ERISA LEGALNEWS

3rd Quarter, 2011 • Volume 2, Number 3

IN THIS ISSUE

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UNITED STATES SUPREME COURT UPDATE

CIGNA v. Amara, 131 S. Ct. 1866 (May 16, 2011)

As expected in our last issue, the United States Supreme Court issued its opinion in a case concerning alleged inconsistencies between a summary plan description and the full plan document, and the possible available equitable remedies to participants who claimed harm arising from the difference in information. The Court found that a summary plan description does not constitute the terms of a plan for purposes of enforcing plan terms pursuant to Section 502(a)(1)(B) such that relief was not available under that section of ERISA. Instead, the Court remanded the case for consideration of the "appropriate equitable relief" available under Section 502(a)(3), and reasoned (arguably in *dicta*) that the standard of harm required depends on the type of relief sought.

Thus, plan sponsors are well advised to formally adopt new terms as plan amendments and not simply issue updated summary plan descriptions to avoid challenges based on the differences in terms. Further, the Court suggested that detrimental reliance need not be shown unless the remedy sought was equitable estoppel, but left that open for the trial court's consideration.

With respect to what equitable remedy exists for purported harm arising from differences between plan document and SPD language, the Court's guidance was less than clear. Stay tuned for further developments to be reported here as this issue winds its way through the trial courts.

SELECT CIRCUIT COURT DECISIONS

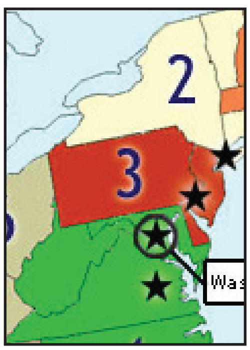
by: Tim M. Iannettoni, Aaron V. Burrell and Benjamin M. Sobczak / edited by Kimberly J. Ruppel

Second and Third Circuits

Administrative Investment Actions Do Not Constitute Fiduciary Activity

Faber v. Metropolitan Life Ins. Co., Case 09-4901, 2011 U.S. App. LEXIS 16153 (2nd Cir. 2011)

In this class action, plan participants alleged that MetLife breached its fiduciary duty by retaining and investing life insurance proceeds for its own profits. Under the plan, when life insurance proceeds were due to a beneficiary, MetLife would deposit the funds into a retained asset account, referred to as a Total Control Account ("TCA"). The beneficiary was then provided a checkbook allowing them to withdraw proceeds as needed, and competitive interest rates were paid on the proceeds. At the same time, MetLife would invest amounts in the TCA for its own profit. The Court held that these investments did not violate MetLife's fiduciary duty under ERISA, finding that MetLife was not a fiduciary when it invested the funds backing Plaintiffs' TCA.



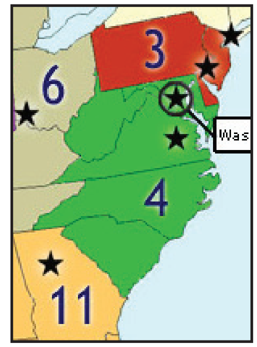
Renfro v. Unisys Corp., Case No. 10-2447, 2011 U.S. App. LEXIS 17208 (3rd Cir. Aug. 19, 2011).

The Third Circuit similarly considered a class action involving allegations of a plan trustee's breach of fiduciary duties based upon purported inadequate selection of investment options for a defined contribution plan. The Court noted that the plan offered seventy-three investment options, including company stock, mutual funds and a variety of risk profiles and fee schedules. Because the plan's directed trustee's role was expressly limited to "hold and invest . . . plan assets in trust among several investment options selected by the Applicable fiduciary," the Court held that the trustee's limited role did not constitute activities to support a breach of fiduciary duty claim. Further, the Court held that the range of investment options available was reasonable.

Fourth Circuit - Fiduciary Exception

Solis v. The Food Employers Labor Relations Ass. et. al., Case No. 10-1687, 2011 U.S. App. LEXIS 9110 (4th Cir. 2011)

The DOL issued subpoenas to a pension and health fund, (the "Funds"), for the production of documents relating to their investments. The Funds withheld a portion of the documents claiming they were protected by the attorney-client privilege and work product doctrine.



On appeal, the Fourth Circuit joined the majority of circuits in recognizing the application of the fiduciary exception to the attorney-client privilege and the work product doctrine in the ERISA context, and held that the documents were not privileged as a result of the fiduciary exception. The court explained that documents purportedly protected by the attorney client privilege -- Board of Trustee meeting minutes, notes distributed in these meetings, and correspondence relating to investments -- were documents related to fund administration and were therefore discoverable. With respect to those documents claimed to be protected by the work product doctrine, the court held that by failing to provide a detailed privilege log explaining exactly how the documents fit within this privilege, the Funds failed to carry their burden, waiving the privilege.

Fifth Circuit - Limited Discovery Allowed

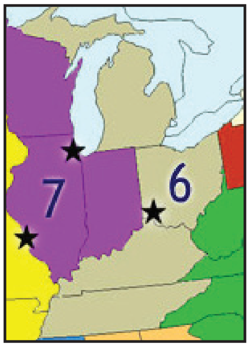
Crosby v. Louisiana Health Service and Indemnity Co., Case No. 10-30043, 2011 U.S. App. LEXIS 14739 (5th Cir. July 19, 2011).

A medical benefits claimant sought discovery to demonstrate whether the administrative record was complete, whether the claims administrator complied with ERISA's procedural requirements, and whether coverage had previously been afforded for similar claims. The Court agreed that discovery of extrinsic evidence was inappropriate to "resolve the merits of the coverage determination . . . unless the evidence . . . relates to how the administrator has interpreted the plan in the past . . ." However, the Court noted that controlling authority "does not prohibit the admission of evidence to resolve other

questions . . . [such as] the completeness of the administrative record; whether the plan administrator complied with ERISA's procedural regulations; and the existence or extent of a conflict of interest . . . ." The Court remanded to allow discovery within those parameters, while noting the overriding ERISA policy goal of efficient and inexpensive claim administration and cautioning against allowing discovery that would be overly burdensome or costly.

Sixth Circuit - Proposed Class Action Is Not Superior

Pipefitters Local 636 Insurance Fund v. Blue Cross Blue Shield of Michigan, Case no. 09-2607, __ F.3d __, 2011 U.S. App. LEXIS 16624 (6th Cir. August 12, 2011)

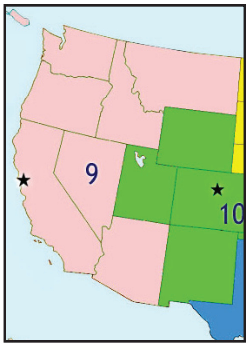


Plaintiff, a multiemployer health and welfare benefits fund administered pursuant to ERISA and the LMRA, asserted breach of fiduciary duty claims based on the defendant's allegedly inconsistent practice of collecting a cost transfer subsidy fee from its self-insured clients purportedly in violation of state law. The plaintiff moved for certification of a class action to include similarly situated self-insured group plans which contracted with the defendant pursuant to an administrative services contract and were assessed the fee. The Court found that, despite some commonality, the issues to be considered required individualized attention, applying the reasoning of the Supreme Court's recent opinion in *Wal-Mart Stores, Inc. v. Dukes*. Due to the fact-specific inquiry necessary to determine whether the defendant was acting in a fiduciary capacity with each potential self-funded group plan, the court would be required to examine the terms and funding arrangements of the contract for each customer. Further, because the fee collected was used to subsidize insurance coverage for senior citizens, the Court found that the public's interest would be better served by individual suits. Finally, the amount of damages sought was significant enough not to preclude individual class members from seeking relief. For these reasons, the Court found that the plaintiff failed to satisfy the superiority element of Rule 23(b)(3).

The Court additionally considered whether class certification was appropriate under Rule 23(b)(1)(A) and found that a trial court could find that the defendant owed a fiduciary duty to one client but not another. As a result, prosecuting separate actions would not impair the defendant's ability to pursue a uniform course of conduct and did not present a risk of inconsistent adjudication.

Ninth Circuit - Statute of Limitations Begins To Accrue Upon Actual Denial

Withrow v. Bache Halsey Stuart Shield, Inc., Case No. 09-55024, 2011 U.S. App. LEXIS 17526 (9th Cir. Aug. 23, 2011).



While receiving LTD benefits for over 15 years, the claimant made occasional inquiries about whether her payments were improperly reduced, but she received no formal response. After the claimant finally presented a formal appeal, the plan administrator denied her claim. After filing suit, the district court initially dismissed the claim as untimely. However, the Court of Appeals determined that California's four-year statute of limitations applied and then considered when the plaintiff's claim actually accrued. Applying federal common law, the Court found that the claim accrued "either at the time benefits are actually denied, or when the insured has reason to know that the claim has been denied." The Court noted that a plaintiff has a "reason to know" of a denial when the plan communicates a "clear and continuing repudiation of a claimant's rights under a plan such that the claimant could not have reasonably believed but that his or her benefits had been finally denied." The Court found that the plan "actually denied" the plaintiff's claim in 2004 when the representative informed her of the denial, and that plaintiff had no "reason to know" her claim was denied prior to that date. Because the plaintiff filed her complaint in 2006, she was within the applicable statute of limitations and the case was allowed to proceed.

Eleventh Circuit - Claimant's Burden To Show Impact Of Conflict Of Interest

Blankenship v. Metropolitan Life Insurance Co., Case No. 10-10717, 2011 U.S. App. LEXIS 13358 (11th Cir. June 30, 2011).

In this action involving alleged wrongful denial of LTD benefits, the Court considered the extent to which the structural conflict of interest impacted the claim administrator's decision, who insured the benefits at issue. The Court explained that "the burden remains on the plaintiff to show the decision was arbitrary; it is not the defendant's burden

to prove its decision was not tainted by self-interest." Reviewing the record before it, the Court held that the defendant possessed a reasonable basis for its benefits decision, and that its conflict of interest did not render the decision arbitrary and capricious. Plaintiff failed to demonstrate that the conflict of interest had "sufficient 'inherent or case specific importance.'" This was so even in light of the amount of money at issue - to which the lower court afforded special importance - since "the size of the award is not enough to be the dispositive factor in th[e] case."

DICKINSON WRIGHT WELCOMES MICHAEL R. HOLZMAN

Dickinson Wright PLLC is pleased to announce that Michael R. Holzman has joined the firm as a member in the Washington D.C. office. Mr. Holzman specializes in employee stock ownership plans (ESOPs). He counsels companies, shareholders, fiduciaries, and lenders on the complexities of plan compliance and how to best meet client objectives in a tax efficient manner. Mr. Holzman's ESOP work encompasses a diverse spectrum of industries nationwide ranging from manufacturing and retail to government contractors and professional service firms. Mr. Holzman advises clients on the many ESOP applications such as employee buyouts, resolution of shareholder disputes, ownership succession, corporate reorganizations, mergers, and acquisitions.

Mr. Holzman received his B.A. from Miami University, his J.D. from The Catholic University of America, Columbus School of Law, and his LL.M. in Taxation from Georgetown Law. He is a member of the American Bar Association, The ESOP Association and The National Center for Employee Ownership. Before joining Dickinson Wright, Mr. Holzman was an attorney at the law firm of Morgan, Lewis & Bockius LLP.

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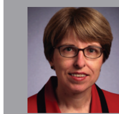

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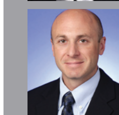

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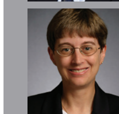

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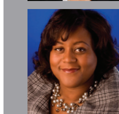

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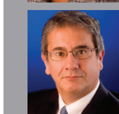

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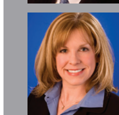

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