PROSKAUER ROSE LLP

The ERISA Litigation Newsletter

A report to clients and friends of the firm

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In this month's issue:

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Editor's Overview

Who knew "Labor Day" would arrive on June 19 this year? The U.S. Supreme Court issued four significant labor and employments decisions on that day, two addressing benefits issues. First, in *MetLife v. Glenn*, the Court held an insurance company that both decides and pays benefits is conflicted, and that courts should consider such a conflict as one of any number of factors in reviewing the insurer's decision to deny benefits. Second, in *Kentucky Retirement Systems v. EEOC*, the Court concluded that the more generous benefits provided to individuals who become seriously disabled before reaching retirement eligibility did not violate the Age Discrimination in Employment Act because this treatment turned on pension eligibility and was not "actually motivated" by age.

For a review of the Court's other two labor and employment decisions, which do not involve ERISA issues, see ***Meacham v. Knolls Atomic Power Laboratory***, 128 S. Ct. 2395 (2008) (holding that under the ADEA an employer defending a disparate impact claim on the basis of a reasonable factor other than age bears both the burden of production and the burden of persuasion in showing that the factors the employer relied upon in selecting those employees to be laid off were reasonable); and ***Chamber of Commerce of the United States of America v. Brown***, 128 S. Ct. 2408 (2008) (holding that the National Labor Relations Act preempted a California law that barred employers receiving state funds from using the funding to engage in any activity that opposed union organizing activity, because the statute "impermissibly 'predicat[es] benefits on refraining from conduct protected by federal labor law'").

Following articles on *Glen* and *Kentucky Retirement Systems*, we review a decision from a district court in the Fifth Circuit, which once again proves that no good deed goes unpunished. In *Stoffels v. SBC Communications*, the court held that fringe benefits (reimbursement of phone use) offered to certain retirees constituted a pension plan under ERISA.

We conclude with an article on *George v. Duke Energy Retirement Plan*, in which plaintiffs challenged, among other things, wear-aways caused by a conversion to a cash balance plan. In *Duke Energy,* the district court granted some relief to defendants, but denied a motion to dismiss disparate impact claims under the ADEA and fiduciary misrepresentation claims under ERISA related to the wear-aways.

U.S. Supreme Court Rules That Insurers Who Review and Pay Benefit Claims Are Conflicted

By Myron D. Rumeld, Russell L. Hirschhorn & Avi Bernstein

On June 19, 2008, in *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), the U.S. Supreme Court held that an insurance company that both reviews a participant's claim for benefits under an ERISA plan and is responsible for paying that benefit is operating under a conflict of interest. In so holding, the Court stated that such a conflict of interest should be a factor in determining whether to uphold the insurer's decision to deny a claim for benefits, the significance of which is to be evaluated on a case-by-case basis.

The *Glenn* decision was the Court's first attempt to address issues left open nearly twenty years ago in *Firestone Tire & Rubber v. Bruch*, 489 U.S. 101 (1989). In *Bruch*, the Court held that a plan fiduciary's decision to deny a participant benefits should be reviewed *de novo* unless the benefit plan gives the fiduciary discretionary authority to determine the eligibility for benefits or to construe the terms of the plan, in which case such a decision should be reviewed under an arbitrary and capricious standard. Even if a fiduciary is afforded discretionary authority, the Court stated that if the fiduciary is operating under a conflict of interest, that conflict must be weighed as a factor in determining whether there is an abuse of discretion.

Following *Bruch*, the lower courts have struggled when considering two questions: (i) what facts and circumstances give rise to a finding of a conflict of interest; and (ii) what effect should the finding of a conflict have on the court's scrutiny of an administrator's decision to deny benefits. The *Glenn* decision answers the first question with respect to insurance carriers, and possibly also with respect to employers who are plan administrators. It also sheds light on the second issue, but in a manner that leaves the district courts with no "bright line" standard to apply.

Background and Lower Courts' Decisions

MetLife served as the insurer and claims administrator for Sears, Roebuck & Company's long-term disability plan. Wanda Glenn, a Sears employee, received two years of long-term disability benefits based on a heart condition. When Ms. Glenn applied for continued LTD benefits, MetLife concluded that medical treatment improved her condition to the point that she was not totally and permanently disabled, and she was not eligible for additional benefits. After exhausting her administrative appeals, Ms. Glenn commenced this litigation. The district court, in reviewing MetLife's decision, applied the "arbitrary and capricious standard" set forth in *Bruch*, and upheld MetLife's denial of Ms. Glenn's claim.

On appeal, the U.S. Court of Appeals for the Sixth Circuit set aside the district court's decision, pointing to language in *Bruch* stating that the arbitrary and capricious standard does not apply in the event a plan administrator has a conflict of interest. The Sixth Circuit concluded that the district court did not give MetLife's conflict of interest appropriate consideration.

The Supreme Court's Decision

"insurance companies that both decide and pay claims have an inherent conflict of interest"

The Court's five-judge majority opinion, authored by Justice Breyer, concluded that insurance companies that both decide and pay claims have an inherent conflict of interest. In so holding, the Court rejected MetLife's argument that insurance companies serving as plan administrators are inherently different than employers administering their own plans (e.g., because insurers pass along the cost of claims to employers, the insurer does not bear the ultimate cost of the claim). The dissenting opinions authored by Justices Scalia and Kennedy, discussed below, agreed with this conclusion.

"the conflict should be just one factor among many in determining whether a plan fiduciary abused its discretion in making its determination"

On the issue of how the conflict should affect the judicial standard of review, the Court reiterated the statement in *Bruch* that a conflict should "be weighed as a factor in determining whether there is an abuse of discretion" and determined that the conflict should be just one factor among many in determining whether a plan fiduciary abused its discretion in making its determination. The Court stated the standard of review need not automatically change from deferential to *de novo* as a result of this conflict, and that it did not seek to overturn *Bruch's* holding by adopting a rule that would in practice create a *de novo* standard for the vast majority of ERISA claims denials. It also declined to create any special rules shifting the burden of proof in the event of a conflict.

In an opinion that concurred in the decision, Chief Justice Roberts stated that he would consider the conflict of interest only where there is evidence that the conflict motivated or affected the plan administrator's decision. He expressed concern that considering a conflict of interest as a factor absent such evidence would open the door to a near universal *de novo* review of claims decisions, in spite of the majority's stated intent not to do so.

In a dissenting opinion, Justice Scalia (joined by Justice Thomas) advocated adopting the position of the *Restatement of Trusts*, which provides that a conflict of interest should not be taken into account unless the conduct actually and improperly motivates the decision. In addition, Justice Scalia stated that the majority's finding that employers who pay and decide claims for benefits was *dicta* since that issue had not been briefed or argued. Finally, Justice Scalia characterized the majority's totality of the circumstances test as "nothing but *de novo* review in sheep's clothing."

Justice Kennedy agreed with the framework set out by the majority but, in his view, the Court should have remanded the case to the Sixth Circuit for review consistent with that framework.

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The Court's decision that an entity that decides and pays benefits is conflicted and must be considered as a factor in reviewing a plan fiduciary's decision to deny benefits effectively changes the law in those Circuits that had held a conflict of interest should not be considered unless there was evidence that the conflict infected the decision-making process. This may make it more difficult for plans to defend claims for benefits, and possibly open the door to additional issues for discovery. As the Court's majority opinion observed, however, plans should be able to minimize the weight attributed to any such conflicts by establishing quality control procedures and ethical walls to keep the plan fiduciaries who decide claims for benefits separate from those responsible for paying for the benefits.

U.S. Supreme Court Rules Disability Benefit Formula That Credits Younger Workers with Additional Years of Service Does Not Violate the ADEA Because Any Disparate Treatment Was Not "Actually Motivated" by Age

By Myron D. Rumeld, Russell L. Hirschhorn & Kevin Pflug

On June 19, 2008, in *Kentucky Retirement Systems v. EEOC*, 128 S. Ct. 2361 (2008), the U.S. Supreme Court concluded that the more generous benefits afforded to individuals who become seriously disabled before reaching retirement eligibility did not violate the Age Discrimination in Employment Act ("ADEA") because this treatment was not "actually motivated" by age. Rather, any disparity was based solely on pension eligibility, which is a concept "analytically distinct" from age, even though pension eligibility may in part be based on age.

Background and Lower Courts' Decisions

Charles Lickteig, an employee in the Jefferson County Kentucky Sheriff's Department, was a participant in a plan put in place by the State of Kentucky for state and county workers who hold hazardous jobs, such as law enforcement officers, firefighters and paramedics. The plan provides that an employee is eligible for a normal retirement benefit after either 20 years of service, or 5 years of service in the case of an employee who attains age 55. The Plan pays benefits based on years of service times 2.5% of final preretirement pay. The Plan also allows an employee who has 5 years of service and became disabled to retire immediately, regardless of years of service, if the employee became disabled in the line of duty. A participant who became disabled prior to becoming eligible for a normal retirement benefit receives imputed years of service equal to the number of years that the disabled employee would have had to continue to work in order to become eligible for normal retirement, but limited to no more than the number of years already worked.

Although Lickteig was eligible to retire when he reached age 55, he continued to work until he became disabled. At that time, he had reached age 61 and accrued 18 years of service. Because Lickteig became disabled after satisfying the Plan's eligibility requirements for a normal retirement benefit, the Plan did not impute any additional years of service in calculating his retirement benefit. Had Lickteig been under age 55 at the time he became disabled, he would have received up to two years of imputed service (to bring him to 20 years of service). Lickteig filed a claim with the EEOC claiming age discrimination. The EEOC agreed and subsequently filed suit on his behalf, alleging that the plan failed to impute years of service to Lickteig's benefit calculation solely because he became disabled after reaching age 55.

The district court granted summary judgment in favor of defendants and held that the EEOC could not establish age discrimination. A panel of the Sixth Circuit affirmed, but upon rehearing *en banc*, the full court determined that the Plan violated the ADEA.

The Supreme Court's Decision

"the Court determined that the plan did not violate the ADEA by imputing service only to individuals who become seriously disabled before reaching retirement eligibility because the plan's decision was not 'actually motivated' by age."

In a 5-4 decision, the Court determined that the plan did not violate the ADEA by imputing service only to individuals who become seriously disabled before reaching retirement eligibility because the plan's decision was not "actually motivated" by age. Relying heavily on its earlier decision in *Hazen Paper Co. v. Biggins*, 507 U.S. 604 (1993), the Court held that where "a plaintiff claims age-related disparate treatment (i.e., intentional discrimination because of . . . age) the plaintiff must prove that age actually motivated the employer's decision." In so holding, the Court stated that although pension eligibility is typically tied to age, the two concepts are "analytically distinct," and therefore disparate treatment based on pension eligibility is not age discrimination *per se*. The Court noted, however, that discrimination on the basis of pension eligibility could violate the ADEA when pension eligibility serves as a proxy for age.

The Court rejected the EEOC's argument that Kentucky's disability retirement provision uses pension eligibility as a proxy for age and therefore violates the ADEA. The Court provided six reasons why any differences in treatment under the Plan's disability retirement provisions were not "actually motivated" by age:

First, reiterating the holding of *Hazen Paper*, the Court noted that "as a matter of pure logic, age and pension status remain analytically distinct concepts."

Second, the Court observed that the plan provisions in question were part of "a set of complex systemwide rules" and that "[t]hese systemic rules involve, not wages, but pensions — a benefit that the ADEA treats somewhat more flexibly and leniently in respect to age."

Third, the Court held that there is a clear rationale for the disability retirement formula, which is not related to age: the purpose of the plan's disability benefit is to treat a disabled employee as if the employee became disabled after, rather than before, the employee became eligible for a normal retirement benefit.

Fourth, the Court observed that, in some instances, the disability benefit rules treat older workers more favorably than younger workers.

Fifth, the Court found that the justification for the disability retirement benefit was not grounded in any of the stereotypical assumptions that the ADEA sought to eradicate.

Sixth, the Court stated that "[t]he difficulty of finding a remedy that can both correct the disparity and achieve the Plan's legitimate objective — providing each disabled worker with a sufficient retirement benefit, namely, the normal retirement benefit that the worker would receive if he were pension eligible at the time of disability — further suggests that this objective and not age actually motivated the Plan."

In so ruling, the Court rejected two arguments proffered by the EEOC. First, the Court determined that the Older Workers Benefit Protection Act, which broadened the field of employer actions and narrowed the statutorily available justifications for age-related differences in pension benefits, was inapplicable because there was no dispute that the ADEA applied to the Plan. Second, the Court rejected the EEOC's argument that the Court should defer to an EEOC interpretation contained in a regulation and compliance manual that prohibited imputing service to normal retirement age, concluding that the regulation did nothing more than restate the terms of the statute while the compliance manual was inconsistent with *Hazen Paper*.

In a dissenting opinion Justice Kennedy (joined by Justices Scalia, Ginsburg, and Alito) argued that the Plan's disability retirement rules violate the ADEA because older workers receive a benefit based solely on their years of actual service, but younger workers receive a "bonus" benefit insofar as the formula credits them with the number of years they would have worked if they had not become disabled. The dissent argued that, under the ADEA, a discriminatory employment action or plan provision is not rendered lawful merely because the employer's motives in enacting the policy or plan provision were benign. The dissent also observed that there was a stereotypical assumption underlying the imputing of service; i.e., that a younger worker would have kept working longer than an older one but for the disability. The dissent noted that, although this is an actuarially sound assumption, it is not one they believe is permitted by the ADEA.

* * *

The Court's opinion saves the imputing of service tied to pension eligibility from being deemed *per se* unlawful. Because of the numerous factors and qualifications referred to in the majority opinion, it is unclear, however, how broadly its reasoning and rule may apply beyond this context.

No Good Deed Goes Unpunished: District Court in Fifth Circuit Applies Expansive View of Retirement Income To Rule Cash Telephone Concession Is a Pension Plan

By Robert Rachal

In *Stoffels v. SBC Communications*, 2008 WL 2151998 (W.D. Tex. May 21, 2008), a district court held that telephone concessions offered to out-of-region retirees constituted a pension plan under ERISA. Telephone concessions were fringe benefits that long predated the breakup of AT&T in 1984. The regional phone companies continued to offer these concessions post-breakup. For employees and retirees who lived within defendant SBC's service area, the concession was discounted services. For those who lived outside of the service area, the concession was cash reimbursement for the costs of purchasing local services from other carriers.

There appeared to be two key issues in determining whether the concession offered out-of-region retirees constituted "retirement income" that would make it an ERISA pension plan. The first was the purpose of the concession. Defendant argued that the underlying intent of the plan was to provide discounted services to in-region employees and retirees, who then became ambassadors for defendant's products. In this view, cash reimbursements were offered to out-of-region employees and retirees not as a separate "retirement plan," but rather so that they would be treated equitably with in-service employees and retirees. The court rejected this connection, reasoning that out-of-region retirees were provided something substantially different – cash payments – than in-region retirees, and that this cash payment constituted "income" received upon meeting retirement eligibility requirements.

The second key issue was whether the concession for out-of-region retirees should be treated as a distinct plan from concessions offered employees and those who lived in-region. For example, if the plan was not distinct from one providing concession benefits to employees, then it would not be retirement income, because it would not meet the requirement of systematically deferring income to retirement. The court focused on the fact that a third-party administrator was charged to administer benefits offered out-of-region retirees separate from concessions offered active employees.

Notably, the court also considered it irrelevant that the company did not intend for the out-of-region concession to be a pension plan, stating the key issue is whether the plan meets the statutory definition of an ERISA pension plan. In light of the foregoing, the district court ruled that the telephone concession for out-of-region employees constituted an ERISA pension plan.

* * *

Stoffels applied an earlier ruling by the Fifth Circuit in *Muscemi v. Schwegmann Giant Super Markets, Inc.*, 332 F.3d 339 (5th Cir. 2003), which had ruled that grocery vouchers provided to retirees constituted a pension plan. In *Muscemi*, the Fifth Circuit applied the Internal Revenue Code's broad definition of "income" and the fact that the vouchers were received after retirement to conclude they constituted "retirement income" creating an unintended pension plan under ERISA.

Not all courts apply the broad view of "pension plan" espoused by *Muscemi* and now *Stoffels*. For example, in *Rathburn v. Qwest Communications Int'l, Inc.*, 458 F. Supp. 1238 (D. Colo. 2006), a district court in Colorado ruled that Qwest's very similar telephone concession was not a pension plan (among other things, the *Rathburn* court concluded the out-of-region benefits offered employees and retirees were not separate plans, and that the primary purpose of the plan was to make commercial ambassadors out of Qwest employees and retirees). However, *Muscemi* and now *Stoffels* illustrate the very real risk that fringe benefits and perks can be turned into unintended pension plans, absent careful structuring of these fringe benefits.

District Court Refuses To Dismiss ADEA Disparate Impact and ERISA Fiduciary Misrepresentation Claims Related to Wear-Aways Caused by a Cash Balance Conversion

By Stuart Robinson

In *George v. Duke Energy Retirement Cash Balance Plan*, 2008 WL 2307485 (D.S.C. 2008), the district court dismissed ERISA and ADEA age discrimination claims arising out of Duke Energy's conversion of its defined benefit plan to a cash balance plan, but allowed plaintiffs' wear-away claim under ADEA to proceed. The court also concluded that plaintiffs' fiduciary misrepresentation claim may proceed.

When Duke Energy converted its pension plan to a cash balance plan, transition provisions provided that participants would receive the greater of the accumulated pension benefits to which they were already eligible under the old plan or the amount hypothetically calculated for the new cash balance account. A combination of these transition provisions and a higher interest rate under the cash balance plan than that used under the old plan resulted in a wear-away period for some participants. As a result, many participants earned no additional retirement benefits for a number of years beyond those to which they were already eligible under the old plan until the accrued benefit under the cash balance plan exceeded that under the old plan. Many participants retired before their wear-away period ended.

The court rejected plaintiffs' claim that the cash balance formula violated ERISA and ADEA, reasoning that "the pay credits and interest credits are applied to each employee's hypothetical cash balance account in an age neutral fashion." Plaintiffs also claimed, however, that older employees disproportionately suffered from the wear-away caused by this conversion. The court determined that plaintiffs stated an ADEA disparate impact claim because plaintiffs identified a specific employment practice being challenged, the wear-away effect on employees over the age of 40.

On the fiduciary misrepresentation claim, defendants argued that plaintiffs had failed to plead any detrimental reliance on the alleged failure to disclose the effects of the cash balance conversion. Without deciding whether detrimental reliance or a lesser standard of prejudice controlled, the court concluded that plaintiffs' inability to take protective actions in light of this nondisclosure was sufficient to allege either detrimental reliance or prejudice.

Rulings, Filings and Settlements of Interest

- The U.S. Supreme Court agreed to hear a case that focuses on the question of whether employees should have been given service credits toward retirement for maternity leave taken before the Pregnancy Discrimination Act went into effect. Since the law's enactment, maternity leave has been counted as a credit toward retirement benefits. The law essentially requires employers to give women who take pregnancy leave the same benefits as employees who take other types of temporary disability leave. In August 2007, the Ninth Circuit ruled *en banc* that AT&T violated Title VII by refusing to give credit to the pensions and retirements of women who took time off for maternity leave prior to the Act's effective date. The case is *AT&T Corp. v. Noreen Hulteen*, 2008 WL 2484730 (June 23, 2008).

- On June 9, the U.S. Supreme Court asked the Solicitor General for its views on whether ERISA statutory violations can be remedied under section 502(a)(1)(B), which authorizes relief only for "violations of the plan." The case is *AK Steel Corp. Retirement Accumulation Pension Plan v. West*, 2008 WL 2329938 (June 9, 2008). The Sixth Circuit determined that ERISA and the Code required the cash balance plan to perform a whipsaw calculation in determining plaintiffs' lump-sum benefits. In its petition for *certiorari*, the plan argued that the Sixth Circuit's decision conflicts with decisions from the Fifth and Eighth Circuits that have held that section 502(a)(1)(B) applies only to claims based on the plan language and does not apply to statutory claims.

- Also on June 9, the U.S. Supreme Court denied *certiorari* in *AT&T Pension Benefit Plan v. Call*, No. 06-1398, a decision from the Seventh Circuit concluding that a pension plan amendment affecting the calculation of lump-sum payments improperly reduced early retirees' accrued benefits.

- The Supreme Court denied *certiorari* in *Amschwand v. Spherion Corp.*, Docket No. 07-84, see April 2008 Newsletter, a case in which the Supreme Court could have reevaluated the scope of appropriate equitable relief under section 502(a)(3).

- In the May 2008 Newsletter, we discussed *Noe v. Polyone Corp.*, 520 F.3d 548 (6th Cir. 2008), where the Sixth Circuit held that retiree medical benefits for collectively bargained employees vest if the collective bargaining agreement ("CBA") does not contain explicit language stating that such benefits are not vested. In contrast to the *Polyone* decision, the Fifth Circuit recently rejected plaintiffs' argument that retiree medical benefits vest unless there is language in the CBA to the contrary. *See Nichols v. Alcatel USA, Inc,* 2008 WL 2469407 (5th Cir. June 20, 2008). In so holding, the court reasoned that the inference adopted by the Sixth Circuit, known as the *Yard-Ma*n inference (from the case *International Union v. Yard-Man, Inc.*, 716 F.2d 1476 (6th Cir. 1983)), has never been accepted by the Fifth Circuit.

- In *Glazer v. Reliance Standard Life Ins. Co.*, 524 F.3d 1241 (11th Cir. 2008), the Eleventh Circuit held that a plan administrator was not required to furnish a claimant the report of a physician who conducted "an independent peer evaluation" of the claimant's medical records during the review of a claimant's application for long-term disability benefits. Rather, the report must only be produced to the claimant after an adverse decision has been made. The court agreed with the Tenth Circuit, *see Metzger v. UNUM Life Insurance Company of America*, 476 F.3d 1161 (10th Cir. 2007), the only other circuit to have decided the issue, which explained that requiring these documents to be produced earlier would create "an unnecessary cycle of submission, review, re-submission, and re-review." The purpose of the production of these documents is to enable a claimant to evaluate whether to appeal an adverse determination. And, documents produced prior to before a decision is made would not assist a claimant in deciding whether to pursue an appeal because the claimant would not yet know if there has been an adverse determination.

- In *Taylor v. United Technologies Corp.*, 2008 WL 2333120 (D. Conn. June 3, 2008), the district court certified a class of plaintiffs who alleged that defendants breached their fiduciary duties by: (i) misrepresenting that the performance of the company stock fund would reflect the total investment return on company stock, when in fact the company stock fund also holds cash to fund participant distributions; and (ii) failing to ensure that various management and administrative fees and expenses were not unreasonable or excessive. The court also determined that plaintiffs had Article III standing insofar as they alleged that the loss to the plan due to excessive fees or impaired returns represented a concrete and actual injury. Finally, the court concluded that former employees who already had taken a full distribution of their benefits under the plan had statutory standing because they have a colorable claim for vested benefits.

- In *In re Diebold ERISA Litigation*, 2008 WL 2225712 (N.D. Ohio May 28, 2002), a district court in the Sixth Circuit denied a motion to dismiss a "stock drop" claim based on the contention Diebold stock was "artificially inflated." In *In re Guidant Corp. ERISA Litigation,* No. 1:05-cv-1009-LJM-TAB (S.D. Ind. June 19, 2008), another district court, this time in the Seventh Circuit, refused to dismiss fiduciary breach claims that fiduciaries should have disclosed problems with the company's products earlier than the public disclosures. Although as reported in the June 2008 Newsletter, several recent decisions by the Third, Fifth and Seventh Circuits have raised substantial defenses to these types of claims, *Diebold* and *Guidant* suggest that not all district courts will agree these claims should be dismissed at the pleading stage.

- The Southern District of Illinois, in *Beesley v. International Paper Co.*, 2008 U.S. Dist. LEXIS 43258 (S.D. Ill. June 3, 2008), concluded that communications about changing the 401(k) plan committee were not subject to the fiduciary exception to the attorney-client privilege. In so holding, the court reasoned that changing the identity of the body that was charged with supervision and oversight of the plan at issue was not a plan management function; rather it constituted a plan amendment. An article in the June 2008 Newsletter addressed these issues in more detail.

- In *Feigenbaum v. Summit Health Administrators, Inc.*, 2008 WL 2386168 (D.N.J. June 9, 2008), the court denied defendant-insurance broker's motion for summary judgment, finding that there was a genuine issue of fact as to whether it was an ERISA fiduciary. In this case, the sponsor of a self-funded health plan claimed that the insurance broker breached its fiduciary duties by failing to procure full, continuous stop-loss insurance coverage. The court reasoned that if the plan sponsor could establish that the broker played a central role in determining the level of benefits the plans will provide or it has *de facto* delegated its administration to the broker, the broker may in fact be an ERISA fiduciary.

- In *Kaufman v. S & A Restaurant Corp.*, 2008 WL 2242621 (N.D. Tex. May 30, 2008), the court addressed whether a bonus plan constituted a pension plan under ERISA. After the CEO was terminated, the bonus plan shares were revalued from $27.60 a share to zero. The former CEO sued for benefits under ERISA. Although the plan permitted participants, once every two years, to redeem shares while employed, it limited this redemption to 40% of vested shares. The court concluded that since the bonus plan systematically deferred the remainder of the shares until termination of employment, there was a genuine issue of material fact whether it was an ERISA pension plan. The Western District of Texas considered related issues in *Stoffels v. SBC Communications*, 2008 WL 2151998 (W.D. Tex. May 21, 2008). *See supra*.

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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