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Editor's Overview

This month's article takes a look back at some highlights from 2010 and offers some predictions about what's in store for 2011. As the authors discuss below, ERISA cases continue to get the attention of the U.S. Supreme Court. 2010 was a year in which we saw several significant rulings in the area of employer stock fund litigation, and we expect to see more decisions in this area throughout 2011. The coming year also may be the year that significant decisions are issued with respect to the availability and scope of discovery in benefit cases, and the burdens of proof in plan communication claims.

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

Year-End Reflections for ERISA Plan Sponsors and Fiduciaries: Highlights from 2010 and Thoughts on What's in Store for 2011[1]

By Myron D. Rumeld and Russell L. Hirschhorn

With the year-end upon us, this is as good a time as any to take stock of recent decisions and trends in ERISA litigation and look into our crystal balls to see what it may tell us about what's in store for the year to come. This past year, there were several significant rulings that could conceivably represent the start of a trend toward limiting the risk of liability exposure in some of the principal areas of ERISA litigation, most notably stock-drop litigation. But whether this trend will take hold may depend on the outcome of some of the cases still pending. In other areas, including for example with respect to the availability and scope of discovery in benefit cases, and the burdens of proof in plan communication claims, recent cases have served merely to tee up the issue for future courts to resolve. As a result, while digesting the impact of this past year's decisions, we already wait in anticipation of those rulings that the coming year will bring.

Highlights of 2010

Of the many decisions that we have reviewed in the past year,[2] there are a few that are particularly noteworthy because of their potential impact on future litigation trends.

Supreme Court Rulings. ERISA cases continued to occupy the attention of the U.S. Supreme Court, which issued two significant rulings this past year. In *Hardt v. Reliance Standard Life Ins. Co.*, 130 S. Ct. 2149 (2010), the Court resolved a split among the circuits and ruled that a party need not be a "prevailing party" in order to obtain an attorneys' fee award in an ERISA action. Instead, the Court determined that only "some degree of success" is necessary. *Hardt* will clearly change the law in those circuits that had imposed a prevailing party requirement on parties seeking a fee award in ERISA cases. But whether the decision will substantially broaden the opportunity to recover attorneys' fees will depend on how the lower courts apply the newly enunciated "some success on the merits" standard, and the extent to which they continue to incorporate the "five factor" test that previously had been utilized to evaluate attorneys' fee motions.

In the other Supreme Court decision, *Conkright v. Frommert*, 130 S. Ct. 1640 (2010), the Court held that the plan administrator should be accorded the discretion to determine the remedy for its statutory failure to articulate clearly how benefits would be calculated for returning employees. In so ruling, the Court expressed a strong disinclination to unduly penalize plans for administrative errors, saying: "People make mistakes. Even administrators of ERISA plans." We will not be surprised to find this statement applied to a broad range of situations in which plaintiffs seek substantial recoveries of benefits not intended by the plan designers, based on clerical errors. This is already evident from the Seventh Circuit's decision in Young v. Verizon, 615 F.3d 808 (7th Cir. 2010), which, quoting this passage, applied the scrivener's error doctrine to remedy a devastating scrivener's error in Verizon's multi-billion dollar pension plan.

Employer Stock Fund Litigation. In the high-stakes area of employer stock-drop litigation, plan sponsors and fiduciaries continued to enjoy considerable success. With the Ninth Circuit's ruling in *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010), five circuit courts have now expressly adopted the *Moench* presumption of prudence related to investments in an employer stock fund. Armed with the *Moench* presumption, several courts have dismissed stock-drop claims at the pleadings stage, including in cases brought against some of the leading financial institutions during the financial meltdown. *See*, *e.g.*, *Dudenhoeffer v. Fifth Third Bancorp*, No. 1:08-cv-538, 2010 WL 4970767 (S.D. Ohio Nov. 24, 2010); *In re SLM Corp. ERISA Litig.*, 2010 WL 3910566 (S.D.N.Y. Sept. 24, 2010); *In re Bank of Am. Corp. Securities, Derivative, & ERISA Litig.*, 09-MD-2058, 2010 WL 2010 WL 3448197 (S.D.N.Y. Aug. 27, 2010); *In re Lehman Brothers Securities and ERISA Litig.*, 683 F. Supp. 2d 294, 301 (S.D.N.Y. 2010).

Excessive Fee Litigation. Plan sponsors and fiduciaries also generally continued to enjoy success in defending against plaintiffs' excessive fee litigation claims. In *George v. Kraft Foods Global, Inc.*, 684 F. Supp. 2d 992 (N.D. Ill. 2010), for example, a district court dismissed, on a motion for summary judgment, a suit challenging various aspects of the operation and administration of the plan, including the fees charged for various administrative and investment services, and the structuring of two company stock fund investment options as "unitized funds." In so ruling, the court rejected plaintiffs' contention that a request for proposal was the exclusive legitimate means of determining the reasonableness of recordkeeping fees. The court also rejected plaintiffs' claims that defendants failed to adequately disclose the fees paid to its recordkeeper.

We also saw the first “excessive and unreasonable fees” decision after trial, which resulted in a mixed verdict. In *Tibble v. Edison Int’l, No.* CV 07-5359 SVW (AGRx), 2010 WL 2757153 (C.D. Cal. July 8, 2010), the court ruled, after three-day bench trial, that defendants breached their fiduciary duty of prudence related to the investment in more expensive retail funds after August 2001 because, under the facts presented, there was no advantage offered by them and there was no evidence that the fiduciaries considered offering the institutional funds that had lower management fees. The court, however, rejected plaintiffs’ claim concerning mutual funds that were added to the plan years earlier because nothing had occurred that would have required the fiduciaries to reevaluate the available share classes and fee structure of these funds. The court also rejected plaintiffs’ duty of loyalty claim because plaintiffs had failed to demonstrate that defendants were improperly motivated by a desire to capture more revenue sharing for the plan sponsor. Insofar as plaintiffs claimed that defendants breached their duty of prudence because the funds had excessive investment management fees, the court concluded that defendants’ process for monitoring and negotiating the fees for the money market fund was prudent.

Issues and Trends on the Horizon for 2011

The coming year presents opportunities to clarify the law in several areas that have provoked a significant amount of high stakes litigation.

Supreme Court Rulings. In *CIGNA Corp. v. Amara*, Case No. 09-804, the Supreme Court will have the opportunity to clarify the standard of proof in cases where participants seek recovery of benefits based on an allegedly inaccurate summary plan description (SPD). Depending on the breadth of the Court’s ruling, the decision could have widespread implications on the sustainability of a large variety of claims under ERISA that are premised on allegations of faulty communications. As we have discussed previously, by addressing the extent to which there is an individualized burden of proof, the ruling in Amara also may have an impact on the ability of plaintiffs to obtain class certification of claims based on faulty communications.

Employer Stock Fund Litigation. In the employer stock fund arena, the recent trend in favor of dismissal of complaints which are found not to contain allegations sufficient to rebut the *Moench* presumption will likely continue to be tested at the appellate level. There are already two such cases pending before the Second Circuit. Decisions in these cases that are in line with the other Circuits could effectively put to rest any further challenges to the *Moench* presumption, and place in serious jeopardy the viability of any stock drop complaint in which the company was not at serious risk of financial failure.

Excessive Fee Litigation. The law with respect to excessive fee litigation is still too unresolved to slow the pace of such litigation. Furthermore, the U.S. Department of Labor's (DOL's) recently issued final regulation on fiduciary requirements for participant disclosure in participant-directed individual account plans may provide new opportunities for asserting such claims.

Section 404(c). The outcome of both employer stock fund and excessive fee litigation may be substantially impacted by forthcoming rulings from the Seventh Circuit in *Baxter International*, 10-cv-2273 and elsewhere on the scope of the defense under Section 404(c), 29 U.S.C. § 1104(c) — the provision of ERISA that purports to provide a safe harbor for fiduciaries in participant-directed plans. While some courts have concluded that Section 404(c) should provide a defense to claims challenging the selection and retention of employer stock funds, the DOL has taken the view that it does not. To bolster its position, the DOL recently stated in the final regulation on fiduciary requirements for participant disclosure in participant-directed individual account plans its view, which reiterated the view previously set forth in the preamble to its Section 404(c) regulation, that adherence to the regulatory disclosure requirements does not relieve a fiduciary from the duty to prudently select and monitor service providers or designated investment alternatives offered under a plan.

Conflict of Interest Discovery In Benefit Cases. Notwithstanding the Supreme Court's ruling in *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008), courts continue to be divided on the appropriate scope of conflict of interest discovery. Many (but not all) courts have recognized that limited discovery may be warranted in some circumstances to determine the extent of a conflict, but they are deeply divided on the scope of such discovery. We are hoping that the courts will provide greater clarity and consistency on this issue in the coming year.

Expanding the Definition of Fiduciary. Finally, the coming year may provide greater clarity on the circumstances in which investment advisors and consultants are subject to claims for fiduciary breach under ERISA, on the grounds that they "render investment advice for a fee." The significance of this issue has been heightened by the recent spate of lawsuits seeking recovery of Madoff investment losses, some of which have been directed against investment advisors and sub-consultants who participated in Madoff investments but whose status under ERISA under existing regulations is far from clear. In apparent recognition of this issue, the DOL has issued a proposed regulation which, if finalized, will both clarify and arguably expand the scope of advisors considered to be fiduciaries under ERISA.

Proskauer Is Perspective

Our look back at the past year, and forward into the coming year, confirms the enduring nature of ERISA litigation practice. It seems that for every issue that is resolved by the courts — typically after years of mixed results — there are an equal, if not greater, number of new issues arising. New issues are provoked by both the complexity of the subject matter, which naturally causes courts to reach divergent results, and by the ingenuity of the ever-present and increasingly active plaintiffs' bar. In both good and bad economic times, ERISA litigation continues to be a "growth stock." As a result, it will continue to be of concern to plan sponsors, administrators and fiduciaries.

Rulings, Filings and Settlements of Interest

- In *DeLuca v. Blue Cross Blue Shield of Michigan*, 2010 WL 4961726 (6th Cir. Dec. 8, 2010), the Sixth Circuit concluded that BCBS was not acting in a fiduciary capacity when it negotiated hospital reimbursement rates "because those business dealings were not directly associated with the benefits plan at issue here but were generally applicable to a broad range of health-care consumers."
- In *Resilient Floor* Covering *Pension Fund v. M&M Installation Inc.*, 2010 WL 5175008 (9th Cir. Dec. 22, 2010), the Ninth Circuit remanded an action brought by a multiemployer pension fund to recover withdrawal liability from a union company and its non-union company counterpart under an alter-ego theory of liability. In so ruling, the Ninth Circuit determined that the district court did not properly apply the alter-ego test, which requires proof that the two companies have common ownership, management, operations, and labor relations and that the non-union

company is being used to avoid the CBA obligations of the union company. The Ninth Circuit also rejected defendants' argument that there should be no alter-ego liability because the non-union company was in existence prior to the union company.

- In *Daniels-Hall v. National Education Association*, 2010 WL 5141247 (9th Cir. Dec. 20, 2010), the Ninth Circuit affirmed the dismissal of a class action based on the marketing of a retirement annuities plan that was not governed by ERISA. The suit, brought on behalf of approximately 57,000 public school employees, alleged that plaintiffs were misled into selecting the annuities plan by failing to disclose that the plan charged excessive fees. In so ruling, the court explained that ERISA does not apply to government plans administered by school districts.
- In *Brown v. Medtronic, Inc.*, 2010 WL 5059594 (8th Cir. Dec. 13, 2010), the Eighth Circuit affirmed the dismissal of a putative stock-drop class action. In so ruling, the Court held the plaintiff lacked standing as to some of his claims because he liquidated his company stock holdings before negative information about one of the company's products reached the public (which had allegedly caused a decline in the stock's price). With respect to those claims not dismissed for lack of standing, the Eighth Circuit ruled that it need not determine whether it should adopt the *Moench* presumption because the plaintiff failed to allege facts from which it could be inferred that the plan's company stock investment was imprudent. Although the plaintiff argued that the plan's company stock investments should have been liquidated when the company was informed of its product's problems, the Court explained that "it is fanciful to believe Medtronic could have taken such an action without creating a much more severe impact on stock price than the alleged impact that Medtronic's actual response caused."
- In *Kenney v. State Street Corp.*, 2010 WL 5035906 (D. Mass Dec. 9, 2010), a district court granted summary judgment in favor of State Street and dismissed plaintiff's claim that State Street breached its fiduciary duty by making negligent misrepresentations about the risk and quality of its investment portfolio in an SEC filing and press release. Although plaintiff claimed that these risky investments caused losses to participants in the ESOP, plaintiff admitted that he had not read either of the documents and therefore could not have relied on the statements.
- In *Crosby v. Louisiana Health Service and Indemnity Co.*, 2010 WL 5356498 (5th Cir. Dec. 29, 2010), the Fifth Circuit overturned a magistrate judge's ruling, adopted by the district court, that limited a health care plan participant's discovery from her insurance company to the administrative record. The participant "sought extensive discovery concerning the compilation of the administrative record, the proceedings at the administrative level, and [the insurance company's] past coverage determinations" in similar situations.

The magistrate judge denied the request, reasoning that Fifth Circuit precedent restricted the scope of discovery to evidence of how the administrator had previously interpreted the plan and expert reports explaining scientific terms. In overturning the magistrate judge's decision, the Fifth Circuit stated that while its prior decisions have prohibited "the admission of evidence to resolve the merits of the coverage determination[,]" they do not "prohibit the admission of evidence to resolve other issues that may be raised in an ERISA action." For example, a plaintiff seeking benefits under section 502(a)(1)(B), according to the Court, may seek to introduce evidence concerning the completeness of the administrative record, whether the plan administrator complied with ERISA's procedural regulations or whether there existed a conflict of interest.

- In *In re Schering-Plough Corporation ERISA Litigation*, No. 03-1204 (D.N.J. Dec. 16, 2010), the district court approved the $8.5 million settlement of stock-drop claims whose litigation spanned over seven years and involved two appeals to the Third Circuit.
- In *FedEx Corporation v.* Northern *Trust Company*, No. 08-2827 (W.D. Tenn. Dec. 16, 2010), the parties reached a confidential settlement of a two-year long litigation over Northern Trust's alleged mismanagement of the assets in FedEx's pension plan

[1] Originally published by Bloomberg Finance L.P. Reprinted with permission.

[2] For our readers' convenience, we have provided hyperlinks to articles by our colleagues that analyzed in greater detail the cases discussed below.

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