PROSKAUER ROSE LLP

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In this month's issue:

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Law & The Workplace

Editor's Overview

In the three months following the Supreme Court's decision in *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) (in which the Court held that a conflict of interest is just one of many factors to take into consideration when deciding whether an administrator has abused its discretion), seven Courts of Appeal have evaluated whether *Glenn* modified their law in evaluating conflicts of interest. As the first article below explains, with one exception, these Circuits have concluded that their pre-*Glenn* approaches remain good law.

The second article analyzes a recent case from the Sixth Circuit in which the court addressed whether ERISA preempted a state's substantive regulation of apprentice programs. The court concluded that, after the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), a purpose-based preemption test is used, and held that substantive regulation of apprentice programs was not an area that Congress intended ERISA to control.

The third article addresses a case from the Ninth Circuit in which the court ruled that retirees who were seeking nonvested retiree health benefits did not have standing. The article follows up on one that appeared in the May Newsletter and highlights the contrasting views of the Circuits.

We conclude with an article that discusses a district court decision that concluded a plan administrator abused its discretion in unilaterally reforming a plan to correct a multi-billion-dollar drafting error. As the article notes, however, there is cautious optimism that the court will use its equitable powers to reform the plan.

The *MetLife v. Glenn* Hangover: Circuit Courts' Initial Take on the Supreme Court's Opinion

by Nicole A. Eichberger

On June 19, 2008, the Supreme Court issued its much anticipated decision in *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) on the two questions of: (1) what facts give rise to a finding of a conflict of interest; and (2) what effect the finding of a conflict should have on a court's scrutiny of an administrator's decision to deny benefits. In a split

Click here for our Client Alert on the Ninth Circuit's Decision Concluding That San Francisco's "Pay or Play" Ordinance Is Not Preempted By ERISA.

decision, the Court held that when the entity deciding a claim for benefits under a plan is the same entity responsible for payment of the benefits under the plan, a conflict of interest exists. The Court further stated that this conflict of interest is just one of many factors to take into consideration when deciding whether an administrator has abused its discretion in denying a claim for benefits. The Court declined to enter any bright-line rules, and held that the weight given to the conflict of interest factor should be determined on a case-by-case, fact-by-fact basis.

Several Circuit Courts have now addressed whether *Glenn* modifies their standards on how conflicts affect the abuse of discretion standard of review. They have done so in cases where an insurer is responsible for the payment of benefits, like in *Glenn*, and also in other situations as well.

Fifth Circuit:
The Fifth Circuit viewed *Glenn* as supporting its pre-*Glenn* precedent on reviewing benefit claims. *See Crowell v. Shell Oil Co.*, 2008 WL 3485331 (5th Cir. Aug. 14, 2008); *Dunn v. GE Group Life Assurance Co.*, 2008 WL 3842929 (5th Cir. Aug. 18, 2008). In these cases, the court the Fifth Circuit held that *Glenn* supports a "sliding scale" approach to its abuse of discretion review. *See also Young v. Wal-Mart Stores, Inc.*, 2008 WL 4302590 (5th Cir. Sept. 22, 2008).

Sixth Circuit:
The Sixth Circuit in *Roumeliote v. Long Term Disability Plan for Employees of Worthington Industries*, 2008 WL 4181187 (6th Cir. Sept. 11, 2008), applied *Glenn* to affirm an administrator's denial of a disability benefits claim. In so holding, the Sixth Circuit observed that *Glenn* stated that the weight given to a conflict of interest must be on a case-by-case basis, and where, as here, there are other factors supporting the administrator's decision, the conflict of interest will not necessarily be given more weight.

Seventh Circuit:
The Seventh Circuit applied *Glenn* in *Gutta v. Standard Select Trust Ins.*, 2008 WL 3271414 (7th Cir. Aug. 8, 2008), to deny plaintiff's petition for rehearing *en banc*, holding that *Glenn* did not change the reasoning of the panel's decision, which affirmed the administrator's denial of plaintiff's claim for benefits. Rather, the Seventh Circuit held that *Glenn* affirmed the Seventh Circuit's practice of considering a conflict of interest as one of many factors in determining whether the administrator abused its discretion, and the conflict of interest factor does not have to be afforded special weight in a court's consideration.

Eighth Circuit:
On July 2, 2008, the Eighth Circuit issued the first substantive Circuit Court opinion post-*Glenn*. *In Wakkinen v. Unum Life Ins. Co. of American*, 531 F.3d 575 (8th Cir. 2008) the court affirmed Unum's denial of a long-term disability benefits claim. Although the Eighth Circuit held that a conflict of interest existed, the administrative record presented by the plaintiff did not show that Unum abused its discretion in denying the claim for disability benefits merely because it was responsible for the payment of benefits too. In so holding,

the court found that the plaintiff's own doctors' reports did not support the disability requirements under the policy, nor did the plaintiff provide new supporting medical information when requested by Unum. Since *Wakkinen*, the Eighth Circuit has remanded another long-term disability claim matter to the District Court to decide in light of *Glenn* and *Wakkinen*. *See Jones v. Mountaire Corp. Long Term Disability Plan*, 2008 WL 4163498 (8th Cir. Sept. 11, 2008).

Ninth Circuit:
The Ninth Circuit applied *Glenn* to remand a disability claim case to the District Court to permit a plaintiff to obtain discovery beyond the administrative file. *See Wilcox v. Wells Fargo and Co. Long Term Disability Plan*, 2008 WL 2873735 (9th Cir. July 23, 2008). In rendering its decision, the Ninth Circuit followed the other Circuit Courts in concluding that *Glenn* supported the Circuit's prior holdings on reviewing ERISA benefit claims. Here, the Ninth Circuit found that *Glenn* recognized that a conflict of interest may be a factor in vitiating an abuse of discretion standard, and that a plaintiff must be permitted discovery to determine the nature of the conflict and its application to the denial of benefits. *See also Burke v. Pitney Bowes Inc. Long-Term Disability Plan*, 2008 WL 4276910 (9th Cir. Sept. 19, 2008).

Tenth Circuit:
In *Weber v. GE Group Life Assuarnce Co.*, 2008 WL 4182360 (10th Cir. Sept. 12, 2008), the Tenth Circuit followed the Fifth Circuit and applied a "sliding scale" approach to benefit claim cases when the administrator had a conflict of interest.

Eleventh Circuit:
To date, the Eleventh Circuit is the only Circuit Court to change its approach in reviewing benefit claims following *Glenn*. Prior to *Glenn*, the Eleventh Circuit employed a "heightened" abuse of discretion standard when an administrator operated under a conflict of interest. Under this standard, a burden-shifting approach was applied, and the plan administrator ultimately bore the burden of showing that its decision was not affected by the alleged conflict. Post-*Glenn*, the Eleventh Circuit did not depart immediately from its pre-*Glenn* rule. *See White v. Coca-Cola Co.*, 2008 WL 4149706 (11th Cir. Sept. 10, 2008). In *White*, the Eleventh Circuit relied on the Supreme Court's language that a conflict of interest may be afforded "great weight" to support its holding that *Glenn* supported the Eleventh Circuit's "heightened" abuse of discretion standard. Subsequent to *White*, however, the Eleventh Circuit held in *Doyle v. Liberty Life Assurance Co. of Boston*, 2008 WL 4272748 (11th Cir. Sept. 18, 2008), that the Supreme Court's holding "implicitly overrule[d] and conflict[ed] with our precedent" of applying a "heightened" abuse of discretion standard. In *Doyle*, the Eleventh Circuit held that it will follow the Supreme Court's holding, cease a burden-shifting standard of review and merely consider a conflict of interest as one of many factors in applying a non heightened abuse of discretion standard.

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With the exception of the Eleventh Circuit's overruling of its burden-shifting approach to conflicts, the Circuit Courts to date have concluded *Glenn* supports that particular Circuit's

pre-*Glenn* analysis. It may be the case that the Circuit Courts are moving towards using a "sliding scale" approach to conflicts as illustrated by the Fifth and Tenth Circuits.

Sixth Circuit Applies *Travelers et al.* To Dissolve Sixteen-Year-Old Injunction of State Law Regulation of Apprentice Program

By Robert Rachal

In *Associated Builders & Contractors v. Michigan Dept. of Labor*, 2008 WL 4205941 (6th Cir. Sept. 16, 2008), Michigan sought to impose state law requirements on electrician apprenticeship programs: one requirement was a ratio requirement that there be one trained electrician to one apprentice on the job site; the other one was an equivalency requirement that to be approved the program must meet federal apprentice training standards. In 1992 the District Court held these state law requirements were preempted by ERISA, finding that the state regulation impacted an ERISA plan, the funded apprenticeship program, by mandating the structure of the program.

The Sixth Circuit concluded that, post-Travelers, a purpose-based preemption test is used in which, to warrant preemption, the law at issue must regulate an area that Congress intended ERISA to control exclusively.

In 2006, the state argued the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*, 514 U.S. 645 (1995), and its progeny had negated the grounds for preemption. On appeal, the Sixth Circuit agreed. The Sixth Circuit concluded that, post-*Travelers*, a purpose-based preemption test is used in which, to warrant preemption, the law at issue must regulate an area that Congress intended ERISA to control exclusively. Applying this test, the Sixth Circuit concluded that the laws did not seek to control how the ERISA fund was managed or administered; rather, they regulated substantive apprenticeship standards, an area within the state's public safety concern.

* * * *

Associated Builders & Contractors aptly illustrates how *Travelers* and its progeny have reworked preemption analysis. Using a purpose-based approach, the Sixth Circuit could find no policy rationale for using ERISA to create a regulatory vacuum in which a state was precluded from regulating safety and substantive standards in an apprenticeship program for electricians.

Poore v. Simpson Paper Co.: Ninth Circuit Holds that Retirees Lack Standing To Sue for Medical Benefits

by Kevin Pflug

In the May Newsletter, we discussed the Sixth Circuit's decision in *Noe v. PolyOne Corp*, 520 F.3d 548 (6th Cir. 2008), which held that a court may find that retiree health benefits vest under a collective bargaining agreement ("CBA") even if the intent to vest has not been explicitly set out in the agreement. The Ninth Circuit recently took a very different view. In *Poore v. Simpson Paper Co.*, 2008 WL 4291174 (9th Cir. Sept. 22, 2008), the Ninth

Circuit held that retirees lacked standing to sue for health benefits where the applicable CBA incorporated by reference a benefit booklet that required the employer to negotiate with the union before it altered or terminated health benefits. In so holding, the Ninth Circuit reasoned that the company retained the ultimate authority to alter or terminate retiree health benefits.

Factual Background

Simpson Paper Company ("Simpson Paper") closed the Evergreen Mill in 1996 for economic reasons. In 2002, Simpson notified all retirees that it intended to phase out completely post-retirement medical benefits. By July of 2004 Simpson Paper had terminated all retiree health benefits.

Three CBAs were in force during the time when Simpson Paper owned the Evergreen Mill. The CBAs incorporated by reference benefits booklets, which contained reservation-of-rights provisions that expressly reserved to Simpson Paper the right to "alter, amend, delete, cancel or otherwise change the welfare plan benefits at any time, *subject to negotiation with the Union*." (Emphasis added by the court.)

The retirees alleged that Simpson violated ERISA by terminating the medical benefits without first either obtaining the union's agreement, or bargaining to impasse. The retirees also asserted breach of contract claims under the Labor Management Relations Act ("LMRA").

The Ninth Circuit's Analysis

Considering the issue of jurisdiction *sua sponte*, the Ninth Circuit held that the retirees lacked standing because they did not have a vested right to the retiree health benefits. The court observed that to have standing to sue under ERISA, the plaintiffs must be able to show that they are plan "participants," something they could not do since they did not have "a reasonable expectation of returning to covered employment" or "a colorable claim to vested benefits."

As retirees, plaintiffs clearly did not have a reasonable expectation of returning to their jobs. The Ninth Circuit's analysis therefore focused principally on whether the retirees had a colorable claim to vested benefits. It determined that even though the benefits booklet "provide[d] a specific duration in which the benefits at issue apply, which can in some circumstances indicate vesting, when read together with the reservation-of-rights provision, the plan allow[ed] such benefits to be altered, or even terminated, without the retirees' consent, which defeat[ed] vesting."

The Ninth Circuit held that even if Simpson was required to negotiate, "it ultimately retain[ed] the exclusive authority to change retirement health benefits irrespective of the outcome of such negotiations." In so holding, the court reasoned that "a duty to negotiate is not of the same character as a duty to secure consent." The court also found that, in addition to the reservation-of-rights provision, other provisions of the CBAs and benefits booklet demonstrated the "malleability" of the retirees' benefits. For example, the CBAs

provided that "all participants covered by the health care plans will be subject to the same level of contributions as active employees and to the same health care plan provision changes which take effect from time to time." In addition, the benefits booklet provided that Simpson Paper is only required to pay for post-retirement medical benefits to the same extent that it pays for the health benefits of its active employees.

The Ninth Circuit also dismissed the plaintiffs' breach of contract claim under the LMRA, holding that the plaintiffs' contractual rights to retiree health benefits no longer existed because these benefits were not vested.

The Dissent

Judge Graber dissented on the grounds that the majority's decision confused subject matter jurisdiction with the merits of the case. Judge Graber observed that "federal courts have an unflagging duty to hear cases that are properly before them" and that the "majority shirks this responsibility by closing the courthouse door to plaintiffs who raise colorable claims under federal law." In so stating, Judge Graber argued that the retirees had an absolute contractual right to their benefits until Simpson Paper negotiated with the union regarding the termination of the post-retirement medical benefits. In Judge Graber's opinion, whether or not the negotiation requirement was followed was a disputed issue of fact that required the court to reverse and remand for further proceedings.

* * * *

Although many courts have found standing exists when the claim is that a fiduciary breach caused a plan to lose assets, *Poore* illustrates that standing may still be a significant defense in other contexts, such as a claim for nonvested retiree health benefits from a plan.

District Court Finds that Plan Administrator Abused Its Discretion in Reforming Plan To Correct for Multi Billion-Dollar Drafting Error, But Leaves Open the Possibility of Reformation

by Michael Spencer

In *Young v. Verizon's Bell Atl. Cash Balance Plan*, 2008 WL 4066517 (N.D. Ill. Aug. 28, 2008), a District Court found that a plan administrator abused its discretion by relying on the doctrine of mistake, or "scrivener's error," to reform the terms of the plan to correct a drafting error. Plaintiff brought a class action alleging, among other things, that defendants had miscalculated her opening account balance under the pension plan. The plan had been amended in 1995 to include a cash balance formula, which included a formula for calculating the opening balances of participants who worked at Bell Atlantic and accrued benefits under the prior plan. The plan stated that the opening balance for individuals not eligible for a pension benefit at the time of conversion would be:

> "the product of multiplying (A) the Participant's applicable Transition Factor described in Table 1

> of this Section, *times* (B) the lump-sum cashout value of the Accrued Benefit payable at age 65 . . ., multiplied by the applicable transition described in Table 1 of this Section."

Plaintiff argued that the plan language required the transition factor to have been applied twice to calculate her opening account balance. Doing so would have increased her account balance from $240,813 to $640,321; applied to the class as a whole, it would have added several billion dollars of unanticipated liability to the plan.

In reviewing the plaintiff's claim for benefits, the Verizon Claims Review Unit ("Review Unit") multiplied the transition factor once, reasoning that the objective evidence, including the Board resolution authorizing the conversion, similar relevant plan provisions, other plan documents and records, including earlier and later restatements of the plan and the plan's actuarial reports, and summary plan documents sent to employees, all suggested this second mention was an unauthorized drafting error. On appeal, the Verizon Claims Review Committee ("Committee") affirmed this decision for substantially the same reasons. The Committee also placed specific emphasis on material sent to the employees that referred several times to the "transition multiplier" as being applied only once.

The case was certified as a class action on January 16, 2007, and the parties proceeded by a trial on the papers in which the parties submitted briefs and the administrative record. In addressing plaintiff's argument that the Committee improperly disregarded the second reference to multiplication by the transition factor, the district court first held that the language at issue was not intrinsically ambiguous. The court found that the "language clearly states that the transition factor will be multiplied a second time. . ."

After finding the language was not intrinsically ambiguous, the court next addressed defendants' argument that it could reform the plan because it was extrinsically ambiguous. On this point, the court stated that "[w]hen faced with language that appears to be have been mistakenly included in the plan, courts expect plan administrators to treat the language as a mistake or scrivener's error, rather than a mere ambiguity." To support the argument that the Committee properly considered extrinsic evidence, the defendants relied on the Seventh Circuit's decision in *Mathews v. Sears Pension Plan*, 144 F.3d 461 (7th Cir. 1998). In *Mathews*, the Seventh Circuit used extrinsic evidence to find that plan language that appeared clear on its face was in fact ambiguous. However, the District Court distinguished the *Mathews* decision because the plan language at issue in that case involved a "term of art." The court found that the dispute in this case involved an alleged drafting error, *i.e.* the erroneous second reference to multiplication by the transition factor. The court further noted that neither party in *Mathews* argued that the language was not intended to be in the plan; instead, their dispute focused on the meaning of the language contained in the plan. Given this distinction, the court held that the Committee should have sought reformation of the plan once the Committee concluded that the second reference to the multiplier was a drafting error. In so holding, the court concluded that the Seventh Circuit treats the doctrine

of mistake and the doctrine of ambiguity as distinct, with the doctrine of mistake requiring a party to seek relief in court.

In its conclusion, the district court made clear the defendants could move the court to reform the plan. The procedural posture in which this case was decided also seems to leave the door open for the defendants to introduce the objective extrinsic evidence relied upon by the Review Unit and Committee in construing the plan language at issue.

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The district court was obviously uncomfortable granting a plan administrator unilateral power to reform a plan to correct for drafting errors. The court, however, failed to address the fact that, under ERISA and cases such as *Curtiss-Wright v. Schoonejongen*, 514 U.S. 73, 82-84 (1995), plan administrators are, by law, required to ignore amendments that are not properly authorized under the plan documents. Thus, a plan drafter – whether through intent or neglect – should have no authority to add unauthorized plan terms. In any event, there is some hope that the court will use its equitable powers here to reform the plan to strike the unintended and potentially catastrophic windfall caused by this drafting error.

Rulings, Filings and Settlements of Interest

- In *Vaughn v. Bay Environmental Management, Inc.*, 2008 WL 4276603 (9th Cir. Sept. 19, 2008), the Ninth Circuit joined the First, Third, Fourth, Sixth, Seventh, and Eleventh Circuits in concluding that a former employee who has received a full distribution of his or her account balance under a defined contribution pension plan has standing as a plan participant to file suit under ERISA to recover losses occasioned by a breach of fiduciary duty that allegedly reduced the amount of his or her benefits. In so holding, the Ninth Circuit distinguished its earlier decision in *Kuntz v. Reese*, 760 F.2d 926, 929 (9th Cir.1985), *vacated by Kuntz v. Reese*, 785 F.2d 1410, 1411 (9th Cir.1985). In *Kuntz*, the Ninth Circuit concluded that former employees of a defined benefit plan did not have standing to sue for breach of fiduciary duty related to alleged misrepresentations about the benefits that would be paid under that plan. The *Vaughn* Court observed that the *Kuntz* plaintiffs conceded that they had received all of the benefits due to them under the plan and that they alleged only that they would not have participated in the plan but for defendant's misrepresentations about the amount of benefits they would receive. In *Vaughn*, by contrast, the Ninth Circuit observed that plaintiff alleged that he had not received all of the benefits due to him under the plan. Although he received a lump-sum distribution of the value of his individual accounts, plaintiff contended that he did not receive a "full" distribution because his accounts contained less than they would have if the fiduciaries had not breached their duty of prudent investment. In addition, the Ninth Circuit found it relevant that plaintiff sought an "equitable remedy," the establishment of a trust for benefits owing to the plan participants.

- In *Ruppert v. Principal Life Ins. Co.*, 2008 WL 397082 (S.D. Iowa Aug. 27, 2008), a trustee of a 401(k) plan filed a class action on behalf of over 25,000 401(k) plan participants challenging how a full-service retirement plan service provider, Principal, disclosed and handled revenue-sharing payments. The District Court concluded class certification was not appropriate because commonality and typicality were not met. The plans at issue were marketed to independent financial advisors who advised plan sponsors. The district court found that although templates were used to market the plans, the mutual funds offered, and the marketing and educational materials used, varied from plan to plan based on the involvement of the independent financial advisor and the size, needs and sophistication of the end user client. The District Court also found that the scope of any fiduciary status by Principal would have to be determined on a plan-by-plan basis.
- In *Cole et al. v. International Union, UAW et al.*, 533 F.3d 932 (8th Cir. 2008), plaintiffs argued that a past practice of including recent retirees in retirement window plans constituted an implied contract term of a collective bargaining agreement, which they claimed was required to be applied to the window plan offered at their St. Louis plant. The court held the window plan was part of an ERISA pension plan and that offering was part of a broader program explicitly made part of the pension plan. Because an ERISA plan can only be amended in writing, the court held plaintiffs' claim seeking to enforce an implied plan term failed.

Employee Benefits Litigation

Proskauer Rose's Employee Benefits Litigation Group is a significant component of the Firm's renowned Labor and Employment Law Department, which has nearly 175 attorneys.

The Employee Benefits Litigation Group is led by Howard Shapiro and Myron Rumeld. The Group defends complex and class action employee benefits litigation.

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