Proskauer

newsletter

October 2010
in this issue

A report to clients and friends of the Firm
Edited by **Russell L. Hirschhorn**

Editor's Overview

Our focus this month is on a recent ruling from the Tenth Circuit that addressed the permissible scope of discovery of a plan administrator's dual role conflict of interest. In a case of first impression among the Circuit Courts, the Tenth Circuit held that a district court may consider evidence outside the administrative record, but cautioned that conflict discovery may often prove to be beyond the confines of the Federal Rules of Civil Procedures' prohibitions against overly broad or unnecessary discovery and, as such, may be inappropriate.

As always, be sure to review the section on *Rulings, Filings and Settlements of Interest*.

Tenth Circuit Permits Discovery of Dual Role Conflict of Interest Issues in ERISA Benefit Claims, But with Limitations[1]

By Russell L. Hirschhorn and Brian Neulander

In *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), the Supreme Court held that the structural conflict affecting insurance companies that both decide and pay claims for benefits is a factor for courts to weigh in determining whether the insurance company abused its discretion in denying a claim for benefits, but does not modify the arbitrary and capricious standard of review that ordinarily applies to such determinations. With that ruling, *Glenn* resolved a significant, long-standing Circuit split. It left unanswered, however, another important question: the extent to which the conflict's impact on the benefit determination could be investigated in discovery.

In the first Circuit Court decision to rule on the issue, the Tenth Circuit recently held in *Murphy v. Deloitte & Touche Group Ins. Plan*, 2010 WL 3489673 (10th Cir. 2010), that a district court may consider evidence outside the administrative record related to an administrator's dual role conflict of interest. The Court

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cautioned, however, that conflict discovery may often prove to be beyond the confines of the Federal Rules of Civil Procedures' prohibitions against overly broad or unnecessary discovery and, as such, may be inappropriate.

The Magistrate Judge's Decision

The plaintiff, Murphy, filed a claim for long-term disability benefits under the Deloitte & Touche Group Insurance Plan (Plan). Metropolitan Life Insurance Company (MetLife), which was both the insurer and plan administrator, ultimately denied the claim. Shortly after filing a complaint in federal court seeking judicial review of MetLife's decision, Murphy propounded discovery requests on MetLife concerning MetLife's dual role conflict of interest. The magistrate judge assigned to the case at the parties' consent refused to permit the discovery, finding that "the conflict of interest was apparent on the face of the administrative record, which rendered discovery on that issue unnecessary." The magistrate judge subsequently granted summary judgment in favor of the Plan and MetLife.

The Tenth Circuit's Decision

On appeal, Murphy challenged the magistrate judge's denial of her discovery request and his grant of summary judgment in favor of the Plan and MetLife. The Tenth Circuit rejected Murphy's argument that *Glenn* changed the standard for dual role conflict of interest discovery, but stated that in light of "the lack of clarity in our case law on this issue and the *Glenn* decision" it would take the opportunity to "clarify the appropriate standard for discovery related to a dual role conflict of interest."

The Tenth Circuit's analysis began with the observation that it has "frequently, consistently, and unequivocally reiterated that, in reviewing a plan administrator's decision under the arbitrary and capricious standard, the federal courts are limited to the administrative record." (Internal quotations omitted.) The Court reasoned that a general prohibition on discovery outside of the administrative record "makes sense," since a district court would have no justification for concluding that an administrator abused its discretion by failing to consider materials never submitted to it. In addition, the Court explained that Congress designed ERISA to provide for an inexpensive and expeditious method for participants and beneficiaries to resolve disputes over benefits, and that allowing the district court to consider extra-record materials would undermine this goal.

The Court acknowledged, however, that these broad statements were potentially misleading in cases involving a dual role conflict of interest and that it had, in some cases, permitted such discovery to take place. It further observed that the Supreme Court's decision in *Glenn* contemplated the possibility of discovery related to a dual role conflict of interest. Although the Supreme Court did not rule on this issue in *Glenn*, the Tenth Circuit reasoned that the Court must have contemplated that, at least in some cases, discovery and consideration of extra-record materials may be necessary and appropriate, since it stated that a conflict of interest weighs more heavily against an administrator that has a history of biased claims administration, which typically would not be reflected in the administrative record.

Having determined that discovery related to the scope and impact of a dual role conflict of interest may, at times, be appropriate, the Court next considered the

standard for addressing such discovery requests. The Court cited the Supreme Court's admonition in *Glenn* against special procedural and evidentiary rules focused narrowly upon the evaluator/payor conflict and concluded that this admonition also applied to discovery rules. It thus determined that the discovery dispute in this case should be governed by the standards set forth in Federal Rule of Civil Procedure 26(b).

In so ruling, the Court warned that neither party should be permitted to engage in unnecessarily broad discovery that slows the efficient resolution of an ERISA claim. In fact, the Court stated that discovery related to a conflict of interest may often prove inappropriate because a district court must balance the need for a fair and informed resolution of claims against the desire for a speedy, inexpensive, and efficient resolution of claims. It also must consider the necessity of such discovery in light of the facts and circumstances of the case; for example, the need for conflict discovery decreases when the administrative record already contains evidence of proper procedures and practices, or where the benefit denial was supported by the plain terms of the plan.

In the case before it, the Tenth Circuit rejected the magistrate judge's conclusion that discovery was not required merely because MetLife conceded it served as both the administrator and insurer of the Plan. The Court stated that Murphy might be able to argue that discovery, appropriately circumscribed, would be appropriate to allow her to determine, and present evidence on, the seriousness of the inherent conflict and the likelihood that it compromised MetLife's decision-making process in her case. The Court recognized, however, that the magistrate judge was understandably concerned by the breadth of Murphy's discovery request, which sought "extensive evidence of how the administrator and independent physicians had resolved other cases." According to the Court, in all but the most unusual cases the need for such expansive discovery is likely to be outweighed by the burdensomeness and costs involved.

Because the magistrate judge did not apply the correct legal standard for resolving Murphy's discovery request, the Tenth Circuit vacated the lower court's decision and remanded the case for further proceedings.

Proskauer's Perspective

Insofar as the Tenth Circuit stated that dual role conflict of interest discovery may be warranted, but should be carefully circumscribed, the Tenth Circuit's ruling arguably represents a middle ground between those district courts that have unconditionally permitted such discovery and those that have limited it by, for example, requiring a threshold showing of evidence that the conflict may have tainted the administrative process. Because the Court failed to articulate a specific standard other than the general Rule 26 requirements, however, the interpretation of its ruling is left to the whims of the district courts, which may unfortunately expose plans to the risk of broad discovery rulings.

Rulings, Filings and Settlements of Interest

- In *Brown v. Owens Corning* Investment *Review Committee*, 2010 WL 3730918 (6th Cir. Sept. 27, 2010), the Sixth Circuit affirmed dismissal, on statute of limitations grounds, of plaintiffs' claims against plan fiduciaries arising from employer stock holdings in two Owens Corning retirement plans. In October 2000, Owens Corning entered bankruptcy in the face of mounting asbestos liabilities. A group of participants brought a class action in September 2006, asserting that the plan fiduciaries violated ERISA by failing to protect participants from the decline in the plans' company stock holdings prior to bankruptcy. In December 2006, the plaintiffs added the plans' directed trustee as a defendant, asserting that the trustee breached its fiduciary duties to protect the plan when it failed to assert ERISA claims against the fiduciaries responsible for plan investments. The district court, on reconsideration of a motion it had previously denied, granted summary judgment, finding that the claims against the directed trustee were time-barred. In so ruling, the court determined that the pleadings and evidence established that the plan participants had actual knowledge of potential ERISA claims from information provided to them in the summary plan description and plan-related announcements. Plaintiffs appealed, arguing that the district court erred in finding that they had actual knowledge of the identities of the potentially responsible fiduciaries. The Sixth Circuit disagreed, stating that the materials distributed to the plan participants adequately informed participants which fiduciaries were involved in the management and administration of the plans' employer stock holdings.
- In *Jensen v. Solvay Chemicals, Inc.*, 2010 WL 3472945 (10th Cir. Sept. 7, 2010), the Tenth Circuit reversed in part the dismissal of a suit by participants challenging their retirement plan's conversion to a cash balance formula, and found that the plan's ERISA § 204(h) notice was insufficient because it failed to adequately disclose how participants' early retirement benefits were calculated under the old and new plan formulas. The Court also held, however, that the notices provided sufficient information about future benefit accruals and that ERISA § 204 does not require disclosure about whether participants would be subject to "wear-away" periods or the possible duration of those periods. The Court remanded the case for a determination on whether participants were entitled to relief, which, it stated, "depend[ed] on whether there was an 'egregious failure' in compliance." The Court affirmed the dismissal of the participants' age discrimination claim, finding that ADEA § 4(i) creates a safe harbor for defined benefits that cease employees' benefit accruals because of age.
- In *Temme v. Bemis Co.*, 2010 WL 3528846 (7th Cir. Sept. 13, 2010), retirees who were employed by a company that was acquired by Bemis Company brought suit against Bemis claiming that it violated ERISA when it increased retirees' health care deductibles and cancelled the retirees' prescription drug benefits. Plaintiffs argued that a plant-closing agreement provided that the retirees would be provided with lifetime health benefits. The district court granted Bemis' motion for summary judgment, holding that the plant-closing

agreement did not make a promise of lifetime health benefits to retirees. The Seventh Circuit reversed, ruling that district court failed to read the 1985 plant-closing agreement in conjunction with the relevant collective bargaining agreement. The Court reasoned that when the two documents were read together "there [were] straightforward indications of the parties' intent to create lifetime benefits," including: (i) a description of retiree benefits that contained no ending date; and (ii) a provision of the CBA that provided that, in the event a retiree dies, the dependent spouse would retain coverage until the spouse qualifies for other coverage, which, according to the Court, "strongly impl[ied] that retired employees (and their spouses) are covered until death." The case was remanded for a determination as to whether Bemis's health insurance reductions resulted in health benefits that were less than what the parties expected under the plant-closing agreement and the CBA.

- In *Curtis v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 2010 WL 3609598 (M.D.N.C. Sept. 9, 2010), a magistrate judge issued a Report and Recommendation recommending the denial of Merrill Lynch's motion to dismiss a participant's putative class action that contended that Merrill Lynch breached its fiduciary duties by imprudently investing plan assets too heavily in technology stocks. Merrill Lynch's motion to dismiss contended that the participant's claims were barred by the six-year statute of limitations. The magistrate judge rejected this argument, reasoning that although plaintiff may have had knowledge of the plan's losses more than six years before filing her complaint, there was no evidence she had actual knowledge that Merrill Lynch had disregarded the plan's investment guidelines with respect to the concentration of plan investments in technology stocks.
- In *In re Visteon Corp.*, No. 09-11786 (D. Del. Bankr. Sept. 17, 2010), the court approved a settlement between Visteon and The Industrial Division of the Communications Workers of America (the "Union"), resolving the Union retirees' claim that the company violated ERISA by terminating their non-vested benefits during the pendency of the company's bankruptcy. The settlement requires Visteon to pay $11.5 million to the Union retirees. Another group of retirees who are members of the United Auto Workers union are continuing to litigate their claims. The Third Circuit's recent decision in this action was discussed in the September Newsletter.
- In *In re SLM Corp. ERISA Litig.,* 2010 WL 3783749 (S.D.N.Y. Sept. 24, 2010), the court granted SLM Corp.'s motion to dismiss plaintiffs' stock-drop claims. In dismissing plaintiffs' prudence claim, the court found that plaintiffs failed to rebut the *Moench* presumption of prudence, which required plaintiffs to allege a "precipitous decline in [the company's] stock price" and that fiduciaries had "knowledge of [the company's] impending collapse." Although there was an 85% decline in Sallie Mae's stock price, plaintiffs did not allege that "Sallie Mae's viability as a going concern was threatened or that its stock was at risk of becoming worthless." In dismissing plaintiffs' disclosure claim, the court concluded that plaintiffs did not allege that the plan fiduciaries acted in a fiduciary capacity when making the allegedly false and misleading statements to participants. It explained that "those who prepare SEC filings do not become ERISA fiduciaries through those acts," and that there is "no

affirmative duty under ERISA to disclose information about the company's financial condition to plan participants."

- In *In re Guidant Corp. ERISA Litig.*, No. 05 Civ. 1009 (S.D. Ind. Sept. 10, 2010), the court approved a settlement between Guidant and participants of the Guidant Employee Savings and Ownership Plan, resolving the participants' stock-drop claims. The settlement requires the company to pay $7 million for distribution to class members. Plaintiffs' counsel was awarded approximately $3 million of the settlement amount in attorneys' fees and costs.
- In *Bagley v. KB Home*, No. 07 Civ. 01754 (C.D. Cal. Sept. 7, 2010), the court approved a settlement between KB Home and participants of the KB Home 401(k) Savings Plan, resolving the participants' stock-drop claims. The settlement requires the company to pay $3 million to the settlement class. Plaintiffs' counsel was awarded approximately $750,000 of the settlement amount in attorneys' fees and costs.
- In *In re General Growth Properties, Inc. ERISA Litig.*, No. 08 Civ. 6680 (N.D. Ill. Sept. 3, 2010), General Growth Properties, Inc. filed a motion for authorization and approval of a $5.75 million class action settlement of participants' stock-drop claims. The settlement proposal must receive final approval from both the bankruptcy court in the Southern District of New York (where General Growth's bankruptcy petition is pending) and the Northern District of Illinois (where the ERISA litigation is pending).

Our ERISA Litigation Practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation Practice defends complex and class action employee benefits litigation.

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