioner, despite the commissioner's evident partiality to the owners.

More importantly, though, drawing this distinction for arbitration ignores what courts have actually said about why they defer to the results of arbitration: Parties agree to submit their disputes to decision by an arbitrator; courts respect the choice and step in only when certain, specified defects enter the process (such as corruption or "bias," a term that is defined differently from the "conflict of interest" context).

The process for ERISA benefits disputes bears a better analogy to arbitration than to the other processes to which the authors compare it. As the Supreme Court has made clear, Congress did not mandate that any employer offer benefits plans and did not intend for ERISA to be construed in a way that would discourage employers from making the voluntary decision to do so. The decision to offer benefits is, in effect, a multiparty contractual transaction on behalf of the plan sponsor and its employees (albeit often with caveats and reservations of rights).

As a condition of that contractual arrangement, the parties agree to use, as a dispute resolution process, the familiar claims review process under ERISA. Although some plaintiffs may think that the persons designated to hear claims are not completely neutral or independent of the plan's sponsor or insurer, those persons are, when exercising discretion, acting in a fiduciary capacity, balancing the needs of the participants and the financial viability of the benefits offering. The parties to this contractual arrangement recognize that the decision maker is required to diligently work to produce a result that is just and fair to the claimant and to the whole program.

An important analytical error in the approach of the authors of the ABA article to benefits decision making process lies in the focus on a one-to-one adversarial relationship between the claimant and the plan *after* a claim *denial*. Somewhere lost in the discussion about the process for reviewing benefits decision under ERISA are the millions of decisions that *grant* benefits, the heart and soul of the success story of benefits administration, and the hundreds of thousands of denials that are resolved internally, without the need for resort to litigation. In *Glenn*, the Supreme Court pointed to this vast universe of claims that did not end up in federal court (a number several times higher than entire annual docket of those courts) as an illustration of why universal *de novo* review could be pernicious.

Perhaps it is understandable that plaintiffs' lawyers might view the world in such a binary and conflict-oriented way; to a hammer, every problem is a nail. A broader view, however, reminds us that benefit plans serve a larger employee population, of which any particular claimant is but one participant. The complexities of balancing the interests of all participants should not be outsourced to federal judges, who have neither the time, expertise, nor inclination to administer the plans.

So, is it unconstitutional to grant deference to plan fiduciaries in benefits claim denial cases? Of course not. The judiciary continues to function independently when it respects these private choices. The judiciary's reserved role to curtail the abuse of discretion in the process ensures that the contractual arrangement embodied between plans and their participants does not overreach.

The authors make an intriguing offer in their article, one inspired by a thirty-year old movie. They say:

> In the 1983 comedy *Trading Places* the amoral Duke brothers conduct an experiment in social Darwinism debating whether genetics or nurturing is the source of success. They make a wager, and then put their theories to the test. They manipulate the life of Louis Winthorp III (Dan Akroyd), a successful commodities trader, by "trading places" with Billie Ray Valentine (Eddie Murphy), a street con artist.
>
> We'll bet the same amount wagered by the Duke brothers with our readers – identify any litigation in the federal courts between *private* litigants, other than discussed in this paper, where the Article III Judge must defer to the decision of the defendant without conducting a full trial on the merits. We bet you can't.

I close by setting forth the basis to collect that dollar. A hoary doctrine in the law holds that private associations may agree to resolve their own disputes, essentially internally, with judicial review limited to an abuse of discretion standard. This judicial deference to the internal affairs of private associations most recently received public notice when the NBA ordered Donald Sterling to sell his interest in the LA Clippers. Sterling has little legal recourse, because an association may establish and enforce its own rules, for the good of the association. Indeed, the standard of review in such cases reads remarkably like the courts have applied the standard of review in ERISA benefit denial cases. Mere allegations of bias are not enough. The complainant must make a factual demonstration to support allegations of bias and proof that the bias affected the outcome of the proceeding. In other words, the courts will check an abuse of discretion, but otherwise not intervene.

Like the NBA, or any other private association, benefit plans can establish their own rules and regulations, subject to deferential judicial review.

We'll take that dollar now.

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