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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Law & the Workplace℠

Editor's Overview

In our report covering cases for the end of 2008, we revisit several issues that have become common in ERISA litigation. Our first article updates an earlier one on how courts are reviewing benefit decisions of plan administrators post *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).

Next we address when plaintiffs have established a cognizable "injury" giving them standing to sue. In the noted case, the district court concluded plaintiffs failed to show they had any injury that could be redressed by a court concerning a claim that a defined benefit plan paid allegedly excessive investment fees.

We also address the Sixth Circuit's continued expansion of its retiree health jurisprudence. In its latest case finding such benefits vested, the Sixth Circuit admitted that a "reasonable argument" can be made that it has adopted a presumption of vesting regarding retiree health benefits.

We conclude with an article and a casenote on employer "stock drop" claims. Reflecting that these cases are not monothlitic in the standards applied or the facts at issue, in the *Bausch & Lomb* case (defended by Proskauer Rose) the court dismissed the claims with prejudice; in the *Ford Motor* case the court allowed the claims to proceed.

MetLife v. Glenn Update

By Brian Neulander

As discussed in the **October 2008 Newsletter**, the Circuit Courts have begun applying the Supreme Court's ruling in *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008) to determine: (i) the facts necessary to create a conflict of interest; and (ii) the level of scrutiny applicable to a conflicted administrator's decision to deny benefits. In the past month, the Second and Fourth Circuit Courts of Appeal have concluded that *Glenn* modified their jurisprudence, while the Third Circuit Court of Appeal issued an unpublished decision that inexplicably made no mention of *Glenn*.

Second Circuit

In *McCauley v. First Unum Life Ins. Co.*, 2008 WL 5377680 (2d Cir. Dec. 24, 2008), the Second Circuit abandoned its prior standard set forth in *Sullivan v. LTV Aerospace & Defense Co.*, 82 F.3d (2d Cir. 1996), which applied a *de novo* standard of review when a plaintiff showed: (i) that a conflict of interest existed, and (ii) that the conflict had affected the reasonableness of the administrator's decision to deny benefits. Based on *Glenn*, the court concluded that a conflict of interest "does not make *de novo* review appropriate" even when it is shown to have affected the decision; however, the conflict still must be weighed as a factor to determine whether the administrator abused its discretion. The court applied the new standard and granted plaintiff's claim for benefits, concluding that First Unum's financial interest, its prior history of biased claims administration, and its ignoring of a medical report that supported the claim of disability was an abuse of discretion as a matter of law.

Although the court did not say so explicitly, its decision suggests that a conflict of interest may be given more weight when, as here, the court concludes that the conflict affected the decision to deny benefits.

Third Circuit

In *Hession v. Prudential Ins. Co. of America*, 2008 WL 5207089 (3d Cir. Dec. 15, 2008) (unpublished), the Third Circuit continued to apply its sliding scale approach to reviewing the benefit decisions of a conflicted plan administrator. The court observed that the arbitrary and capricious standard of review shifts in each case so that "the level of deference is set in accordance with the level of conflict." Accordingly, deference is "stripped away" when the level of conflict is particularly high. Applying these principles, the court held that the district court failed to apply a sufficiently high standard of review because it failed to take into account both the structural and procedural conflicts at play – principally "self-serving selectivity in the use and interpretation of physicians' reports" – and concluded that defendant's denial of disability benefits was arbitrary and capricious.

The future significance of *Hession* is unknown, since it is an unpublished decision and the court did not explain whether *Glenn* may impact the Third Circuit's sliding scale jurisprudence.

Fourth Circuit

The Fourth Circuit altered its approach to cases involving conflicted or "dual role" entities in *Champion v. Black & Decker (U.S.) Inc.*, 2008 WL 5377692 (4th Cir. Dec. 19, 2008). Pre-*Glenn*, the Fourth Circuit did not conclude all dual role fiduciaries were conflicted, and it applied a "modified" abuse of discretion standard when it did find a conflict. The court ruled that, in light of *Glenn*, "a conflict of interest is readily determinable by the dual role of an administrator or other fiduciary, and that courts are to simply apply the abuse-of-discretion standard of review." Thus, any time the same entity is responsible for paying benefit claims and making benefit eligibility determinations, a conflict of interest arises. In this matter, the conflict of the defendant employer, who self-funded the disability benefits, was weighed as one factor to determine whether the decision to deny benefits was an abuse of discretion. The court observed that the employer had earlier overturned a third party's denial of the initial disability benefits, and that the majority of the medical evidence supported the employer's determination that the disability was a mental health disability (for which initial benefits ended after thirty months under the terms of the plan).

Other Post-*Glenn* Cases of Note

The district courts also have begun analyzing whether *Glenn* modifies the scope of discovery in benefit cases. For example, in *Gessling v. Group Long Term Disability Plan for Employees of Sprint/United Management Co.*, 2008 WL 5070434 (S.D. Ind. Nov. 26, 2008), the district court collected cases discussing this issue, and concluded that the Seventh Circuit's precedent limiting discovery to the administrative record in benefit cases appeared to be superseded by *Glenn*. Accordingly, the court determined that *Glenn* permits focused, limited discovery outside the administrative record on conflict issues, including on the defendant's "active steps to reduce bias and to promote accuracy" during the administrative process.

Court Rules Participants Do Not Have Constitutional Standing To Challenge Alleged Excessive Investment Fees Paid by Overfunded Defined Benefit Plan

By Robert Rachal

In *David v. Alphin*, 2008 WL 5244483 (W.D.N.C. July 23, 2008), *aff'd*, 2008 WL 5244504 (W.D.N.C. Dec. 15, 2008), plaintiffs alleged that the fiduciary committee and its individual members of a 401(k) plan and a defined benefit pension plan breached their fiduciary duties by allowing the plans to pay excessive fees in connection with plan investments made in funds managed by affiliates of the employer, Bank of America.

On claims brought on behalf of both the 401(k) plan and the defined benefit plan, defendants sought dismissal of all claims brought against the committee. The court dismissed the claims brought against the plan committee but not the committee members, concluding that the committee was not an enumerated "person" subject to suit under ERISA.

Of greater significance, the court also dismissed the claims brought on behalf of the defined benefit plan, concluding that plaintiffs failed to show any "injury in fact" that would be redressable by any relief ordered by the court – the minimum requirements to have standing under Article III of the U.S. Constitution. In concluding that plaintiffs suffered no redressable injury, the court observed that even if the defined benefit plan recovered any excessive fees, there was nothing that would require the employer to use that recovery to provide enhanced benefits. Applying *Glanton v. AdvancePCS Inc.*, 465 F.3d 1123 (9th Cir. 2006), the court concluded that plaintiffs failed to show how they would individually benefit from the suit; the court also noted that the defined benefit plan was overfunded, and plaintiffs could not plausibly allege that their future benefits were in jeopardy.

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Although ERISA provides broad statutory standing to bring claims "on behalf of" ERISA plans, *David v. Alphin* illustrates a developing trend in which, before allowing such claims to proceed, courts closely scrutinize the claims to ensure that plaintiffs have a personal stake in the case.

Following Precedent, the Sixth Circuit Rules that a CBA Covering a Three-Year Period Creates a Permanent Obligation To Provide Retiree Health Benefits

By Kevin Pflug

Following its decision in *Noe v. Polyone Corp.*, 520 F.3d 548 (6th Cir. 2008) (*see* **May 2008 Newsletter**), the Sixth Circuit in *Cole v. ArvinMeritor, Inc.*, 2008 WL 5211802 (6th Cir. Dec. 16, 2008), held that retirees had vested in their retiree health benefits because the applicable collective bargaining agreements ("CBAs") did not contain language that expressly limited the duration of the company's commitment to provide health benefits to its retirees.

From the late 1970s through 2003, the company closed twelve plants. Before the plants were closed, the company and the union representing the employees, the United Automobile, Aerospace, and Agricultural Implement Workers of America (the "UAW"), had entered into a succession of three-year CBAs that provided health and welfare benefits to active and retired employees.

Beginning in 2001, the company implemented a number of changes to its retiree health benefit plans: (i) in 2001, the company froze Medicare Part B premium reimbursements for retirees age 65 or older, which resulted in an increase of hundreds of dollars per year in the net amount of retirees' Medicare premiums; (ii) in 2003, the company unilaterally eliminated dental, vision, and hearing-aid coverage for retirees and increased deductibles, co-pays, and out-of-pocket maximums; and (iii) in 2005, the company announced that it planned to eliminate all health care benefits as of 2006 for all retirees, dependants, and surviving spouses age 65 or older.

The UAW filed suit to, among other things, preserve retiree benefits. The district court certified a class of approximately 2,900 retirees, spouses, and eligible defendants and issued a preliminary injunction requiring the company to continue to provide retiree health benefits. Following the entry of the preliminary injunction, both sides moved for summary judgment. The district court granted plaintiffs' motion and permanently enjoined defendants from changing or eliminating retiree health benefits.

Relying on *Noe v. Polyone Corp.*, 520 F.3d 548 (6th Cir. 2008), and *UAW v. Yard-Man*, 716 F.2d 1476 (6th Cir. 1983), the Sixth Circuit held that the language in the CBA, which stated that the health care coverage that an employee has at the time of retirement or termination of employment at age 65 “shall be continued thereafter,” unambiguously promises that the company will provide retirees with health benefits for life. In so holding, the court rejected the company’s arguments that the durational language in the applicable insurance agreement expressly limited retiree medical insurance to the duration of the CBA, and pointed out that, in the Sixth Circuit, “general durational clauses cannot trump contractual promises of lifetime retiree healthcare benefits.” The Sixth Circuit also observed that the company’s pension plan, under which benefits are vested for life, contains durational language similar to the durational language applicable to the retiree medical benefits, and that “virtually identical durational language would not have been used if the language was intended to have one meaning as to healthcare benefits and another as to pension benefits.”

Finally, the court addressed the company’s argument that previous Sixth Circuit cases involving similar general durational language were wrongly decided. Acknowledging that there is a “reasonable argument” that the Sixth Circuit actually applies a presumption of vesting with regard to retiree health benefits (although the Sixth Circuit has repeatedly stated there is no such presumption), Sixth Circuit precedent requires that durational language in CBAs “include a specific mention of retiree benefits in order to apply to such benefits.”

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Cole v. ArvinMeritor illustrates the need to ensure that CBAs are drafted carefully and clearly to accurately reflect the plan sponsor’s intent, and, in particular, identify the duration for which the plan sponsor intends to offer post-retirement medical benefits.

District Court Dismisses All Claims in Employer Stock Drop Case

By Nicole Eichberger

In *In re Bausch & Lomb, Inc. ERISA Litigation*, 2008 WL 5234281 (W.D.N.Y. Dec. 12, 2008), the district court dismissed with prejudice ERISA fiduciary claims related to investments in Bausch & Lomb’s stock.

Background & Procedural History

Bausch & Lomb, Inc. (“B&L”) and other individuals were sued over the offering of B&L’s common stock as an investment option in B&L’s 401(k) Account Plan (the “Plan”). The Plan required the offering of the B&L Stock Fund, which was one of 14 investment options. In late 2005, B&L announced that its audit committee began independent investigations into alleged misconduct by two of its foreign subsidiaries. In May 2006, B&L announced a worldwide recall of its MoistureLoc contact lens solution, following reports of a possible link between that product and incidents of fungal keratitis.

Plaintiffs filed a class action lawsuit alleging various breaches of fiduciary duty, including breach of fiduciary duty of prudence and breach of fiduciary duty to disclose, and claims for secondary liability. Defendants filed their motion to dismiss on April 7, 2008.

Ruling by the District Court

With respect to the prudence claim, the district court held that the Plan required the offering of the B&L Stock Fund, thereby entitling defendants to the *Moench* presumption, which presumes that it is prudent to follow the plan terms to invest in employer stock. The court went on to hold, among other things, that plaintiffs failed to plead sufficiently that defendants abused their discretion by making these investments. In so holding, the court stated that "the allegations in the plaintiffs' Complaint simply do 'not present a situation where a company's financial situation is seriously deteriorating and there is a genuine risk of insider self-dealing' which could call into question the fiduciary propriety of continued investment in the Company's securities," *quoting Wright v. Oregon Metallurgical Corp.*, 360 F.3d 1090, 1098 (9th Cir. 2004).

With respect to the disclosure claim, the district court held that the alleged misrepresentations made to the public were made in a corporate, not a fiduciary, capacity. In so holding, the court noted that the complaint lacked allegations that the fiduciaries responsible for plan communications made misrepresentations within the actual plan documents. In addition, the court held that the complaint failed to set forth sufficient allegations that those fiduciaries in charge of plan communications had knowledge of the alleged misrepresentations. Finally, the court held that any claim seeking disclosure of nonpublic information was not viable as there is no duty to provide participants with inside information.

The remaining claims in the complaint, which sought to hold certain defendants liable under secondary liability principles, also were dismissed with prejudice. In so holding, the district court stated that the rest of the claims fell because they require an underlying breach of fiduciary duty, and there were no breaches of fiduciary duties of prudence and disclosure.

Rulings, Filings and Settlements of Interest

- In *Ford Motor Co. ERISA Litigation*, Case No. 06-1718 (E.D. Mich. Dec. 22, 2008), a district court declined to dismiss "stock drop" claims brought against Ford and various individuals who were alleged to have performed fiduciary functions on behalf of Ford's salaried and hourly 401(k) plans. The complaint alleged that the defendants breached their fiduciary duties by continuing to invest in Ford stock when they knew or should have known it was an imprudent investment. The court agreed that the Ford stock funds were entitled to the ESOP presumption that investment in them was prudent, but rejected defendants' arguments that this presumption could be overcome only if the stock was fraudulently inflated or the employer was facing impending collapse. Rather, the court concluded ERISA required a fiduciary to divest of employer stock when, factoring in the needs and risk tolerances of the plan's participants, it would be too risky to invest *any* plan assets in the stock, regardless of what other investments were in the participants' portfolios. The court concluded that by effectively pleading an impending collapse of Ford, plaintiffs had met this standard.

- In *Ned-Sthran v. Methodist Hospitals of Dallas,* Civil Action No. 3:08-CV-0072-K (N. D. Tex. Nov. 25, 2008), plaintiff alleged that a self-funded health plan paid excessive fees for medical services provided by the employer and its affiliated health care providers. The district court declined to certify a class, concluding that there were substantial conflicts over any potential remedy; e.g., any modification to the plan structure would provide widely varying monetary recoveries, and might upset and lessen coverage being provided to current participants. The court also concluded that the plaintiff could not represent a class of COBRA participants because plaintiff had never participated in COBRA coverage.

- Northern Trust has been sued in several ERISA cases regarding the lending of securities from collective trust index funds managed by an affiliate. In *BP Corporation Savings Plan Investment Oversight Committee v. Northern Trust Investments, N.A.*, Civil Action No. 08-v-6029 (N.D. Ill. Dec. 16, 2008), the plan fiduciaries sought a preliminary injunction ordering Northern Trust to distribute to the plans in cash or liquid securities all assets previously invested in the index funds. In response to market disruptions arising in September 2008 that caused collateral impairment, Northern Trust had implemented withdrawal guidelines that required any plan seeking to cash out its investment in the index funds to take approximately 20% of the distribution in illiquid assets from the collateral pool created from Northern Trust's securities lending. The district court held this withdrawal restriction did not create irreparable harm warranting a preliminary injunction; rather, the court reasoned any investment losses caused by holding or selling the illiquid securities could be calculated and paid as money damages.

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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