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View From McDermott: 2014 ERISA Litigation Review–Decisions From the Supreme Court and Beyond

BY MICHAEL T. GRAHAM

Recently, the U.S. Supreme Court issued a number of significant ERISA cases. In its 2013-14 term, the Supreme Court decided two ERISA-based appeals – *Fifth Third Bancorp. v. Dudenhoeffer*[1] and *Heimeshoff v. Hartford Life & Acc. Ins. Co.*[2] In the current 2014-15 term, the Supreme Court already issued one ERISA decision in *M&G Polymers USA, LLC v. Tackett,*[3] and will issue another ERISA decision soon in *Tibble v. Edison Int'l.*[4] Although these four cases have received much attention within the ERISA community, each year there are hundreds of other decisions issued by federal appellate and district courts that also impact a plan sponsor's daily administration of welfare and retirement plans. In fact, many of these district court and appellate decisions are interpreting issues raised or addressed in these Supreme Court opinions. This article will address a few of these cases, which may not have received a lot of attention by the press, but could have long-lasting impacts on plan administration and litigation in future years.

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[1] *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014) (123 PBD, 6/26/14) . In *Dudenhoeffer*, the Court established new rules that impacted the litigation strategies of both plaintiffs and defendants in company stock litigation, eliminating the presumption of prudence related to investments in company stock that had existed for many years. *Id.*, 134 S.Ct. at 2465-71.

[2] *Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 134 S.Ct. 604 (2013) (241 PBD, 12/17/13). In *Heimeshoff*, the Court focused on the timeliness of litigation where a plan contains a contractual limitations period and found that a contractual limitations provision will ordinarily be enforced as written under ERISA if it is of reasonable length and there is no controlling statute to the contrary, even if the claim accrues before a participant submits an administrative benefit claim to the plan administrator. *Id*, 134 S.Ct. at 610-12.

[3] *M&G Polymers USA, LLC v. Tackett*, 135 S.Ct. 926 (2015) (17 PBD, 1/27/15). In *Tackett*, the Supreme Court addressed the interpretation of collective bargaining agreements (CBAs) that include post-retirement welfare benefits, such as retiree health or life insurance benefits, and found that the Sixth Circuit's inference in favor of vesting retiree medical benefits established in *UAW v. Yard-Man, Inc.* is inconsistent with ordinary principles of contract law governing CBAs. *Id*, 135 S.Ct. at 932-37

[4] *Tibble v. Edison Int'l*, No. 13-550 (argued Feb. 24, 2015) (37 PBD, 2/25/15). In *Tibble*, the Court will address when fiduciary breach claims related to the selection of investment in a 401(k) retirement plan accrue for purposes of ERISA's six-year statute or repose, and whether that statue of repose is impacted by a fiduciary's duty to monitor investments. The Court heard arguments in *Tibble* on February 24, 2015, and a decision will be issued on or before the Court's term ends on June 29, 2015.

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Amara v. Cigna Corp. – Plan Reformation as an Available ERISA Remedy

Late in 2014, yet another decision was issued in a long-running dispute between Cigna Corporation and a class of its pension plan participants. *Amara v. Cigna Corp.* was originally filed in 2001 and arose from certain allegedly misleading communications made by the employer related to its pension plan, specifically the effects of a 1998 conversion of the company's defined benefit pension plan to a cash balance plan. In 2008, after a bench trial, the district court held that the defendants had failed to provide notice of a significant reduction in the rate of future accruals in the cash balance formula in violation of ERISA Section 204(h).[5] On the issue of appropriate relief for the violation, the district court held that, pursuant to ERISA Section 502(a)(1)(B), defendants were required to provide the participants with benefits that accrued under the old defined benefit formula (Part A) plus the benefits that accrued under the cash balance formula (Part B) – or Part A + Part B (A+B) benefits – and to issue a new notice under ERISA Section 204(h).[6] On appeal, the United States Court of Appeals for the Second Circuit issued a summary order affirming the judgment.[7]

The Supreme Court granted review and, in 2011, held that ERISA Section 502(a)(1)(B) did not afford the relief the district court granted, and remanded the case to determine whether the class was entitled to relief under ERISA Section 502(a)(3), which provides for ''appropriate equitable relief.''[8] On remand, the district court again ordered the company to provide the class with A+B benefits and issue corrected notices, this time finding that such relief was warranted under ERISA Section 502(a)(3).[9] Both parties appealed; the company arguing that the district court erred in awarding equitable relief under ERISA Section 502(a)(3), while the class argued that the district court erred by limiting the benefits to the A+B formula rather than the full A benefit (and larger benefit for most) under the old formula.

The Second Circuit concluded that the district court did not abuse its discretion in determining that the elements of equitable reformation were satisfied and that the plan should be reformed to adhere to the representations made by plan administrators in the original ERISA Section 204(h) notices sent to participants.[10] The Second Circuit found that, because the pension plan was part of an employee compensation package that stems from their employment agreements, the class had given consideration for their participation in the plan. As a result, it was appropriate to apply a contractual remedy – reformation – to satisfy the representations made in the original notices to participants.[11]

The Second Circuit also found that the class satisfied the elements of reformation, which requires a mutual mistake of both parties, or where one party is mistaken and the other commits fraud or engages in inequitable conduct.[12] The Second Circuit found that the company's misrepresentations, made about the benefits available under the plan after the cash balance conversion, amounted to fraud.[13] The Second Circuit also affirmed the district court's decision to reform the plan to provide A+B benefits, finding that the class understood that the benefits accrued under the old defined benefit formula would be changing and that their Part A benefit would be protected. The Second Circuit determined that the A+B formula reformed the plan consistent with the information the class received through the company's improper notices.[14]

Given this case's long history, it is highly likely that one or both of the parties will seek a second bite of the apple from the Supreme Court.[15] For plan administrators, this decision is further evidence of the bad things that can occur when notices to participants of benefit changes are inaccurate or are based on faulty information. Also, the Second Circuit's decision provides further ammunition for the plaintiffs' bar that the equitable remedy of reformation is accepted under ERISA and may be used to remedy erroneous representations to participants. Stay tuned to see if the Supreme Court will be issuing another decision in a future *Amara* appeal during the 2015-2016 Supreme Court term.

Gabriel v. Alaska Electrical Pension Fund — Surcharge as an ERISA Remedy

The *Amara* case generated additional confusion and litigation following the Supreme Court's decision, regarding whether a court may award equitable remedies for an ERISA violation. In *Amara*, the Supreme Court in dicta discussed the types of equitable remedies that may be available for ERISA violations, including the remedy of surcharge. As explained in *Amara*, ''[e]quity courts possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment.''[16] The Supreme Court went on to explain that, prior to the merger of law and equity, surcharge was a monetary remedy available against a trustee that was ''exclusively equitable,'' and ''extended to a breach of trust committed by a fiduciary encompassing any violation of a duty imposed upon that fiduciary.''[17]

In *Gabriel v. Alaska Electrical Pension Fund*, the Ninth Circuit picked up where *Amara* left off and addressed the circumstances when surcharge is an appropriate remedy for ERISA fiduciary violations.[18] Gabriel worked until April 1975 as an employee of several different electric companies that participated in the Alaska Electrical Pension Plan. In 1975, he became the sole proprietor of another electrical company, and from Sep-

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[5] *Amara v. Cigna Corp.*, 534 F. Supp.2d 288, 363 (D. Conn. 2008)(33 PBD, 2/20/08) (''*Amara I*'').

[6] *Amara v. Cigna Corp.*, 559 F. Supp.2d 192, 222 (D. Conn. 2008)(116 PBD, 6/17/08) (''*Amara II*'').

[7] *Amara v. Cigna Corp.*, 348 Fed. Appx. 627 (2d Cir. 2009)(192 PBD, 10/7/09).

[8] *Cigna Corp. v. Amara*, 131 S.Ct. 1866, 1870-71 (2011) (''*Amara III*'').

[9] *Amara v. Cigna Corp.*, 925 F. Supp.2d 242, 265-66 (D. Conn. 2012) (''*Amara IV*'')(245 PBD, 12/26/12).

[10] *Amara v. Cigna Corp.*, 775 F.3d 510, 514 (2d Cir. 2014) (''*Amara V*'')(246 PBD, 12/26/14).

[11] *Amara V* at 525.

[12] *Id.*

[13] *Id.* at 529-30.

[14] *Id.* at 532.

[15] Notably, on January 20, 2015, the company filed a petition for rehearing and rehearing en banc in the Second Circuit.

[16] *Amara III*, 131 S.Ct. at 1880.

[17] *Id.*

[18] 773 F.3d 945 (9th Cir. 2014)(241 PBD, 12/17/14).

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tember 1975 through November 1978, that company made contributions to the plan for Gabriel and other employees. Based on these contributions, the Fund initially credited Gabriel with 11 years of service – enough to vest his benefits under the plan. However, in 1979, because Gabriel became the sole proprietor of a participating electric company, the Fund determined that he was no longer eligible to participate as an employee, and the Fund notified Gabriel that it would refund the company for the erroneous contributions accepted by the Fund. The Fund also terminated Gabriel's participation in the plan because he no longer met the eligibility rules since he was a sole proprietor and not an employee. Gabriel subsequently retired and commenced benefits under the plan, even though he was never fully vested in his benefits in the 1970s. After receiving benefits for a few years, the Fund discovered its error and requested a repayment of the erroneously paid benefits. Gabriel ultimately filed suit under ERISA, alleging a benefit claim under ERISA Section 502(a)(1)(B) and equitable claims under ERISA Section 502(a)(3).[19]

The district court dismissed Gabriel's equitable claims under ERISA Section 502(a)(3), finding that his claims for equitable restitution, disgorgement of profits and a constructive trust were actually requests for compensatory damages, which are not recoverable under ERISA.[20] The district court also dismissed his benefit claims under ERISA Section 502(a)(1)(B) because the Fund's administrative denials were not clearly erroneous.[21] Gabriel appealed, arguing that the Fund had breached its fiduciary duties by ceasing his benefit payments. On June 6, 2014, the Ninth Circuit affirmed the district court's ruling that Gabriel was not entitled to ongoing retirement benefits even though the Fund had erroneously paid him benefits for three years. The court also held that the remedy of equitable surcharge was not available under ERISA, as such relief was contrary to the limited equitable relief regime available under ERISA. The dissent found that the panel majority had misconstrued the Supreme Court's *Amara* decision, triggering a circuit split.[22]

On July 21, 2014, Gabriel filed a request for rehearing, focusing on whether surcharge was an appropriate equitable remedy under ERISA. On December 16, 2014, without granting or denying the motion for rehearing and before the full court could take action on the request for a hearing *en banc*, the panel withdrew the earlier June 2014 decision and issued a new opinion authored by the original dissenting judge. While this new opinion reached the same findings with respect to Gabriel's reformation and estoppel theories, it declined to reach the merits of the surcharge claim. Instead, the new majority found that *Amara* required a remand to the district court to address a surcharge theory in the first instance. While the judges appeared to suggest that the surcharge remedy was not really applicable in Gabriel's case, it effectively punted the issue back to the district court to avoid a circuit split arguably created by the original opinion.[23]

This case shows the difficulty that lower courts face in interpreting *Amara*'s dictate that certain equitable remedies, like surcharge, may be available under ERISA. Some courts, like the district court in *Amara*, have found that an equitable surcharge remedy may exist for personal losses suffered by a plan participant.[24] Other courts have taken a narrower approach, suggesting that a plaintiff may only seek equitable surcharge if the loss is suffered by the plan or trust as a whole.[25] This difference of opinion as to ERISA-based surcharge may require review by the Supreme Court in future terms. Who knows, maybe it too will recirculate as part of the future *Amara* appeal.

Smith v. AEGON Companies Pension Plan – Effect of ERISA Venue Selection Provisions

Novel ERISA procedural issues also emerged in 2014. One such case is *Smith v. Aegon Cos. Pension Plan*.[26] In *Smith*, the pension plan notified Smith that he had been overpaid benefits for 11 years. As a result, the plan reduced, and then eliminated, Smith's monthly pension benefit to repay the overpayment. Smith exhausted his administrative claim review process and then filed suit in a Kentucky state court. The case was removed to the United States District Court for the Western District of Kentucky.[27]

The company initially moved to dismiss the complaint, arguing that the named defendant was not a proper party under ERISA. The district court granted the motion, finding that Smith was suing to recover benefits under an ERISA plan and that the plan's administrator was not a proper party to the suit. On appeal, the Sixth Circuit affirmed the district court's dismissal.[28] After the district court's initial dismissal, Smith also filed suit against the pension plan in the Western District of Kentucky. Notably, in 2007, the employer added a venue selection provision to the pension plan, which stated that a participant or beneficiary could only bring a suit related to the pension plan in Federal district court in Cedar Rapids, Iowa. Based on this venue selection provision, the pension plan again moved to dismiss Smith's complaint, which the district court granted. Smith again appealed.

On appeal, the Sixth Circuit addressed two issues: (i) the amount of deference to give the Department of Labor's interpretation of venue selection clauses in ERISA plans; and (ii) whether the venue selection clause in question violated ERISA. On the deference issue, the court found that the Department of Labor's interpretation against venue selection clauses was not entitled to deference under *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or *Skidmore v. Swift & CO.*, 323 U.S. 134 (1944). The Sixth Circuit determined that *Chevron* deference was not re-

[19] *Id.* at 951-52.
[20] *Id.* at 953.
[21] *Id.*
[22] 755 F.3d 647, 650 (9th Cir. 2014). The dissent suggested that the majority had read the surcharge remedy too narrowly in light of decisions on the issue from the Fourth, Fifth and Seventh Circuits. *See McCravy v. Metropolitan Life Ins. Co.*, 690 F.3d 176, 180 (4th Cir. 2012)(96 PBD, 5/18/11); *Gearlds v. Entergy Servs., Inc.*, 709 F.3d 448, 449-50 (5th Cir. 2013)(35 PBD, 2/21/13); *Kenseth v. Dean Health Plan, Inc.*, 722 F.3d 869, 878 (7th Cir. 2013)(115 PBD, 6/14/13).
[23] 773 F.3d at 963-64.
[24] *Amara IV*, 925 F. Supp.2d at 256-57.
[25] *Skinner v. Northrop Grumman Ret. Plan B*, 673 F.3d 162, 1166 (9th Cir. 2012)(52 PBD, 3/19/12).
[26] 769 F.3d 922 (6th Cir. 2014)(199 PBD, 10/15/14).
[27] *Id.* at 926.
[28] *Smith v. Commonwealth Gen. Corp.*, 2014 WL 5032357 (197 PBD, 10/10/14)(6th Cir. Oct. 9, 2014).

quired because the interpretation was not made with the force of law, but rather in an amicus brief filed with the court.[29]

Next, for several reasons, the Sixth Circuit also found that the Department of Labor's interpretation should not receive *Skidmore* deference.[30] First, the court decided that the Department of Labor does not have sufficient expertise in determining whether a statute proscribes venue selection. Second, the agency's position on venue selection had only been expressed once previously in another amicus brief, and the agency had not taken any position, even an informal one, related to venue selection clauses under ERISA since its enactment in 1974. In sum, the court found the agency's position to be only an ''expression of mood'' and not an adopted interpretation of law.[31]

The court also ruled that the venue restriction provision was permissible under ERISA. The court noted first that ERISA's statutory scheme is built around the written plan document, and that plan sponsors are generally free to adopt, modify or terminate plans at will. Given the discretion afforded the employer for amending the plan, the court saw no reason why the venue selection clause was invalid. The plaintiff argued that a restrictive venue clause could place a burden on plan participants that do not reside near the venue required by the plan's terms. However, the court found that safeguards for such a burden are available, in that a party may always challenge the reasonableness of a particular venue selection clause. Because the plan's venue selection clause required actions to be filed in Cedar Rapids, Iowa – where the plan is administered – the clause complied, and did not conflict, with ERISA's venue rules in Section 502(e). The court therefore dismissed the lawsuit.

This case will likely have an impact on ERISA litigation in several ways. It strikes a significant blow to the Department of Labor's amicus brief program. For many years, the agency has attempted to offer informal rulemaking and opinions through the filing of amicus briefs in cases involving interpretations of ERISA. This case severely weakens the Department of Labor's current methodology of circumventing the formal regulatory process, because courts may choose not to grant deference to the agency's position provided only through an amicus brief.

To better defend ERISA claims, this case also gives plan sponsors further support for adding venue selection clauses to their benefit plans. As the costs of litigation continue to escalate, defending an ERISA litigation matter close to home can reduce travel and other costs that impact a plan's overall administration and costs. However, before adding a venue selection clause to any plan, a plan sponsor should exercise due diligence to determine if: (i) the venue selected satisfies ERISA's venue rules and (ii) the venue is friendly to ERISA defendants. Otherwise, the venue selection clause may not be found reasonable or may not aid in a lawsuit's defense.

Moyer v. Metropolitan Life Ins. Co. – A Reminder for Contractual Limitation Provisions

As discussed above, more litigation ensues each time the Supreme Court rules on an ERISA issue. Last term, the Court ruled on the reasonableness of contractual limitations periods in *Heimeshoff*.[32] Following that decision, in *Moyer v. Metropolitan Life Ins. Co.*, the Sixth Circuit was faced with an interesting case involving a challenge not to the reasonableness of a limitations period, but to the application of a plan's limitations period.[33]

In *Moyer*, an employee participated in his employer's ERISA-governed long term disability plan. In 2005, Moyer was deemed disabled under the plan's terms. However, in 2007, MetLife reversed its decision and terminated his disability benefits. Almost four years after exhausting his administrative claim remedies under the plan, Moyer filed suit seeking payment of his terminated disability benefits. MetLife moved to dismiss, arguing that the plan's three-year contractual limitations period barred the lawsuit. The district court agreed, finding that the plan documents contained an express limitations period and that Moyer therefore had constructive notice of the limitations period. Moyer appealed.[34]

In a split decision, the Sixth Circuit reversed the district court's dismissal. The panel majority found that Moyer did not have actual knowledge of the plan's limitations provision because it was contained only in the plan document – which Moyer did not receive during the claims review process – and not in the summary plan description or in the adverse benefit determination letter. While the contractual limitations period itself was reasonable, the Sixth Circuit determined that the plan administrator had a duty to include a notice in the claim determination letter and in the summary plan description for the limitations period defense to be valid. The Sixth Circuit found that the failure to include the limitations period notice in the claim decision violated ERISA Section 503's requirement to provide a ''full and fair review'' of a claim.[35]

This case provides a few important reminders for plan sponsors and plan administrators. First, if benefit plans do not contain a contractual limitations period, they should be amended to add one, keeping in mind the holdings from the Supreme Court's *Heimeshoff* decision discussed above. Second, if a plan has a contractual limitations period, that provision must be included in participant communications – specifically a summary plan description and any claim determination letters. In sum, to enforce a contractual limitations period, a participant must be on notice of the provision.

[29] *Chevron* deference, which gives controlling weight to an agency's legal interpretation, applies to an agency's construction of a statute only when an agency is acting with force of law, *e.g.*, through regulations, rulemaking or administrative practice. 769 F.3d at 927.

[30] *Skidmore* deference involves an agency's informal positions, which ''constitute a body of experience and informed judgment to which courts and litigants may resort for guidance. The weight of such a judgment in a particular case will depend upon the thoroughness evident in its construction, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.'' *Skidmore*, 323 U.S. at 140.

[31] 769 F.3d at 928-29.

[32] *Heimeshoff*, 134 S.Ct. at 610-12.

[33] 762 F.3d 503 (6th Cir. 2014)(153 PBD, 8/8/14).

[34] *Id.* at 504.

[35] *Id.* at 506-07.

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