2008 LITIGATION REVIEW

DALLAS BAR ASSOCIATION

Some things change, some things stay the same. What is the same? Several themes here, including the significant number of disability cases in the federal appellate courts, the constant uncertainty on ERISA issues often exacerbated rather than illuminated by decisions of the Supreme Court, and the general increase in litigation (including "new" theories of liability). And, in case you haven't read any news reports in the last six months, the resurgence of employer stock drop cases. Changes? Participants now have some as yet to be fleshed out right to sue for individual damages in a breach of fiduciary duty case, "hard wiring" of some actions in plan documents can in some cases/jurisdictions avoid fiduciary implications, DOL's views on what constitutes a top hat plan have been rejected by a federal appeals court and state and local jurisdictions can mandate health care plan coverage free of ERISA preemption (at least for the moment in the 9th Circuit). As usual, we will focus principally on federal appellate decisions.

Employer Stock:

Caltagirone v. NY Community Bancorp, Inc., 2007 WL 4467655 (2nd Cir.). In this claim, which was decided on the basis of standing, the court in discussing an ESOP stated

> "Thus, the district court found that there exists no discretion to recommend any particular investment option under the ESOP or for ESOP Administrators to invest in any stock other than NYCB stock. Thus, as the district court found, the failure-to-disclose and the imprudent-investment allegations have no possible application to the ESOP plan, because neither the administrators nor the participants had the power to choose their investments under this Plan. If there is a complaint against the ESOP along these lines, it is that the plan was badly designed because its holdings appear to have consisted entirely of NYCB stock. However, a participant cannot sue for fiduciary breaches relating solely to the design of an **ERISA** plan. *See, e.g.*, *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 433-44, 119 S.Ct. 755, 142 L.Ed.2d 881 (1999)."

In re Syncor ERISA Litigation, 2008 WL 427763 (9th Cir.). The plaintiffs alleged that plan fiduciaries knew that plan holdings in employer stock were inappropriate given that the plan sponsor was engaged in questionable overseas activities. In reaching its decision, the court noted it had not yet adopted the *Moench* presumption and that the *Moench* presumption was in any event not rebutted based solely on the plan sponsor's financial viability. The court noted that a prudent man standard based only on a company's alleged financial viability does not take into account the myriad of circumstances that could violate the standard. The court noted a violation could occur where the company stock did not trend downward over time, but was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed.

Rogers v. Baxter International Inc., 2008 WL 867741 (7th Cir.). Holds that PSLRA limitations on filing litigation with respect to securities matters does not apply to a

separate ERISA breach of fiduciary lawsuit based on same facts, as ERISA provides a separate cause of action that is not superseded by PSLRA.

Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008). In a 401(k) stock drop case, there are many holdings favorable to the defense, including:

> "the allegations by plaintiffs that fiduciaries should have sold stock because the plan became too heavily weighted in high risk Company stock was nothing more than a claim for failure to diversify."

> "Despite the risks inherent in concentrating plan assets in any one security, the express statutory exemption of the diversification duty in relation to an employer's stock holdings precludes the recovery Kirschbaum seeks under Count I."

As against the challenge that the plan documents permitted fiduciaries to liquidate at least, in part, a stock fund, the Court stated

> "the plan documents, considered as a whole, compel that the Common Stock Fund be available as an investment option...."

Assertions that the Company, as a fiduciary, had a obligation to terminate the stock fund sought no less than systemic modifications of the plan itself and because the design was allotted to the Company as a settlor, the Company had no fiduciary duty concerning such terms.

> "Because the plan's requirement to invest in REI stock are mandatory and were treated as such by REI and the Benefits Committee, we agree with the district court that no fiduciary duties are inherent in the plan other than to follow its terms."

With respect to overriding plan terms,

> "The *Moench* presumption logically applies to any allegations of fiduciary duty breach for failure to divest and EIAP or ESOP of Company stock."

With respect to the prudence in light of *Moench*, the court noted many cases in which there had been substantial stock drop, but no fiduciary breach was found for failure to sell stock.

The court also stated

> "Less than rigorous application of the *Moench* presumption threatens its essential purpose. A fiduciary cannot be placed in the untenable position of having to predict the future of the Company stock's performance. In such a case, he could be sued for not selling if he adhered to the plan, but also sued for deviating from the plan if the stock rebounded."

With respect to trading inside information, the court said

> "Requiring a fiduciary to override the terms of a Company stock purchase plan could suggest the necessity of trading on insider information. Such a course is prohibited by the securities laws. Fiduciaries may not trade for the benefit of plan participants based on material information to which the general shareholding public has been denied access. Moreover, from a practical standpoint, compelling fiduciaries to sell off a plan's holdings of Company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price."

On negligent misrepresentation, the court noted that the SEC filings by the Company had not been incorporated into a SPD and therefore were not plan documents. This might be an important lesson for the future.

Pension and Employee Stock Ownership Plan Administrative Committee of Community Bancshares v. Patterson, 547 F.Supp.2d (U.S.D.C. N.D. Alabama 2008). The company officer who had defrauded a company breached his fiduciary duties to ESOP when, while acting on behalf of ESOP in a purchase of company stock, he failed to disclose to the ESOP his prior fraud.

Ward v. Avaya Inc., 2008 WL 4888494 (3rd Cir.). In a typical 401(k) stock drop case, plaintiff could not overcome the presumptions in *Moench*.

Nelson v. Hodowal, et al., 2007 WL 4570893 (7th Cir.). The remains of the *Nelson v. Ipalco* case rose to the Seventh Circuit with only one issue: whether the plan fiduciary should have told plan participants that the plan fiduciaries had sold some of their company stock even while the benefit plan continued to have company stock holdings. The court stated that the "case boils down to an argument that an ERISA fiduciary has a duty to disclose, directly to a pension plan's participants, even non-material information that may affect the participants for reasons unrelated to the value of the investment."

The court noted that the defendants did disclose their sales by public filings with the SEC and the stock markets, these filings would have been read by investment analysis, the investment analysts would have taken it into account in valuing securities and trading them, and thus the fact that participants were not directly advised was not important.

Two points here: If a fiduciary has an obligation to directly disclose to plan participants dispositions of company stock when the benefit plan also owns company stock, is there a mirror obligation to directly disclose purchases? And if so, should the plan provisions on limits on company stock be overridden if the fiduciary thinks employer stock is a better buy than other investments? And, recall that in earlier decisions in this case a holding was that a plan amendment could be a fiduciary act.

Equitable Remedies:

Adams v. The Brink's Company, 2008 WL 142771 (4th Cir.). Excess benefits were erroneously paid from a defined benefit pension plan. When the plan tried to recoup the funds, the participants who had received too much money initiated litigation. The Court found

the plan's administrative committee had breached its fiduciary duty by sending inaccurate communications to the Participant. The Court also found that the Plaintiff had relied and continued to rely on the mistaken calculation. With respect to restoring to the plan the amounts that had been overpaid, the Court found that the responsibility for miscalculation was on the plan, not on the participant, and that the participant and his wife had detrimentally relied on the benefit statements. Therefore, the Court stated

> "The equities of the situation demand an exception to the full restoration rule in order to protect [the Plaintiff] and provide a necessary incentive for [the Company] to ensure that they are protecting the interest of future Participants and Beneficiaries."

Thus, the Court found an equitable remedy of not requiring restorative payments by the participant who had received a windfall.

Could therefore a fiduciary safely determine without attempting to litigate that a plan had no remedy in erroneous payment circumstances?

Avmed Inc. v. Browngreer PLC, 2008 WL 4909535 (5th Cir.). Self-funded medical plans were not allowed to file claims against Vioxx settlement fund as under Sereboff the claims administrator of the Vioxx fund had not determined which claimants were eligible and therefore, the plans' claims for injunctive relief (requesting that the funds not be disbursed) were premature. As a practical matter the decision may have put the settlement funds out of the reach of the complaining plans.

Top Hat Plans:

Crowell v. Shell Oil Co., 2008 WL 3485331 (5th Cir.). Former executive disputed amount of change in control contract SERP benefits payable upon termination after change in control. Among the many holdings in the case are the following:

> The particular contract was found to be subject to ERISA, the court distinguishing *Fontenot*.
>
> The change in control agreements were not excess benefit plans because they provided benefits other than by reference to Section 415 of the Code. (principally 401(a)(17) of the Code.) However, these contracts may have also provided benefits for additional compensation that was not considered compensation under the underlying qualified defined benefit plan.
>
> Even though the employer was not given any discretion in the documents to interpret the documents, because the underlying plan to which the documents referred gave discretion and authority to employer to construe the underlying plan, the decision of the employer under the change of control agreements was entitled to deference. So the absence of discretion granted to administrator was not fatal where plan to which the excess plan referred had such a provision.

As to the defense argument that interpreting the contracts as argued by plaintiffs would have resulted in an unanticipated cost, the courts stated the standard is "an inquiry into the plain reading of the plan language and whether a proposed alternate reading would result in cost unanticipated under the plain meaning."

Whitescarver v. Sabin Robbins Paper Co., 2008 WL 4809502 (6th Cir.). In a top hat plan benefit claim case, plaintiff alleged that the plan administrator had announced an anticipatory denial of benefits, which was what had triggered plaintiff's lawsuit.

Alexander v. Brigham and Women's Physicians Organization, Inc., 2008 WL 186385 (1st Cir.). In a well-reasoned opinion discussing the top-hat exemption for ERISA coverage, the Court made several statements of importance including the following:

"It is an open question whether the statutory phrase 'select group' modifies only term 'management' or also modifies the term 'highly compensated employees.'"

"The more natural and sensible reading of the statute is that a plan is 'maintained' for a group of employees only if those employees realistically have the capacity to benefit from it. Thus, for the purpose of determining whether a plan services a select group, we find relevant here only those employees who actually earned enough NPI to fund plan contributions."

"The question whether the relevant universe of employees is 'highly compensated' is even more open-and-shut. To come within the compass of the top-hat provision, an employer must be able to show a substantial disparity between the compensation paid to the members of the top-hat group and the compensation paid to all other workers."

"Once again, we look to first to the text of the top-hat provision. In that proviso, Congress nowhere mentioned bargaining power. Indeed, the statutory language contains no indication that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans, either individually or collectively, when measuring the bona fides of a select group and determining the applicability of the top-hat provision."

"What authority exists for the appellant's position derives from a DOL opinion letter purporting to shed light on Congress's reasons for enacting the top-hat provision."

"We declined the appellant's invitation to depart from the plain language of the statute and jerry-build onto it requirement of individual bargaining power."

"If more were needed--and we doubt that it is--we are further counseled against the importation of a requirement of individual bargaining power by the bizarre consequences that would follow from it. Most important, that thesis implies that every top-hat plan can be rendered noncompliant by demonstrating

that a single covered employee lacks individual bargaining power, no matter the overall characteristics of the "select group of management or highly compensated employees" to which he belongs."

"The two main reasons underpinning our holding that there is no requirement of individual bargaining power to qualify for the top-hat provision--(i) that neither the text nor the legislative history of the statute contains the slightest hint that Congress contemplated that courts would consider employees' ability to bargain over the terms of their deferred compensation plans and (ii) that the DOL opinion letter does not presume to interpret the statute--militate just as strongly against importing a requirement of collective bargaining power into the top-hat provision."

502(a)(3):

Tullis v. UMB Bank, N.A., 2008 WL 215535 (6th Cir.). Another case of the LaRue vintage in which the question of whether a participant may sue for breach of fiduciary duty when the loss is not "plan wide." In this case, the Sixth Circuit decides that the participant can sue under 502(a)(2).

Lanfear v. Home Depot, Inc., 2008 WL 2916390 (11th Cir.). Former participants who complained that their accounts, when distributed, were worth less than they should have been by reason of breach of fiduciary duty are participants entitled to sue for a breach of fiduciary duty because they were asserting a claim for benefits. The court rejected the reasoning of the Fifth Circuit in *Sommers Drug Stores*.

In addition, as the participants were claiming the benefits they were required to exhaust in administrative remedies. This holding requiring a filing of claim for benefits and pursuit of administrative procedures for individualized claims for breach of fiduciary responsibility seems to follow the analysis in one of the LaRue opinions. It is inconsistent with at least one earlier 5th Circuit precedent that held exhaustion was not required when it would effectively give a fiduciary the power to decide a claim the fiduciary has committed a breach.

Attorneys' Fees:

Hahnemann University Hospital v. Plan Vista Solution, 2008 WL 222519 (3rd Cir.). In a dispute about the award of attorney's fees in an ERISA matter, the court noted that pre-litigation fees are not covered and articulated the standards for determining when attorney's fees should be award in an ERISA case.

McCarter v. Retirement Plan for the District Managers of the American Family Insurance, 2008 WL 4052905 (7th Cir.). Plaintiffs alleged, but did not prevail, on assertion that they had made elections under the cash balance plan that minimized their benefits. One claim related to the relatively short time frame within which the election was required to be made.

An interesting aspect of the case is that the defending employers were awarded attorneys' fees as against the plaintiffs.

Gaeth v. Hartford Life Insurance Co., 2008 WL 3833879 (6th Cir.). In this case, the district court awarded attorneys' fees to the complaining plaintiff who won in district court, but as the case was reversed in the Circuit Court of Appeals, the issue of attorneys' fees was remanded, with the remand language suggesting the district court might find it difficult to award attorneys' fees to an nonprevailing party. Also, the case discusses at length the standards for awarding attorneys' fees under ERISA.

Lemon v. Liberty Life Assurance, 2008 WL 5391909 (5th Cir.(Tex.))).

*1 In this **ERISA** appeal, Perri Lemon and her counsel, James Plummer, appeal an order requiring Lemon and Plummer to pay the attorneys' fees and costs of Liberty Life Assurance Company of Boston. Because the district court did not sufficiently articulate its reasons for awarding attorneys' fees, we vacate the award, in part, and remand for further consideration.

I.

This case arises from a dispute between Lemon and Liberty over a disability policy issued pursuant to the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001, *et seq.* ("ERISA"). In the district court, Lemon alleged that Liberty wrongfully denied her disability claim. Video surveillance, however, indicated that Lemon was not nearly as disabled as she claimed. Accordingly, the district court granted Liberty's motion for summary judgment. Liberty then filed a motion for attorneys' fees and costs pursuant to § 502(g)(1) of ERISA. [FN1] The court granted the motion and ordered both Lemon and Plummer to pay $7,498. The court did not declare the legal basis for the award, but granted the award for two succinctly stated reasons: (1) Lemon had lied to her doctor and exaggerated her pain, and (2) Plummer had maintained a baseless suit and misrepresented his client's condition to the court. Each of these reasons appears to be in the nature of a sanction.

> FN1. "In any action under this subchapter ..., the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." 29 U.S.C. § 1132(g)(1).

II.

In ERISA cases, we review an award of attorneys' fees and costs for abuse of discretion. *Wade v. Hewlett-Packard Dev. Co. LP Short Term Disability Plan*, 493 F.3d 533, 541 (5th Cir.2007). It is an abuse of discretion for a district court to assess attorneys' fees without considering the factors announced in *Iron Workers Local No. 272 v. Bowen*, 624 F.2d 1255, 1266 (5th Cir.1980). *See Wade*, 493 F.3d at 543 n. 8. The award of costs, however, is subject to the "prevailing party" test. *Id.* at 543.

In order for this court to review the award of fees, the district court must explicitly state the statutory basis for its decision. It must also clearly and thoroughly state the factual justifications for the award. In its Order on Attorneys Fees, the district court did neither. [FN2]

> FN2. Liberty's motion cited § 502(g)(1), but the district court did not reference that provision. The applicable statutory authority is particularly

> important in this case because the court ordered Plummer to pay fees and costs. This circuit has not considered whether § 502(g)(1) permits the assessment of fees against a party's counsel. The Second Circuit has noted that statutes, such as § 502(g)(1), that are silent on awards against the attorney, are usually not a proper basis for such an award. *See, e.g.,* Healey v. Chelsea Res. Ltd., 947 F.2d 611, 624 (2d Cir.1991) ("When a fee-shifting statute that authorizes the courts to award attorneys' fees to prevailing parties does not mention an award against the losing party's attorney, the appropriate inference is that an award against attorneys is not authorized."). Fee-shifting or sanctions may be warranted in this case under 28 U.S.C. § 1927 or Rule 11, but we cannot evaluate such an award without knowing the statutory or other authority under which it was made. We indicate no opinion on any aspect of the award of attorneys' fees against a party's counsel.

Because the award of costs is governed by the "prevailing party" test, we AFFIRM the award of costs against Lemon. We VACATE and REMAND the award of costs against Plummer. We also VACATE and REMAND the award of attorneys' fees against both Lemon and Plummer. On remand the district court should state the statutory or other basis for each award and articulate, in some detail, the evidence and the reasoning that support each award.

Taylor Chevrolet v. Medical Mutual Services, 2008 WL 5378025 (6th Cir.(Ohio). Employer/medical plan sponsor sued stop loss carrier in state court and carrier removed to federal court. The Supreme Court recently clarified the legal standard governing a district court's discretion in granting attorneys' fees under § 1447(c). "Absent unusual circumstances, courts may award attorney's fees under § 1447(c) only where the removing party lacked an objectively reasonable basis for seeking removal." *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 141 (2005). "Conversely, when an objectively reasonable basis exists, fees should be denied." *Id.; see also* Bartholomew, 409 F.3d at 687 ("[A]n award of costs, including attorney fees, is inappropriate where the defendant's attempt to remove the action was 'fairly supportable,' or where there has not been at least *some* finding of fault with the defendant's decision to remove.").

III.

*3 Applying the standard set forth in *Martin,* we hold that the district court did not abuse its discretion in awarding attorneys' fees to Taylor under § 1447(c). A defendant may remove a state court action under § 1441(a) only if the action "originally could have been filed in federal court." *Caterpillar Inc. v. Williams,* 482 U.S. 386, 392 (1987). Although a civil action "arising under the Constitution, laws, or treaties of the United States" may be brought originally in federal court, 28 U.S.C. § 1331, Medical Mutual lacked an objectively reasonable basis for believing that Taylor's entirely state law complaint raised a federal question. [FN2]

FN2. The parties do not dispute that diversity of citizenship under 28 U.S.C. § 1332 would not have been an objectively reasonable basis for removal, as both Taylor and Medical Mutual are citizens of Ohio for diversity jurisdiction purposes.

Here, Taylor's complaint neither implied that Taylor was suing in its capacity as an ERISA fiduciary nor that Medical Mutual was being sued in its capacity as such. Rather, the relationship between Taylor and Medical Mutual was independent from any duties either party had to the Plan or its participants and beneficiaries. Taylor's claims related solely to Taylor's own injuries--not any injury to the Plan or its participants and beneficiaries--and Taylor was clearly seeking to enforce its rights under a separate, distinct administrative services contract with Medical Mutual. *See Sonoco*, 338 F.3d at 373 (holding that where a plan sponsor's claims "relate solely to its own injuries, and not to its fiduciary responsibilities to the plan or to the plan's participants and beneficiaries," it is not acting as a fiduciary under ERISA). Moreover, there was no allegation that Medical Mutual had failed to pay benefits to any participants or beneficiaries of the Plan, or that it had paid any claims in violation of the Plan's terms. Thus, any failure by Medical Mutual was not a failure to properly carry out its fiduciary duties of processing benefit claims and distributing Plan funds under the terms of the Plan. *See Geweke Ford v. St. Joseph's Omni Preferred Care Inc.*, 130 F.3d 1355, 1359 (9th Cir.1997) (noting that third-party administrator's "alleged failure was to file the claim with [the excess liability insurer] properly and in a timely manner, it was not a failure to administer the Plan"). Even assuming that Medical Mutual had a duty to notify American National of any excess amount or to notify Taylor of its double payment, then, that duty could have only arisen out of the administrative services agreements between the parties and ran only to Taylor.

Because Taylor's claim involved neither Taylor's nor Medical Mutual's status as an ERISA fiduciary, Medical Mutual could not have reasonably concluded that it fell within the scope of § 1132(a)(2). [FN8] Accordingly, the district court did not abuse its discretion in awarding attorneys' fees and costs to Taylor under § 1447(c).

> FN8. We briefly note that Medical Mutual could not have perceived Taylor's claim as one brought under any of the other subsections of ERISA's civil enforcement provision. Only a "participant or beneficiary" may bring a civil action under § 1132(a)(1), and, as discussed above, Medical Mutual does not dispute that Taylor is neither a "participant" nor a "beneficiary." Section 1132(a)(3) is also inapplicable because Taylor did not allege that Medical Mutual had violated any provision of ERISA or the terms of the Plan; it only alleged that Medical Mutual had violated the terms of the administrative services agreements between the parties. *See Penny/Ohlmann/Nieman, Inc. v. Miami Valley Pension Corp.*, 399 F.3d 692, 701 (6th Cir.2005) (noting that employer's breach of contract claim against third-party service provider was not preempted by ERISA in part because there was "no allegation that any of the plan's terms have been breached"). Finally, Medical Mutual does not argue that Taylor's claim fell within the scope of the remaining subsections, §§ 1132(a)(4)-(a)(10).

Eckert v. Titan Tire Corporation, 2008 WL 222274 (8th Cir.). In an M&A transaction, it was alleged that the asset transfer in connection with the transfer of liabilities of a defined benefit pension plan was implemented incorrectly. When the company that sponsored the transferee plan sued the seller, the sponsor of the transferor plan, it was found that the one year statute of limitations on claims under the M&A agreement had expired. Note that the company that was the sponsor of the transferee plan had not brought an ERISA cause of action. Assuming that the buyer wanted to bring such a cause of action, would the buyer as plan sponsor

have standing? Would the transferor plan have standing? What about a state law cause of action by the transferee plan and consider if the transferee plan was or was not a third party beneficiary of the M&A transaction document that required an asset transfer?

ERISA Coverage:

Shearer v. Southwest Service Life Insurance Company, 2008 WL 256984 (5th Cir.). Health insurance policies were purchased by an employer for each of two employees, and these employees effectively owned the company. The court found that this did not establish an ERISA plan, because the purchase of life insurance for an employee is insufficient to establish an ERISA plan, citing *Taggart v. Life & Health Benefits*, 617 F.2d 1208, 1211 (5th Cir. 1980). The court noted that the company did not buy insurance for any other employees. It seems as if the intellectual struggle with owner only or mostly owner plans continues in this circuit.

Hughes v. Zurz, 2008 WL 4488891 (6th Cir.). The question was whether the certain arrangements, both verbal and written, constituted a benefit plan subject to ERISA. The court applied the four-part test first set out in *Donovan v. Dillingham*, determining ultimately that there was a lack of reasonably ascertainable claims procedure that was fatal to the assertion that the plan was subject to ERISA. Read literally, ERISA coverage might be avoided by omitting a claims procedure from plan documents.

Clawbacks:

Dow Chemical Co. v. Reinhard, 42 EBC 1961 (E.D. Michigan 2007). Employee alleged by Company to have breached fiduciary duties. Company asserted that the executive must return previously vested equity awards and in addition blocked distribution/exercise of other equity awards. Key to Company's claim was that the executive was "fired" and did not "retire." Often there are disputes of this nature, sometimes when the employee is terminated involuntarily and the employer subsequently discovers there were facts that would have justified a for cause termination.

Estoppel:

Robinson v. New Orleans Employers, 2008 WL 687289 (5th Cir.).

> "A plaintiff must establish three elements for an equitable estoppel claim under ERISA: (1) a material misrepresentation, (2) the plaintiff's reasonable and detrimental reliance upon that representation, and (3) extraordinary circumstances. *Mello v. Sara Lee Corp.*, 431 F.3d 440, 444-45 (5th Cir. 2005)."

Reliance was not permitted in Robinson in the case of an oral statement by plan administrators that a person would be considered a spouse under a pension plan. But if the SPD and the plan are different, the participant can get the benefit of the erroneous SPD without having to show reliance. Washington v. Murphy Oil USA, Inc., 2007 WL 2326071 (5th Cir.). But the court said it was concerned about the result if there had been a windfall.

Pell v. DuPont, 2008 WL 3166997 (3rd Cir.). On fact based question of what was the proper date for calculating service under the pension plan, because employee had been

advised that a date earlier than the proper date under the plan was appropriate, the employee was entitled to benefits based on those communications even though the date was clearly wrong under the terms of the plan and the employee had on occasion been given the correct date.

The participant was required to show detrimental alliance and he was able to do so by testifying that he would have explored another job alternative had he known the pension benefits would not count the earlier service.

White v. Coca-Cola Company, 2008 WL 4149706 (11th Cir.). In a contest interpretation of plan provisions, the court permitted the plan committee to construe the plan consistent with an SPD that seemed to be at variance with the plan and may have effectively allowed the SPD to override the plan to the detriment of participants.

Age Discrimination:

Kentucky Retirement Systems v. Equal Employment Opportunity Commission, June 19, 2008, 128 S.Ct. 2361 (2008). Kentucky safety workers retirement plan that provided extra years of service for "disability retirement" which could have resulted, in some circumstances, in younger disabled participants receiving more credit that older disabled participants found not to be in violation of age discrimination rules, in part, because, in some circumstances, older workers could get greater benefits than younger workers and the circumstances taken as a whole eliminate the possibility that pension status serves here as a proxy for age.

Hirt v. The Equitable Retirement Plan, 2008 WL 2675828 (2nd Cir.). Cash balance plan found not to be age discriminatory.

Plan Administrator Conflicts:

Metropolitan Life Insurance Company v. Glenn, June 19, 2008, 128 S. Ct. 2343. Supreme Court finds certain relationships result in a conflict of interest for plan administrators and prescribes "standard" for reviewing decisions of those conflicted administrators. In *Glenn*, the Supreme Court confirmed that when an insurance company or an employer determines whether the employee is eligible for benefits and pays the benefits out of its own pocket, operating in such a dual role creates a conflict of interest and a court reviewing the decision of the administrator should take that conflict into account as a factor in determining whether the plan administrator has abused its discretion in denying benefits.

Since the 1989 decision in *Firestone Tire & Rubber Co. v. Bruch*, benefit plan sponsors and professionals have struggled with identifying which conflicts of interest would be sufficient to require greater scrutiny of decisions of a plan administrator. And, once that greater scrutiny was to be required, what was that greater scrutiny.

The *Metropolitan Life* decision is clear that an insurance company that provides the source of funding for a benefit plan operates under a conflict of interest when it administers claims. *Metropolitan Life* is also clear that an employer or its representative administering a self-funded plan is also operating under a conflict of interest. *Metropolitan Life* requires that the standard of review be something less than deferential, but not *de novo*. Just where the standard

is between those two outer boundaries will depend on the facts and circumstances of each case. The court did not believe in necessary or desirable to create burden of proof rules, or other special procedural or evidentiary rules, rather noting that conflicts are of one factor among many that a reviewing court must take into account.

The court did suggest some actions that could lead to a more deferential standard of review, including

> ". . . where the administrator has taken active steps to reduce potential bias and to promote accuracy, for example, by walling off claims administrators from those interested in firm finances, or by imposing management checks that penalize inaccurate decision making irrespective of whom the inaccuracy benefits."

This comment suggests plan sponsor will want to review with insurers their internal policies for claims processing and review and consider how the plan sponsor's internal management structure and claims administration staffing and procedures might be adjusted in an effort to secure a more deferential standard of review of plan administrator decisions.

And the court leaves each case to its own facts and circumstances as there is no bright line standard for determining the appropriate level of deference, suggesting that the district and appellate courts will be faced with a volume of challenges to plan administrator decisions where there is any basis to assert a conflict.

Burke v. Pitney Bowes Inc. Long-Term Disability Plan, 544 F.3d 1016 (9th Cir. 2008). This case discussed the standard applicable to review of an administrative claim after the Supreme Court decision in *Metropolitan Life v. Glenn*, the court finding that benefits paid out of a trust primarily funded by the employer presents a structural conflict of interest for the employer, even though employees make some contributions which the court thought lessened the structural conflict.

Sanders v. First Unum Life Insurance Company, 2008 WL 5391909 (5th Cir.(Tex.): In light of the Supreme Court's decision in Metropolitan Life Insurance Co. v. Glenn, 128 S.Ct. 2343 (2008), we must reassess our standard of review governing cases such as this one that challenge an Employee Retirement Income Security Act ("ERISA") plan administrator's decision to deny disability benefits, where the administrator has a conflict of interest because it has both the discretionary authority to determine the validity of the employee's claim and pays the benefits under the policy. Our current standard of review allows a court to review *de novo* the administrator's decision when it is shown that a conflict of interest actually influenced that decision. *See* Sullivan v. LTV Aerospace & Defense Co., 82 F.3d 1251, 1255-56 (2d Cir.1996). We find this standard to be inconsistent with the Supreme Court's instructions in *Glenn* and abandon it. We now adhere to the Supreme Court's clarified explication of the standard of review governing such cases, which is that such a conflict of interest is to be "*weighed as a factor* in determining whether there [wa]s an abuse of discretion," Glenn, 128 S.Ct. at 2348 (quotation marks omitted) (emphasis in original). After applying this standard, we hold that, as a matter of law, the plan administrator abused its discretion in denying plaintiff's claim for long-term disability benefits.

Day Trading:

In re Mutual Funds Investment Litigation v. Janus Capital Group, 2008 WL 2406211 (4th Cir.). Former participants in 401(k) plan argued that fiduciaries knew that some mutual funds that were investment alternatives in the 401(k) plan were allowing market timing trading which harmed investors in those funds. The principal thrust of the court's opinion was on standing, but the case is interesting because it illustrates another avenue of attack against 401(k) plan fiduciaries.

Too Much Information?:

Wehrenberg v. Federal Signal Corp., 2007 WL 1225375 (N.D.Ill.). Plaintiff alleged that a breach of fiduciary duty occurred when a plan fiduciary put the participant on notice of a federal securities law insider information issue that prevented the person the person from trading and that dissemination of information. Is this the case that stands for the proposition that it is sometimes appropriate for a fiduciary to keep participants ignorant?

Damages:

Frommert v. Conkright, 2008 WL 2837783 (2nd Cir.). In fashioning a remedy for what the court held to be a prohibited offset for prior distributions from a defined benefit plan, the court simply deducted the face amount of a prior lump sum distribution not timed value of money. The court's analysis is simplistic and might be thought to ignore context of the plan and its operation.

QDROs/DROs:

Galenski v. Ford Motor Company Pension Plan, 2008 WL 3929795 (6th Cir.). Describes a situation in which a qualified domestic relations order was issued retroactively and after the death of the participant.

Health Coverage Mandates:

Golden Gate Restaurant v. City and County of San Francisco, 2008 WL 4401387 (9th Cir.). San Francisco ordinance requiring companies to maintain benefit plans or provide insurance coverage for employees without health insurance found not to be preempted by ERISA. Note that the Department of Labor filed an amicus brief urging that the ordinance was preempted by ERISA.

Jury:

Rolland v. Textron, Inc., 2008 WL 4874463 (11th Cir.). "It is well-settled that plaintiffs bringing ERISA claims are not entitled to jury trials under ERISA, because such claims are equitable in nature."

2008 LITIGATION REVIEW

DALLAS BAR ASSOCIATION

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