Proskauer

newsletter

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in this issue

A report to clients and friends of the firm

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Editors' Overview

This month we highlight the Seventh Circuit's recent decision in *Spano v. Boeing Co.* and *Beesley v. International Paper* (consolidated cases), Nos. 09-3001 & 09-3018, -- F.3d --, 2011 WL 183974 (7th Cir. Jan. 21, 2011). In this opinion, the Seventh Circuit vacated and remanded for further proceedings the certification of two classes of defined-contribution plan participants in "excessive-fee" breach of fiduciary duty cases. The decision suggests that although class claims by 401(k) plan participants alleging breach of fiduciary duty under ERISA § 502(a)(2) are possible, a district court must conduct a careful analysis to determine whether class treatment is appropriate, and must narrowly define the classes to prevent intra-class conflicts of interest that may arise naturally due to the characteristics of defined-contribution plans.

A second article reviews how, in the aftermath of the decision in *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008), courts have struggled to interpret and apply the Supreme Court's instructions regarding whether a conflict of interest exists with respect to the benefit claim decision-making entity, and, if so, the extent of permissible discovery related to that conflict of interest. The article includes a discussion of the application of *Glenn*'s principles to Taft-Hartley plans.

As always, be sure to review the section on *Rulings, Filings, and Settlements of Interest*. This month we include reports on multiple class action settlements, the fiduciary exception to attorney-client privilege, preemption, breach of fiduciary duty, and some interesting procedural rulings.

Spano v. Boeing Co.: Seventh Circuit Vacates Class Certification of Excessive-Fee Cases, But Remands for Possible Certification of "Better- Defined and More-Targeted Classes"[1]

Contributed by Kara L. Lincoln

Recently, the Supreme Court held that although ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), does not provide a remedy for individual injuries distinct from plan injuries, that provision does authorize a participant to maintain a breach of fiduciary duty claim for harm to his individual 401(k) plan account. *LaRue v. DeWolff, Boberg & Associates, Inc*., 552 U.S. 248 (2008). In the context of class certification motions, the plaintiffs' bar asserts that *LaRue* affirmed that relief under ERISA § 409, 29 U.S.C. § 1109, is "singularly to the plan," finding that a breach of fiduciary duty even as to just one participant is nonetheless a breach concerning the financial integrity of the plan. As such, plaintiffs argue that *LaRue* did not change the nature of ERISA § 502(a)(2) claims or the certifiability of those claims as class actions. The defense bar, on the other hand, asserts that *LaRue* sends a clear message that courts can no longer simply assume that an action is brought on behalf of a plan "as a whole," and its participants collectively, just because it is pled under ERISA § 502(a)(2). Instead, defendants argue that a class certification ruling must account for the fact that every participant's claim is, as *LaRue* allows, based on unique facts that must be individually proven.

According to the Seventh Circuit, *LaRue* actually tells us "very little" about whether a participant in a defined contribution plan asserting a breach of fiduciary duty claim pursuant to ERISA § 502(a)(2) can proceed on behalf of a class under Federal Rule of Civil Procedure 23. In *Spano v. Boeing Co*., -- F.3d --, 2011 WL 183974 (7th Cir. Jan. 21, 2011), the Seventh Circuit vacated class certification of ERISA § 502(a)(2) breach of fiduciary duty claims concerning individual participants' 401(k) plan investments. The Court rejected Defendants' position that such claims were too individualized ever to be appropriate for class certification, but nevertheless vacated the two district court decisions certifying classes of all past, present, and future plan participants as being too broad.

Factual Background and Procedural History

The Court's opinion addressed the appeals of class certification rulings in two very similar "excessive fee" cases, *Spano v. Boeing Co*., 2008 WL 4449516 (S.D. Ill. Sept. 29, 2008), and *Beesley v. International Paper Co.*, 2008 WL 4450319 (S.D. Ill. Sept. 30, 2008). The *Spano* case involved The Boeing Company Voluntary Investment Plan (Boeing Plan), which permitted approximately 200,000 participants to direct their investments among 11 investment options, including the Boeing Stock Fund. The *Beesley* case involved two 401(k) plans sponsored by International Paper, the International Paper Hourly Savings Plan, and the International Paper Salaried Savings Plan (IP Plans), in which approximately 72,000 participants directed their investments among 12 investment fund options,

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a company stock fund, and over 11,000 publicly traded mutual funds available through a brokerage window.

In both *Spano* and *Beesley*, the participants in the respective plans alleged three main breaches of fiduciary duty: (i) causing the plan to pay excessive fees; (ii) offering imprudent investment options; and (iii) failing to disclose to participants material information regarding fees, expenses, and investment options. Some of the allegedly excessive fees were specific to certain investment options, while others were imposed equally on all participants.

The district court certified a class in each case for all claims asserted by Plaintiffs pursuant to Rule 23(b)(1). The class in each case was defined as:

> All persons . . . who are or were participants or beneficiaries of the Plan and who are, were or may have been affected by the conduct set forth in this Complaint, as well as those who will become participants or beneficiaries of the Plan in the future.

The classes excluded "the Defendants and/or other individuals who are or may be liable for the conduct described in this Complaint," but were not limited to only those participants who held the specific investment options at issue, or who were harmed by the alleged fiduciary misconduct. Defendants in both cases sought interlocutory review, which the Seventh Circuit granted before consolidating the appeals.

Class Treatment of Individual ERISA § 502(a)(2) Claims

The Seventh Circuit began its ruling by summarizing the Supreme Court's decision in *LaRue*, which held that an individual 401(k) plan participant could maintain a breach of fiduciary duty claim under ERISA § 502(a)(2) for harm to his individual account, regardless of whether any other plan participants suffered harm from the alleged breach. As to whether and under what circumstances a participant may maintain an ERISA § 502(a)(2) claim as a class claim, the Court stated:

> To determine whether class treatment is appropriate, we must distinguish between an injury to one person's retirement account that affects only that person, and an injury to one account that qualifies as a plan injury. The latter kind of injury potentially would be appropriate for class treatment, while the former would not.

For example, the Court explained the plaintiff's injury in *LaRue*, which occurred as a result of the plan fiduciary's failure to implement his investment instructions, would be inappropriate for class treatment if the facts proved that the plan fiduciaries carried out all other investment instructions promptly, but could be suitable for class treatment if the facts established that the plan fiduciaries failed to implement any participant's instructions for a period of time. Essentially, the propriety of class treatment would depend on the factual circumstances of each case.

Criteria for Class Certification under Rule 23

In analyzing the class certification issues raised in *Spano*, the Court found instructive the reasoning of *In re Schering Plough Corporation ERISA Litigation*, 589 F.3d 585 (3d Cir. 2009). In that case, the Third Circuit vacated certification of a class of 401(k) plan participants alleging that defendants breached their fiduciary duties by continuing to offer company stock as an investment option in the plan. The district court certified a class of all participants or beneficiaries in the 401(k) plan who held investments in the company stock fund. In vacating that decision, the Third Circuit found that because the class representative signed a release, she could not establish typicality and adequacy of representation. In particular, the Third Circuit found that the release created possible defenses unique to her, as well as incentives and a willingness to pursue the litigation that were different from those of the rest of the class. The Third Circuit, however, remanded the case for further proceedings, noting that certification under Rule 23(b)(1)(B) appeared feasible because the case would significantly impact other participants' claims.

Rule 23(a)

The Court reviewed the specific criteria for class certification. Under Rule 23, a properly-certified class must meet the four requirements of numerosity, commonality, typicality, and adequacy of representation in Rule 23(a), and fall within one of three general categories in Rule 23(b). Before certifying a class, a district court must evaluate Rule 23's requirements, making whatever factual and legal inquiries are necessary. This requires the court to "do more than review a complaint and ask whether . . . the case seems suitable for class treatment;" it must investigate the facts that are relevant to class certification. If the court determines class treatment is proper, it must issue a detailed certification order. A certification order should specify the issues being certified, and why the Rule 23 requirements are satisfied for those issues. Moreover, the order should precisely define the class. As explained by the Seventh Circuit in *Spano*, the class definition is a "vital step" upon which the scope of the litigation and the *res judicata* effect of the final judgment both depend.

In *Spano*, the Court ultimately concluded that the classes, which it deemed "breathtaking in . . . scope," failed to satisfy the typicality and adequacy of representation requirements. The numerosity requirement of Rule 23(a) was concededly met due to the sheer number of participants in each plan. With regard to commonality, the Court first noted that Rule 23(a)(2) does not require "that every member of the class have an identical claim. It is enough that there be one or more common questions of law or fact." The Court then ruled that Plaintiffs' assertions that the fiduciaries selected imprudent investment options, charged excessive fees to all participants, and misled participants met the commonality requirement. With regard to the misrepresentation claims, the Court disagreed with the IP Defendants' argument "that the individual nature of each participant's investment decisions, and also the individual response each person might have had to the alleged misrepresentation" precluded a finding of commonality. The Court ruled that it was sufficient there were common claims regarding, for example, the allegedly misleading nature of the communications.

As to typicality, the Court instructed “that there must be enough congruence between the named representative’s claim and that of the unnamed members of the class to justify allowing the named party to litigate on behalf of the group.” In the context of a class of 401(k) plan participants alleging imprudent investment options, the Court stated that “a class representative . . . would at a minimum need to have invested in the same funds as the class members.” Here, the Court found that it could not rationally assess this issue for the classes defined by the district court, which included participants in the past who “never held a single share in either or both of” the allegedly imprudent funds.

The Court did not rule on IP’s argument that Plaintiffs’ misrepresentation claims could not satisfy the typicality requirement because these claims required Plaintiffs to prove reliance on an individualized basis. The Court merely suggested “that some misrepresentations might be so central to the operation of a plan that injury to someone who held shares in the affected funds might be inferred[, although] other arguments . . . would require precisely the kind of individualized attention that would make it difficult to find a class representative with claims typical of enough people to justify class treatment.”

The Court also did not rule on IP’s arguments that, consistent with ERISA § 404(c), it should not be held liable “if a person opted to put her money in a riskier or more questionable fund,” and that because each participant chose his own investments, yielding a “close-to-infinite variety of combinations in each participant’s account—varying by which investment, when purchases were ordered, when money was shifted from one fund to another,” Plaintiffs’ claims were not typical of a class. Instead, the Court observed that in a related case decided the same day, *Howell v. Motorola*, -- F.3d --, 2011 WL 183966 (7th Cir. Jan. 21, 2011), it concluded that Section 404(c) of ERISA does not insulate a fiduciary from liability for selecting an imprudent investment option for a 401(k) plan. The Court nevertheless recognized that a participant’s ability to assert a fiduciary breach claim for the selection of imprudent investment options did not necessarily mean that such a claim could be asserted as a class claim. The Court then described the various obstacles a class representative would need to overcome to certify a class:

> Here, if a proper class can be constituted on remand with a representative who personally held one or both of the allegedly imprudent funds, the question on the merits would be whether the mere existence of a fund that is undesirable taints the entire plan, or, if more is needed, what would that be? A showing of deliberate misrepresentations about soundness? A showing that participants had such a small number of options that they were forced into the bad fund? A showing that the menu of options included only, or mostly, imprudent options? Something else? An extra hurdle such a class representative or individual plaintiff would need to surmount in the IP litigation is the fact that IP, like Deere in the

> *Hecker* litigation, not only offers 12 pooled funds in addition to the IP Stock Fund, but it also makes available a brokerage window into over 11,000 publicly traded mutual funds. IP represents that participants are free to take advantage of any of these, in order to meet their own investment goals.

In support of their argument that they adequately represented the class, Plaintiffs contended that their claims challenged the structure of the plan as a whole. The Court, however, found their assertion insufficient in light of Defendants' contention that many of the putative class members had no complaint about the funds. In fact, the Court acknowledged that significant intra-class conflicts among 401(k) plan participants could arise because an imprudent investment for one participant during one period of time could be a prudent investment for another.

Rule 23(b)

The Court also concluded that the classes could not be certified under either Rule 23(b)(1)(A) or (B). With regard to Rule 23(b)(1)(B), for example, the Court found that there was no common interest among all class members because it appeared that some participants were harmed whereas others benefited. "Without the common interest, there is no reason to assume that an adjudication of one person's claim 'as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests.'"

Proskauer's Perspective

The Seventh Circuit's decision marks at least the third time a circuit court vacated a decision certifying a class of 401(k) plan participants. In addition to the Third Circuit's decision in *Schering Plough* referenced above, the Fifth Circuit vacated a district court order certifying a class of 401(k) plan participants who held investments in the plan's company stock fund. In *Langbecker v. Electronic Data Systems*, 476 F.3d 299 (5th Cir. 2007), plaintiffs alleged that defendants breached their fiduciary duties by continuing to offer the company stock fund as an investment option. The Fifth Circuit held that intra-class conflicts of interest, caused by participants' releases and individual investment choices, meant that the named plaintiffs were not adequate representatives of the class.

Like the other circuit decisions, the ruling in *Spano* does not necessarily rule out class certification of claims brought by 401(k) plan participants for breach of fiduciary duty under ERISA § 502(a)(2) in their entirety. In fact, the Court explicitly stated that it did not intend to rule out an order certifying "one or more better-defined and more-targeted classes." However, these decisions do establish that, at the very least, a district court must conduct a detailed, individualized analysis to determine whether class treatment is appropriate, and if it is, the district court must narrowly define the class, classes, and/or subclasses to prevent intra-class conflicts of interest that may naturally arise due to the characteristics of defined-contribution plans. The Court also recognized that individualized issues of reliance may preclude plaintiffs from satisfying Rule

23(a)'s typicality requirement, and the fact that the alleged conduct harmed some participants but benefited others may pose obstacles to satisfying Rule 23(b)(1)'s requirements. Based on the Court's reasoning, it might very well have concluded that these issues would pose obstacles to satisfying the other provisions of Rule 23(b) as well.

Conflict of Interest Discovery: The Who, The What, and The Confusing[2]

Contributed by Nicole A. Eichberger

In its seminal ruling in *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008), the U. S. Supreme Court held unanimously that a "structural" conflict of interest exists in situations where the same entity evaluates claims for benefits and pays benefit claims. *Id.* at 2348. The Court went on to state that the existence of such a conflict would be one factor among many in determining whether there has been an abuse of discretion, and the alleged conflict is of greater importance where circumstances suggested a "higher likelihood" that the conflict affected the benefits decision, or where there was a history of biased claims administration. *Id.* at 2351.

The Supreme Court's *Glenn* ruling has left the courts to address two issues in benefit claim litigation: (1) whether a conflict of interest exists; and (2) if a conflict of interest does exist, what, if any, discovery related to that conflict of interest should be permitted.

Although it was hoped that the ruling in *Glenn* would lead to greater uniformity and predictability in the adjudication of claims for benefits, *Glenn*'s instructions have left courts struggling in determining how to apply them. Not only have the lower courts divided on the scope of discovery to permit where an inherent conflict is identified, but they have also disagreed on the criteria for finding an inherent conflict in the first place. The disagreement among the lower courts has now reached the circuit court level, causing one to wonder how much guidance *Glenn* – the first Supreme Court case to address the standard of review in benefits cases in over 20 years – has really provided.

Identifying Structural Conflicts in Taft-Hartley Plans

With respect to the first issue (whether a structural, or inherent, conflict of interest exists), *Glenn* provided specific guidance only with respect to insured single employer plans. With respect to multi-employer Taft-Hartley plans, which typically are administered by an evenly divided committee of employer and union designated trustees, courts have divided sharply on how best to apply *Glenn*'s rationale.

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In *Anderson v. Suburban Teamsters of Northern Illinois Pension Fund Board of Trustees*, 588 F.3d 641 (9th Cir. 2009), the Ninth Circuit held that trustees of a multi-employer plan did not have a structural conflict of interest. In so holding, the court reasoned that, because the board of trustees consists of both employer and employee representatives, there are no pecuniary interests at stake. The Ninth Circuit held that, given the lack of economic motivation, the administrative decision-making process did not fit *Glenn*'s definition of a structural conflict of interest.

By contrast, in *Durakovic v. Building Service 32 BJ Pension Fund*, 609 F.3d 133 (2d Cir. 2010), the Second Circuit held that Taft-Hartley funds are inherently conflicted when making benefit determinations because, like insurance companies and employers administering self-insured plans, they both determine and pay claims. The court reasoned that, while the employer representatives on the board of trustees have fiduciary interests that weigh in favor of the trusts' beneficiaries, they also have representational and other interests that weigh to the contrary. The fact that union representatives have an equal say in benefit determinations, the court stated, does not negate the conflict, but rather may impact the weight the conflict is afforded.

In *Griffin v. N.Y. State Nurses Association Pension Plan & Benefits Fund*, No. 10-CV-824, -- F. Supp. 2d --, 2010 WL 5342069 (E.D.N.Y. Dec. 22, 2010), (E.D.N.Y. Dec. 22, 2010), a district court cited to *Durakovic* and found a conflict existed because "the Plan is a multi-employer benefit trust fund and the board of trustees consists of fourteen members, comprised equally of representatives of the New York State Nurses Association and the management of participating facilities, as required by the Taft-Hartley Act," who are responsible for paying and determining benefit claims.

The Fourth Circuit viewed the issue differently, albeit under somewhat unusual circumstances. In *Parsons v. Power Mountain Coal Co.*, 604 F.3d 177 (4th Cir. 2010), the Fourth Circuit considered an employer's allegation of an alleged conflict in the administration of benefits in a multi-employer plan where the underlying factual and eligibility determinations were made exclusively by union trustees. The employer was apparently concerned that the union trustees would be motivated to find eligibility, at the employer's potential expense, because contributing employers would ultimately bear the consequences of a plan shortfall resulting from overly generous benefit payments. The Fourth Circuit upheld the trustees' determination of eligibility and rejected the employer's conflict of interest claim. The finding that there was no conflict was based on the observations that employer contributions to the plan are prescribed by the collective bargaining agreements and are not impacted by benefit determinations. To the extent that the benefit claim experience results in a shortfall in funding, the plan's remedy is to reduce benefit levels. Thus, there is no improper motivation for the trustees to grant or deny benefits.

These varied approaches to the application of *Glenn* to Taft-Hartley plans puts into focus some of the issues of interpretation left open by *Glenn*, including with respect to when a structural conflict of interest exists. The Second Circuit's ruling appears to be based on a literal reading of the opinion insofar as *Glenn* suggested that a structural conflict exists whenever the plan administrator and the entity paying benefits are one and the same. The Ninth and Fourth Circuit Courts, by contrast, favored a more practical approach that inquires into whether the benefit determination structure is one that could logically be impacted by financial considerations. The approach taken has a direct impact on whether conflict discovery will be required. And, as demonstrated below, once the gates to discovery are opened, there is no telling when they will close.

What Is the Scope of Conflict of Interest Discovery?

For any plan found to have a structural conflict – including presumably Taft Hartley plans – the court must consider what, if any, conflict of interest discovery should be conducted. With respect to this issue, three potential areas of discovery have been evaluated: (1) claims administration policies and manuals; (2) treatment of similar past claims; and (3) relationships among the entities providing and deciding benefit claims.

Claims Administration Policies and Manuals. Over the past year, courts have consistently permitted conflict of interest discovery of documents and information relating to claims policies, procedures, and/or manuals. For example, in *Kruk v. Metropolitan Life Insurance Co.*, 267 F.R.D. 435 (D. Conn. May 27, 2010), the district court permitted limited discovery as to any statement of policy or guidance with respect to the plan and concerning the denied treatment option or benefits for the claimant's diagnosis, without regard to whether such advice or statement was relied upon in making the benefit determination. Similarly, in *Rauthe v. Metropolitan Life Insurance Co.*, No. CV 10-47-M-DWM-JCL, 2010 WL 3522487 (D. Mont. Sept. 1, 2010), the court permitted discovery as to the procedures and policies MetLife followed to investigate claims. In *Emery v. American Airlines, Inc.,* No. 08-CV-22590, 2010 WL 457151 (S.D. Fla. Feb. 4, 2010), the district court permitted discovery relating to claim manuals, procedures, guidelines, and handbooks used for assessing the claim or relating to safeguards for following plan procedures and reducing bias; and documents showing management checks that penalize inaccurate decision-making or show active steps to reduce bias that relate specifically to Emery's claim. In *Prado v. Allied Domecq Spirits and Wine Group Disability Income Plan*, No. 09-CV-4419, 2010 WL 3119934 (N.D. Cal. Aug. 2, 2010), the district court permitted limited discovery of all the plan documents and any policies guiding the insurer's (Liberty's) decision-making to determine if Liberty abused its discretion in denying plaintiff's claims, as well as limited discovery into the nature, extent, and effect of Liberty's conflict of interest on its decision-making process.

Similar Types of Claims. A second scope of conflict of interest discovery relates to past treatment by the decision-maker of similar types of claims. In *Hall v. Life Insurance Co. of North America*, 265 F.R.D. 356 (N.D. Ind. Feb. 25, 2010), the district court permitted limited discovery relating to how many similar types of claims were reviewed over the last five years where claimants were initially found not disabled, and then whether the claim was denied on appeal. In *Zewdu v. Citigroup Long Term Disability Plan*, 264 F.R.D. 622 (N.D. Cal. Feb. 12, 2010), the district court permitted discovery on the number of disability claims reviewed, granted, and denied by the particular physician who reviewed plaintiff's claim. In addition, the court permitted discovery of documents pertaining to MetLife's training of its medical staff regarding handling of disability claims generally and claims involving plaintiff's particular medical issue. With respect to both discovery requests, the district court permitted the discovery because the plaintiff's request was found to be narrowly tailored.

However, courts have denied discovery of past treatment of similar claims where the request is overly broad and/or not sufficiently tailored to the claim at issue. For example, in *Price v. Hartford Life & Accident Insurance Co.*, -- F. Supp. 2d --, 2010 WL 3998039 (E.D. Mich. Oct. 12, 2010), although the district court permitted limited discovery as to the conflict of interest, the court denied plaintiff's discovery request seeking broad information concerning all claims made under the policy at issue for the last 10 years. Similarly, in *Heim v. Life Insurance Co. of North America*, No. 10-CV-1567, 2010 WL 5300537 (E.D. Pa. Dec. 22, 2010), the district court denied plaintiff's request for all of LINA's Reading Hospital and Medical Center underwriting files as overly broad and not tailored to assess potential procedural and structural conflicts and the influence of such conflicts on the denial of plaintiff's claim for benefits.

Relationships Among the Decision-Making Entities. The third area of conflict of interest discovery that has been permitted relates to the relationships among the various entities that contract with respect to claims administration. For example, in *Price*, the district court permitted identification of each doctor, file reviewer, or surveillance company who provided information considered in the claim, and information on the contractual relationship, fees paid, and frequency of their employment by Hartford. In *Hackett v. Standard Insurance Co.*, No. CIV-06-5040-JLV, 2010 WL 1494772 (D. S.D. Apr. 14, 2010), the district court permitted discovery as to the financial incentives for denying claims and the relationship between the administrator and the vendors it hired to review claims. In *Zewdu*, the district court permitted discovery on MetLife's compensation arrangement with the retained physician. Similarly, in *Benson v. Hartford Life & Accident Insurance Co.*, 724 F. Supp. 2d 1187 (D. Utah 2010), the court afforded discovery to investigate whether conflicts of interest between Hartford and University Disability Consortium (the entity charged with oversight of employer provided benefits), or Hartford and the employer, unfairly biased the review of claimant's disability status. In *Sullivan v. Deutsche Bank Americas Holding Corp.*, No. 08-CV-2370, 2010 WL 391821 (S.D. Cal. Feb. 2, 2010), the district court permitted limited discovery of performance evaluations for the 11 individuals involved in the evaluation of plaintiff's claim for long-term disability benefits over a three-year period.

Presence of Conflict of Interest Does Not Necessarily Mean Discovery

To further complicate the development of the law as to what, if any, conflict of interest discovery is permitted, the Eighth Circuit has departed from the majority of circuit courts, based on language in *Glenn* that suggests that the mere presence of a conflict of interest is an insufficient reason alone to expand the administrative record. In *Atkins v. Prudential Insurance Co.*, No. 09-CV-3561, 2010 WL 5060613 (8th Cir. Dec. 13, 2010), the Eighth Circuit affirmed the district court's rejection of plaintiff's claim that discovery was warranted as to Prudential's alleged structural conflict. Specifically, plaintiff "sought materials regarding how disability claims are adjusted, whether there were additional oral communications, how claims like Atkins' have been handled in other cases, and the procedures Prudential has followed to ensure consistent decision making in similar cases." The Eighth Circuit agreed with the district court that the administrative record was sufficient to permit a fair evaluation of whether Prudential's decision to deny plaintiff's disability claim was arbitrary and capricious.

Similarly, in *Jones v. ReliaStar Life Insurance Co.*, 615 F.3d 941 (8th Cir. 2010), the Eighth Circuit affirmed the district court's order denying plaintiff's request for discovery to explore the insurer's conflict of interest. In so doing, the court emphasized that, in ERISA cases, the general rule is that review is limited to evidence that was before the administrator, and plaintiff presented no convincing reason to create an exception in this case, especially where the insurer conceded that it was also the administrator of the plan, so discovery was not needed to establish a conflict.

Proskauer's Perspective

Examination of the post-*Glenn* case law on structural conflicts and what, if any, conflict discovery should be granted leads to the realization that the seemingly simple questions posed by the Supreme Court do not lend themselves to simple, rigid answers. The rulings in *Anderson* and *Parsons* indicate that determining whether a Taft-Hartley fund suffers from a structural conflict may require more than the application of a simple economic test of who is paying the benefits. Similarly, the rulings in the discovery cases indicate that, while there may be a consensus on what types of discovery may be permitted, the question of how extensive the discovery should be does not lend itself to a uniform answer. Rather, the answer needs to be decided on a case-by-case basis, based on the facts and circumstances presented.

The hope that *Glenn* would generate uniformity and predictability in benefits claim litigation may thus be short-lived. For plan counsel, this is an unfortunate development because it means that the defense of these types of cases will continue to be risky and expensive.

Rulings, Filings, and Settlements of Interest

Rulings

- In *Burke v. LASH Work Environments, Inc.*, No. 10-1139-cv, 2011 WL 286188 (2d Cir. Jan. 31, 2011), the Second Circuit reversed the dismissal, for want of federal subject matter jurisdiction, of a claim that defendants had breached a settlement agreement relating to ERISA withdrawal liability claims. The court found that there was subject matter jurisdiction because, on its face, the complaint asserted various ERISA claims.
- In *Solis v. Malkani*, No. 09-1383, 2011 WL 343949 (4th Cir. Feb. 4, 2011), the Fourth Circuit ruled that the trial court had acted with the scope of its equitable powers by (i) imposing contempt sanctions on the breaching fiduciary for failing timely to remit payment of nearly $500,000 in fees to the independent fiduciary, and (ii) authorizing the replacement fiduciary to terminate the ERISA plan at issue. The independent fiduciary had been appointed to administer the plan following a ruling finding that the named fiduciary had repeatedly breached the duty of loyalty.
- In *Garcia v. Best Buy Stores, L.P.*, No. 10-20243, 2011 U.S. App. LEXIS 2218 (5th Cir. Feb. 2, 2011), the Fifth Circuit affirmed the district court's ruling that Texas's notice-prejudice rule was preempted with respect to its application to a self-funded medical plan. The plaintiff claimed he was injured on the job and submitted a claim to Best Buy's occupational health benefits plan. Best Buy denied the claim because Garcia failed to comply with the plan's requirement that injuries be reported within twenty-four hours. Garcia filed suit, arguing that the Texas notice-prejudice rule required Best Buy to prove that it suffered actual prejudice before asserting a defense relating to the failure to timely notify Best Buy of the claim. On appeal, the Fifth Circuit found that the Texas notice-prejudice rule regulated insurance within the meaning of ERISA's savings clause. However, because Best Buy's plan was self-insured and ERISA's deemer clause exempts self-funded ERISA plans from state laws that regulate insurance, the court held that Texas's notice-prejudice rule was not applicable to Garcia's claim.
- In *Crowell v. CIGNA Group Life Ins.*, No. 09-51086-cv, 2011 WL 365284 (5th Cir. Feb. 7, 2011), the Fifth Circuit affirmed the district court's refusal to enforce a settlement agreement reached between Life Insurance Company of North America ("LINA") and a participant of short-term and long-term disability plans it administered, finding that there was no "meeting of the minds" among the parties. During settlement negotiations, LINA was under the impression that it was negotiating the resolution of Crowell's claims for both past and future claims for benefits since Crowell's complaint sought to recover past benefits due and future benefits, and his demand letter referenced both past and future claims. Crowell, however, had no intention of releasing his future claims to benefits under the plans. After LINA filed a Notice of Settlement with the court, but before it distributed the settlement payments to Crowell, the parties discovered that they misinterpreted each other's legal positions. Crowell nevertheless requested the court to enforce the settlement agreement for payment of his past claims, while preserving his right to bring future claims. The district court denied Crowell's motion and the Fifth Circuit affirmed, finding that "Crowell and LINA were not negotiating the

same claims and therefore, … the putative settlement agreement does not reflect a meeting of the minds."

- In *Kenseth v. Dean Health Plan, Inc*., No. 08-00001 (W.D. Wis. Feb. 14, 2011), a district court granted summary judgment with respect to a former plan participant's breach of fiduciary duty claim, finding that the remedy sought — payment of medical expenses the participant was told the plan would cover — is not "appropriate equitable relief" under ERISA § 502(a)(3). The ruling followed a decision by the Seventh Circuit, 610 F.3d 452 (7th Cir. 2010), which found that defendant had breached its fiduciary duty, but expressed skepticism that any relief was available. In its ruling, the district court explained that compensatory damages are never "equitable," whether recovered from a fiduciary or a nonfiduciary. The court also held that the relief sought was not "appropriate" because plaintiff had failed to show that her medical expenses would have been covered by the plan if she had not been misinformed regarding plan coverage; nor had she shown that relief would not be available via other provisions of ERISA, such as § 502(a)(1)(B).
- In *Womack v. Orchids Paper Products Co. 401(k) Savings Plan*, No. 09-748, 2011 WL 672565 (N.D. Okla. Feb. 15, 2011), a district court held that an employer breached its fiduciary duty by failing to transmit a 401(k) plan participant's investment directions to the plan's trustee. In so ruling, the court held that a prudent fiduciary would not have overlooked the directions, which the participant submitted to her employer with other forms as part of the plan's transition to a new trustee. As a result of the mistake, plaintiff's 401(k) plan account was invested in the plan's qualified default investment alternative, and decreased in value by approximately $100,000 during the next seven months. Summary judgment was granted against the employer, as the named plan administrator, and the employer's CEO and CFO as designated fiduciaries, for their failure properly to supervise and train the employee who mishandled plaintiff's forms. A bench trial will be held to determine damages.
- In *Dann v. Lincoln National Corporation*, No. 08-5740, 2011 WL 487207 (E.D. Pa. Feb. 10, 2011), a stock-drop case, the district court granted plaintiffs' motion to strike certain of defendants' allegedly "bare bones" affirmative defenses as insufficiently pled because they failed to allege legal elements and lacked factual support. The court struck (without prejudice and with leave to amend) the statute of limitations defense, and a defense alleging the plan administrator had discretion to interpret the plan and make factual determinations. The court refused to strike the "loss causation" and/or Section 404(c) defenses. It explained that, although such defenses may not technically be "affirmative," because plaintiffs bear the burden to prove a breach of fiduciary duty caused a loss to the plan, they "go to the heart" of fiduciary breach claims, as fiduciaries are not liable for plan losses that result from a participant's investment choices.
- In *Duffy v. Modern Waste Systems Corp.*, No. 09-cv-0655, 2011 WL 573564 (E.D.N.Y. Feb. 14, 2011), three employers and their owners were held jointly and severally liable for unpaid contributions to a multiemployer pension and welfare fund. Although only one employer signed a collective bargaining agreement requiring contributions to the fund, the district court ruled the three employers constituted a single employer because they shared personnel,

equipment, management, office space, and customers; and the companies constituted a single bargaining unit because they shared professional and administrative services, management, customers, and employees with similar working conditions, job duties, and locations. The companies' owners were held personally liable because they "dominated" the companies' management and abused their corporate status to such an extent that the district court ruled their corporate veils should be pierced.

> In *Am. Dental Ass'n v. Wellpoint Health Network Inc. (In re Managed Care Litig.)*, No. 02-cv-22027, 2011 WL 675540 (S.D. Fla. Feb. 16, 2011), the court dismissed dental providers' claims for additional reimbursement because of their failure to exhaust administrative remedies. The dentists claimed entitlement to additional fees based on the plan's reliance on an allegedly flawed database to calculate usual and customary rates for out-of-network services. One dentist inquired about the failure to pay his usual and customary fee and requested additional information from the plan, but he failed to file a formal appeal pursuant to the plan's procedures. The court determined that the failure to appeal could not be excused as "futile" based on plaintiffs' presumption that the outcome of the appeal would be adverse. Rather, the futility exception would be applicable only if plaintiff was unable to present a claim for administrative review.

> In *England v. Marriott International Inc.*, No. 10 Civ. 01256, 2011 WL 570128 (D. Md. Feb. 15, 2011), a district court granted, in part, and denied, in part, a motion to dismiss plaintiffs' claim that Marriott violated ERISA by failing to bring its retirement stock awards program into compliance with ERISA and to communicate with beneficiaries about their stock reward benefits at the time of their retirement. The court determined, among other things, that the members of the putative class who terminated their employment with Marriott prior to the passage of ERISA could not state a claim based upon ERISA's vesting requirements because ERISA does not "apply retroactively to persons who terminated employment before the requirements became effective." However, the court rejected defendants' argument that the other plaintiffs' claims were time-barred, reasoning that because Marriott denied that ERISA governed the rewards program until 2010, the statute of limitations did not run before then.

> In *Moss v. Unum Life Ins. Co*., No. 5:09-cv-209, 2011 WL 321738 (W.D. Ky. Jan. 28, 2011), the court held that the fiduciary exception to attorney-client privilege did not require disclosure of documents shared between in-house counsel and plan fiduciaries prior to the final administrative decision with respect to a claim for benefits, but after a lawsuit had been filed, because the documents related to the lawsuit rather than to plan administration.

> In *Theis v. Life Ins. Co. of N. Am*., No. 09-cv-98 (W.D. Ky. Feb. 4, 2011), the court held that the fiduciary exception to attorney-client privilege required the disclosure of certain documents related to payment of accidental death policy benefits created during administrative exhaustion of plaintiff's claim, but that the fiduciary exception did not require production of a document created after the final administrative benefit determination in response to a letter containing a "final demand for payment" and threatening litigation.

- In *Estate of Boss v. Boss*, No. 5:10-CV-190, 2011 WL 482874 (W.D. Ky. Feb. 4, 2011), the district court held that an estate's breach of contract claim for pension benefits brought against a deceased participant's ex-wife was not preempted by ERISA, and remanded the case to state court. Prior to divorcing, the plan participant named his wife as the beneficiary of his pension plan. Pursuant to a marital settlement agreement, the wife waived her right to the participant's pension benefits. The participant never changed the beneficiary designation for his pension plan and upon his death, his benefits were paid to his ex-wife. The deceased's estate brought suit in state court against the ex-wife, alleging that she breached the marital settlement agreement by accepting the pension benefits and not relinquishing them to the estate. The ex-wife removed the case, arguing that the claim was completely preempted by ERISA because the estate was seeking to recover benefits under an ERISA plan. The district court concluded that the breach of contract claim was not preempted by ERISA because the estate only sought to recover the pension benefits after they had been distributed to the rightful beneficiary. The court reasoned that the estate was not challenging the terms of the plan or seeking to enforce or clarify rights under the plan, but instead was seeking to enforce the terms of the marital settlement agreement.
- In *Mezyk v. U.S. Bank Pension Plan*, No. 3:09-cv-384-JPG, 2011 WL 147303 (S.D. Ill. Feb. 11, 2011), the district court certified two classes of participants challenging the conversion of their traditional defined benefit plan to a cash balance plan. Plaintiffs, participants who were forty-five years old or older when the conversion took place, challenged a plan provision that applied a deeper discount rate to their accounts than to the accounts of younger participants. They also asserted that the plan failed to properly notify them of the plan amendments, in violation of ERISA's statutory notice provisions. Plaintiffs sought to certify a class of all participants and a subclass of all participants age forty-five and older. Defendants argued that there were intra-class conflicts that prevented the named plaintiffs from serving as class representatives with respect to the statutory notice claims because some participants under age forty-five received greater benefits under the cash balance plan and would not want the conversion declared void. The court found that while defendants' objections were conceivable, they failed to point to a single person who received a benefit that was higher than the benefit he or she would have received if the prior plan remained in effect. The court did, however, exclude three participants who previously brought an unsuccessful lawsuit against defendants for the same claims.

Settlements

- In *Schmidt v. AK Steel Corp. Pensions Agreement Plan, et al.*, No. 09 Civ. 464 (S.D. Ohio Feb. 9, 2011), the court approved a settlement between AK Steel Corp. and a class of its union retirees, resolving the retirees' claim that the AK Steel Corp. Pensions Agreement Plan violated ERISA by failing to employ a "whipsaw" when calculating the retirees' lump-sum distributions. AK Steel Corp agreed to pay 42 retirees approximately $650,000 to make up for the difference between their lump-sum distributions and what they would have been paid had the company used the "whipsaw" when calculating the retirees' payments. Included in the settlement amount are attorney's fees in the amount of $95,000.

- In *In re PPF Bancorp Inc.*, No. 08 Civ. 13127 (D. Del. Bankr. Feb. 3, 2011), the bankruptcy court approved a settlement between PFF Bancorp Inc. (PFF) and a class of participants in its ERISA pension plans, resolving the participants' claims that PFF violated ERISA's fiduciary requirements by imprudently investing in company stock while it was known that the company's value was artificially inflated. PFF is slated to pay the class $3 million and potentially as much as an extra $400,000 from the proceeds of the class's bankruptcy claim. The judge in the district court in which the ERISA litigation is pending must grant final approval before the settlement is finalized.
- In *In re Ford Motor Company ERISA Litigation*, No. 06-cv-11718 (E.D. Mich. Feb. 15, 2011), the district court give final approval to a class action settlement for "stock drop" claims brought by employees of Ford. This settlement is different from most in that it does not establish a monetary fund. Instead, the parties fashioned a unique settlement agreement that requires Ford to implement remedial provisions that will improve the ability of the class to more effectively save for retirement with their 401(k) plans. Specifically, the settlement requires that: (1) Ford provide online financial advice tools for a period of four years following the settlement, enhance communications to active participants regarding the importance of diversification, and provide third-party fiduciary training for Ford's Investment Committee and Investment Process Committee; (2) within ninety days of the settlement, Ford must provide notice to active participants when their investment in Ford stock exceeds 20% of their total holdings; and (3) if Ford elects during the three years following the settlement to match employee contributions to the plan, the match must be made in cash and invested in any applicable investment option under the plan designated by the participant, or, if none is selected, the default investment option. The settlement does provide $2,500 for each named plaintiff and attorney's fees of $1,475,000 for plaintiffs' counsel.
- In *In re RadioShack "ERISA" Litigation*, No. 08-MD-1875 (N.D. Tex. Feb. 8, 2011), the district court approved a $2.4 million settlement of "excessive fee" breach of fiduciary duty claims, wherein a class of 35,000 participants alleged it was imprudent for Radio Shack's 401(k) plan to offer certain mutual funds as investment options in light of their below-average returns and fees. The settlement comes almost five years after the first case in the multidistrict litigation was filed, and almost three years after the class's stock-drop claims were dismissed. *See* 547 F. Supp. 2d 606 (N.D. Tex. 2008). As part of the settlement, RadioShack will provide $1.6 million to the mandatory, non-opt-out class, two years of outside investment advice to the plan participants, and additional training to the plan fiduciaries.
- In *In re Diebold ERISA Litig*., No. 5:06 CV 0170 (N.D. Ohio Feb. 11, 2011), the district court approved a $4.5 million settlement of an action brought by participants in Diebold's 401(k) plan who invested in Diebold stock. The complaint alleged that the defendants breached their fiduciary duties under ERISA by continuing to offer Diebold stock in the 401(k) plan when they knew that the company's stock was artificially inflated. The settlement followed a district court ruling in May 2008, denying defendants' motion to dismiss, and rejecting defendants' argument that a "presumption of reasonableness" should apply at the pleadings stage of the litigation, and a subsequent ruling in March 2009, denying plaintiffs' motion for class certification.

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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