Proskauer

The ERISA Litigation Newsletter

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Editor's Overview

This month, we provide an update on the developing law regarding the "fiduciary exception" to attorney-client privilege and the work product doctrine. This "exception" often confounds in-house and outside counsel alike, and the article concludes with some best practices suggestions. We also highlight a U.S. Supreme Court decision from this term, *AT&T Mobility v. Concepcion*, which held that the Federal Arbitration Act preempts a state law prohibiting waivers of class arbitration. The article discusses the decision's potential implications for employee benefits practitioners.

As always, be sure to review the section on *Rulings, Filings, and Settlements of Interest*. The section includes a summary of a decision that will be discussed in depth in next month's Newsletter: *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc.*, in which the Seventh Circuit held that participants' claims arising from improper calculations of lump sum benefit distributions accrued upon receipt of those benefits.

An Update on ERISA Attorney-Client Privilege and the Work Product Doctrine Under ERISA's "Fiduciary Exception"[1]

Contributed by Howard Shapiro

Supreme Court Justice Roberts has acknowledged the complexities confronting ERISA plan administrators: "People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that the Employee Retirement Income Security Act of 1974 is 'an enormously complex and detailed statute,' *Mertens v. Hewitt Associates,* 508 U.S. 248, 262, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993), and the plans that administrators must construe can be lengthy and complicated." *Conkright v. Frommert,* 130 S. Ct. 1640, 1644 (2010). It is also no surprise that ERISA plans often seek advice of counsel to assist in plan administration and settlor function matters. Whether in-house or outside counsels' benefits-related advice remains legally privileged and confidential, and/or protected by the attorney work product doctrine, continues to be a hot topic for the courts, participants, plan administrators, and ERISA plans.

There is a large and growing body of law addressing whether an exception exists for the typical attorney-client privilege, where counsel advises ERISA plan fiduciaries. *See* Stacey Cerrone, Proskauer Rose LLP, *Reconciling the Attorney Client Privilege with ERISA's "Fiduciary Exception,"* Bloomberg Law Reports — Employee Benefits, Vol. 3, No. 21 (Oct. 11, 2010). Under the so-called "fiduciary exception" crafted by the courts, "an employer acting in the capacity of ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration." *U.S. v. Mett*, 178 F.3d 1058, 1063 (9th Cir. 1999). However, where the advice relates to a settlor function, such as the adoption, modification, or termination of an employee benefit plan, the fiduciary exception does not apply. *In re Long Island Lighting Co.*, 129 F.3d 268 (2d Cir. 1997).

Frequently, in an effort to sustain legal privilege, defendants have invoked the concept that counsel's communication is shielded from disclosure because. at the time the communication occurred, the plan participant's interests diverged from the plan and litigation was foreseeable. That is to say, the participant no longer shared common interests with other plan participants and the plan fully expected that if the claim was denied, surely a lawsuit would follow. This defense argument often is intertwined with the doctrine of attorney work product, as defendants argue that because litigation was foreseeable, communications between counsel and the fiduciaries were privileged and protected by the work product doctrine. Work product refers to the writings, notes, memoranda, reports on conversations with the client or witness, research, and confidential materials that reflect an attorney's impressions, conclusions, opinions, legal research, or theories. Unlike the attorney-client privilege, the right to assert work product protection belongs principally to the attorney. The work product doctrine confers a qualified privilege on documents prepared by an attorney in anticipation of litigation. *Hickman v. Taylor*, 329 U.S. 495, 509–14, 67 S. Ct. 385 (1947). Opinions dealing with the divergence/work product issue have revolved around the timing of counsel's communication.

Recently, the Fourth Circuit has promulgated an opinion on legal privilege and work product in the ERISA context. Also, many district courts have applied these concepts to actual discovery disputes with varying results.

The Rationale for the Fiduciary Exception to the Attorney-Client Privilege

The fiduciary exception developed in non-ERISA cases involving other types of fiduciary relationships, such as between estate trustees and beneficiaries and shareholders and corporate managers. *See Mett*, 178 F.3d at 1063-64 (reviewing genesis of fiduciary exception); *see also Garner v. Wolfinbarger*, 430 F.2d 1093 (5th Cir. 1970) (recognizing fiduciary exception and stating, “where the corporation is in suit against its stockholders on charges of acting inimically to stockholder interests, protection of those interests as well as those of the corporation and of the public require that the availability of the privilege be subject to the right of the stockholders to show cause why it should not be involved in the particular instance”).

As applied to ERISA litigation, the exception is rooted in two distinct rationales. Some courts have held that the fiduciary exception derives from an ERISA fiduciary’s duty to disclose to plan beneficiaries all information regarding plan administration, particularly when it is the administration of the plan that is being challenged in the litigation. In such cases, the fiduciary exception can be understood as an instance of the attorney-client privilege giving way to a competing legal principle. Other courts have endorsed the theory that, as a representative for the beneficiaries of the plan which he is administering, the fiduciary is not the real client. In these cases, the fiduciary exception is not an “exception” to the attorney-client privilege; rather, it reflects the fact that, at least as to advice regarding plan administration, a fiduciary is not “the real client” and thus never enjoyed the privilege in the first place.

Fourth Circuit Applies the Fiduciary Exception to Legal Privilege and Work Product

In *Solis v. The Food Employers Labor Relations Association,* No. 10-CV-1687, __ F.3d __, 2011 WL 1663597 (4th Cir., May 4, 2011),[2] the Fourth Circuit Court of Appeals issued its first opinion dealing with the application of the ERISA fiduciary exception. The case arose from a common fact pattern involving a Department of Labor (DOL) audit/investigation of plan asset investments. Two multiemployer plans invested approximately 3% of their assets in Bernard Madoff funds, resulting in approximately a $10.1MM loss to the plans. Pursuant to ERISA § 504(a)(1), 29 U.S.C. § 1134(a)(1), the DOL commenced an investigative audit as to fiduciary decision-making related to the plans' Madoff investments. The DOL subpoenaed certain documents related to Board of Trustees meetings, including meeting minutes, documents distributed at meetings, notes taken at meetings, and Trustee correspondence relating to Madoff investments. During the investment decision-making process, the Board of Trustees was advised by counsel. Counsel withheld certain documents and redacted portions of other documents, claiming that the documents were protected by attorney-client and work product privileges. Counsel did not submit a privilege log, asserting that documents were not produced because of contemplated future litigation.

In a unanimous decision, the court applied the fiduciary exception to attorney-client privilege and held the plans failed to carry their burden to demonstrate the applicability of the work product doctrine. The court first surveyed the existing case law, discussing the two different theories used to invoke the fiduciary exception: some courts conclude that the ERISA fiduciary's duty to act in the exclusive interest of beneficiaries supersedes the fiduciary's right to assert attorney-client privilege, while other courts hold that the ERISA fiduciary – functioning as a representative of participants and beneficiaries – is not counsel's real client for advice as to plan administration, meaning no privilege ever existed. *Solis,* __ F.3d at __, 2011 WL 1663597 at *4.[3] Without specifying a controlling theory, the court held that the fiduciary exception to attorney-client privilege extends to communications between an ERISA trustee and a plan attorney regarding plan administration. The panel cautioned that limits exist as to the application of the fiduciary exception. The court stated that the exception will not apply to a fiduciary's communications with an attorney regarding his personal defense in an action for breach of fiduciary duty. *See Mett,* 178 F.3d at 1064. Also, the panel held that communications between ERISA fiduciaries and plan attorneys regarding non-fiduciary, settlor function matters, such as adopting, amending, or terminating an ERISA plan, are not subject to the fiduciary exception. *Solis,* __ F.3d at __, 2011 WL 1663597, at *5.[4]

Albeit in *dicta,* the court also provided its views as to the work product doctrine. The panel reiterated the relationship between the plan Trustees and the participants, noting that the Trustees owed fiduciary duties directly to the participants and beneficiaries of the plans. Surveying the case law, and based upon the duties owed by the Trustees, the court opined that it could discern no reason to distinguish between the application of the fiduciary exception to attorney-client privilege or the work product doctrine. However, the court then held that because the plans failed to provide privilege logs identifying specific litigation for which documents were prepared, there was no reason to reach the issue of whether the work product doctrine is subject to the fiduciary exception. *Solis,* __ F.3d at __, 2011 WL 1663597 at *9.[5]

The Fiduciary Exception at the District Court Level

Many of the disputes implicating the fiduciary exception arise during the administrative review of benefit claims. Frequently, during the exhaustion of plan administrative procedures, plan fiduciaries interact with counsel. To resist production of certain documents that are arguably subject to the fiduciary exception, whether created by in-house or outside counsel, plans often argue the advices are shielded from production because they are documents created in anticipation of litigation or because the interest of the plaintiff and the plan had diverged already when the documents were created.

In *Carr v. Anheuser-Busch Cos., Inc.,* No. 10-CV-1729, 2011 WL 2174853 (E.D. Mo., June 3, 2011),[6] plaintiff sued for severance benefits. After the initial claim denial, but before the appeal was considered, in-house counsel sent an e-mail to the plan administrator providing guidance for use when reviewing the appeal of a denied claim. The district court held that the exception applied because the content of the e-mail directly related to how the administrator would conduct the appeal procedure and made no reference whatsoever to future litigation strategy. The district court held there was no divergence of interest between the participant and the plan because in-house counsel was informing the administrator of his duties generally toward all participants. However, the court held that a series of e-mails created after the appeal denial decision was made, but before the final letter was sent denying the appeal, were legally privileged. The district court held these e-mails related specifically to the denial of plaintiff's claim. As the drafting of the denial letter was merely the final end stage in the plan administration process, at this point plaintiff's interest was sufficiently adverse to the plan administrator, negating the application of the fiduciary exception.

These “timing” issues recur in various cases where plan administrators consider benefit claims and defendants argue that legal documents are shielded from production because the interests of the plaintiff and plan have diverged, and/or that the documents were created in anticipation of litigation. In *Gunderson v. MetLife Ins. Co.,* No. 10-CV-50, 2011 WL 487755 (D. Utah, Feb. 7, 2011),[7] plaintiff sought production of a legal opinion provided to the plan administrator two weeks before final resolution on appeal of the claim. Even though the opinion came at the end stage of claim denial, the district court required production of the document because it was advice given to ensure the plan administrator acted correctly in its claim decision and had nothing to do with future, anticipated litigation. In *Thies v. LINA,* No. 09-CV-98, __ F. Supp. 2d __, 2011 WL 482876 (W.D. Ky., Feb. 4, 2011),[8] two documents were withheld from production on the grounds of legal privilege: one e-mail was written by counsel between the time of the initial claim denial and the appeal; the second e-mail was written in response to plaintiff’s request for reconsideration communicated by his attorney after the final denial of the claim. The district court held the first e-mail was subject to the fiduciary exception because the claim was treated as a routine appeal and there was no indication of future litigation. The second e-mail differed. There the plan had denied the claim, exhaustion was complete, and plaintiff sought reconsideration. The district court noted that in the same letter, plaintiff’s counsel demanded payment and threatened to pursue his claim in court. The district court held that at this point the interests of the plaintiff and the plan had diverged, and that there was a real and substantial possibility of litigation.

Other cases exploring similar “timing issues” include: *Moss v. UNUM,* No. 09-CV-209, 2011 WL 321738 (W.D. Ky., Jan. 28, 2011)[9] (holding that where litigation was filed before claim review was completed, in-house counsel’s communication was legally privileged and confidential because it related to the litigation, not the claim review process); *David v. Alphin,* No. 07-CV-11, 2010 WL 3719899 (W.D.N.C., Sept. 17, 2010) [10] (holding that documents regarding settlor function issues are privileged, while ordering production of documents dealing with plan administration and investment of plan assets); *Buzzanga v. LINA*, No. 09-CV-1353, 2010 WL 1292162 (E.D. Mo., April 5, 2010)[11] (ordering production of three documents written before the claim was denied, while shielding the fourth document from production because it was generated in response to plaintiff’s appeal; the court held that the prospect of litigation was sufficient to erect the work product barrier to production); *Allen v. Honeywell Retirement Earnings Plan,* 698 F. Supp. 2d 1197 (D. Az. 2010) (rejecting defendants’ divergence argument for documents created after the initial denial letter issued and requiring the production of documents from outside counsel because, *inter alia,* the initial denial letter invited plaintiffs to appeal and the final denial letter stated defendants undertook a careful review of the administrative record).

Proskauer’s Perspective

This area of the law is difficult for in-house counsel and outside counsel. In-house counsel and outside counsel are asked questions by their clients; clients expect immediate responses. However, clients may wear two hats: they may have fiduciary duties and settlor function duties with respect to benefit plans. Clients frequently pose questions as to benefit plan issues without distinguishing between whether their questions deal with settlor functions or plan administration and whether, in their client capacity, they are acting as an employer/settlor or a fiduciary. One model for preserving legal privilege and work product protection is for a client to divide functions between counsel: one attorney provides plan administration advices, anticipated to be subject to discovery; a second attorney provides settlor function advices and advices in anticipation of litigation, anticipated to be privileged and confidential. This division of tasks can take place among attorneys in the same in-house law department or in the same outside law firm. Such a division of legal tasks is predicated on counsel and client clarifying the engagement and what entity the attorney will actually represent. However, despite best practices as to the scope of the engagement and identification of the client, plan fiduciaries must be made aware that when involved in plan administration, increasingly they operate in an arena where their interactions with counsel may be subject to discovery during litigation.

***AT&T Mobility v. Concepcion*: Can Arbitration Bar ERISA Class Actions?[12]**

Contributed by Robert Rachal

In *AT&T Mobility v. Concepcion,* No. 09-893, 2011 WL 1561956 (April 27, 2011), the U.S. Supreme Court addressed whether the Federal Arbitration Act (FAA) preempted California's judicial rule that effectively required arbitration agreements to include the right to class arbitration for them to be enforceable. Continuing in a long line of cases that have supported arbitration, the Court held this judicial rule was preempted by the FAA since it stood as an obstacle to the accomplishment of the FAA's objectives; the preempted rule did so because it would have required arbitrations to comply with the procedural formalities, costs, and exposures attendant on class proceedings.

As discussed below, there are complex issues involved in whether and when arbitration may apply to ERISA claims, and whether an employer or fiduciary may wish to require arbitration. *Concepcion* does not directly answer these questions. However, *Concepcion* suggests that when arbitration *does* apply to ERISA claims, it may be used to avoid the delay, expense, and risk associated with class actions.

The Court's Decision

In *Concepcion*, the plaintiffs, Vincent and Linda Concepcion, entered into an agreement for the sale and servicing of cellular telephones with AT&T Mobility. This form agreement provided for arbitration of all disputes between the parties, but excluded any class arbitration. Specifically, the agreement required that claims be brought in the parties' "individual capacity, and not as a plaintiff or class member in any purported class or representative proceeding." The agreement had various provisions facilitating arbitration, including simplified forms and procedures to bring claims, and provided that AT&T must pay the costs of all nonfrivolous claims. The agreement also provided that if the arbitration award was greater than AT&T's last settlement offer, then AT&T had to pay a $7,500 minimum recovery and twice the amount of the claimant's attorney's fees.

The Concepcions purchased AT&T service, which was advertised as including the provision of free phones. The Concepcions were not charged for the phones, but were charged $30.22 in sales tax based on the phones' retail value. The Concepcions claimed they should not have been charged $30.22 in sales tax based on the receipt of what had been advertised as free phones. The Concepcions filed a lawsuit in federal court that was consolidated as part of a putative class action asserting a claim related to the alleged improperly charged sales tax. AT&T moved to compel arbitration under the terms of its agreement with the Concepcions. The Concepcions opposed the motion, contending that the arbitration agreement was unconscionable and unlawfully exculpatory under California law because it disallowed class-wide procedures.

Section 2 of the FAA provides that arbitration provisions in contracts are "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." The district court and the Ninth Circuit held AT&T's arbitration provision was unenforceable under California's *Discover Bank* rule, which generally refuses to enforce consumer and like contracts of adhesion that have class action waivers.[13] The Ninth Circuit reasoned that *Discover Bank* did not impermissibly single out arbitration agreements because this bar applied to all forms of class action waivers.

The Supreme Court reversed.[14] The Court first noted that the FAA's preemptive reach may extend not just to state laws that explicitly prohibit arbitration, but also to state laws that are applied in a fashion that disfavors arbitration. Likewise, the Court held that the savings clause of the FAA could not be read to preserve "state law rules that stand as an obstacle to the accomplishment of the FAA's objectives." Applying this standard, the Court held that requiring class arbitration would interfere with the FAA's objectives of providing informal and streamlined proceedings to resolve disputes. The Court noted that class arbitration proceedings are fundamentally different from individual arbitrations, requiring procedural protections and formalities to protect absent parties, and greatly increasing the risk to defendants, who would not have the procedural reviews and protections afforded in class litigation. The Court likened this imposition of class arbitration requirements to state laws that would attempt to directly impose procedural requirements on arbitration (a point the Concepcions conceded could not be done), finding all of this incompatible with the FAA's objectives.

The Court concluded its opinion by observing that states could not use other justifications, such as the desire to ensure that small dollar claims can be prosecuted, as grounds to impose procedures incompatible with the FAA. The Court also noted that this concern was unwarranted in this case in light of the agreement's requirement that AT&T pay $7,500 plus double attorney's fees if its settlement offer is too low.

Justice Breyer, with whom Justices Ginsburg, Sotomayor, and Kagan joined, dissented, stating that California's *Discover Bank* rule should be saved since it applied to all contracts, not just to agreements to arbitration. The dissent also thought imposing class arbitration did not necessarily frustrate the FAA's objectives, since it declined to read the FAA as endorsing individual arbitration as a fundamental attribute of arbitration.

Proskauer's Perspective

Whether and when arbitration may apply to ERISA claims raises numerous complex issues. For example, the arbitration of benefit claims is subject to significant limitations, [15] and may put at risk the "abuse of discretion" review that courts normally apply to the decisions of the plan administrator. And, despite the Supreme Court's wholesale embrace of arbitration, it can also be expected that plaintiffs will make procedural arguments to fight arbitration, such as contending that claims brought on behalf of an ERISA plan cannot be subject to a participant's or employee's agreement to arbitrate.

Employers may nonetheless want to consider whether to seek arbitration agreements for ERISA claims, particularly ERISA fiduciary claims, in light of the Supreme Court's holding in *Concepcion*. Courts have enforced agreements to arbitrate ERISA claims,[16] and based on the Supreme Court's unequivocal embracing of arbitration, including for statutory employment claims, the stronger case would appear to be that ERISA claims can be subject to arbitration. Likewise, if the claim is subject to arbitration under the FAA, under *Concepcion* it ought to be permissible for those agreements to arbitrate to preclude class claims. *Concepcion* reflects that attempting to require class arbitration is incompatible with the objectives of the FAA, while ERISA's "anti-preemption" provision for federal law suggests that ERISA should defer to this objective.[17]

Rulings, Filings, and Settlements of Interest

Cash Balance Plan Conversions:

- In *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son, Inc*., Nos. 10-3917, 10-3918, 10-3988 & 10-3989, 2011 WL 2463550 (7th Cir. June 22, 2011), the Seventh Circuit resolved two issues in a class action by cash balance plan participants who alleged the plan had improperly calculated their preretirement lump sum distributions by failing to adjust the amount for future interest credits: (1) when did plaintiffs' claims accrue for statute of limitations purposes, and (2) was the plan's proposed method for recalculating the improper lump sum distributions entitled to deference. The court concluded that plaintiffs' claims accrued upon receipt of the improper lump sum distributions because that event served as an unequivocal repudiation of entitlement to benefits beyond plaintiffs' account balances. The court accordingly barred the claims of a group of participants who received their lump sum distributions more than six years before the suit commenced. Defendants argued that the limitations period should have run from the time of distribution of the SPD and receipt of several newsletters that advised participants regarding the calculation of benefits under the cash balance formula. The court found, however, that because the rights at issue were relatively obscure and the references in the SPD and newsletters offered only oblique guidance, there had not been sufficient notice to begin the statute of limitations period. Next, as to the proper remedy, the Seventh Circuit held that defendants' proposed recalculation methods were not entitled to deference because the plans did not grant the administrators discretion to calculate lump sum distributions. The court reasoned that because the plan provided an invalid calculation method, the administrator's proposed recalculation methods were novel creations rather than the result of interpretive discretion. In so holding, the court distinguished *Conkright*

v. Frommert, 130 S. Ct. 1640 (2010), which held that administrators' plan interpretations are entitled to deference despite an initial impermissible interpretation. (*See May 2010 Newsletter*.) The Seventh Circuit remanded to the district court to fashion an appropriate formula that was not the result of any deference to the plan defendants' views.

- On remand from the Tenth Circuit, the district court granted in part and denied in part Solvay Chemicals Inc.'s motion for summary judgment in *Jensen v. Solvay Chemicals Inc.*, "___ F. Supp. 2d ___, No. 06 Civ. 00273, 2011 WL 2174896 (D. Wyo. May 24, 2011). The court held that there were genuine issues of material fact as to whether Solvay's failure to provide adequate notice to participants regarding the conversion of the company's pension plan to a cash balance plan (which the Tenth Circuit already determined to be deficient under Section 204(h) of ERISA) was intentional. The Tenth Circuit remanded the case with the directive that unless Solvay's violation of 204(h) was "egregious,"— *i.e.* there was an intentional failure to meet the statute's notice requirements — plaintiffs would have no remedy under ERISA. The court rejected Solvay's argument that to prove "intentional failure" plaintiffs had to provide evidence that Solvay "deliberately omitted information from the 204(h) Notice and made the conscious decision to distribute a deficient 204(h) notice." The court was satisfied that there was enough circumstantial evidence supporting the contention that Solvay knew the statutory requirements and failed to follow them, which it deemed sufficient to deny in part Solvay's motion for summary judgment. The court granted Solvay's motion for summary judgment, however, with respect to the issue of whether Solvay violated section 204(h) by failing to provide participants with "most of the information" required by ERISA. In so doing, the court reasoned that of all the deficiencies claimed by plaintiffs, the Tenth Circuit "only found one required piece of information missing," and agreed with the Tenth Circuit that the notice provided participants with sufficient information to determine the magnitude of the reduction in benefits.

Withdrawal Liability:

- In *In re Marcal Paper Mills Inc*., __ F.3d __, No. 09-4574-cv, 2011 WL 2410740 (3rd Cir. June 16, 2011), the Third Circuit affirmed the district court's decision holding that withdrawal liability under ERISA incurred by a contributing employer as a result of work performed by covered employees after the employer filed a petition for Chapter 11 bankruptcy was afforded a priority status in the bankruptcy proceeding, such that the post-petition withdrawal liability amount would be paid before unsecured claims. The withdrawal liability allocated to pre-petition work would not be afforded the same priority. The court reasoned that post-petition withdrawal liability should be treated as an administrative expense because it was necessary for the employer's continued operation. Additionally, the employer promised its

covered employees that they would receive benefits for all work performed post-petition.

Retiree Benefits:

- In *Kerber v. Qwest Group Life Ins. Plan*, __ F.3d __, No. 10-1349, 2011 WL 2151201 (10th Cir. June 2, 2011), the Tenth Circuit held that Qwest did not breach the plan terms or its fiduciary duties when it amended its retiree life insurance plan to reduce benefits under a "minimum benefits provision." The terms of the plan included a "reduction formula" whereby life insurance proceeds remained constant until the retiree reached age 66, and then decreased over a number of years until it reached 50% of the original amount. Qwest incorporated a reservation of rights provision in the plan that would allow it to "amend or terminate any or all provisions in the future for any reason." In 2005, the Qwest Plan Design Committee unilaterally reduced the benefits available underthe "minimum benefits provision" from $20,000 to provide a fixed $10,000 benefit. The Tenth Circuit held that the reservation of rights clause unambiguously reserved Qwest's right to reduce the retirees' benefits. Furthermore, the court held that the minimum benefits provision was a limitation only on the reduction formula and not an overarching limitation on the plan as a whole. Finally, the court concluded that Qwest did not misrepresent to participants Qwest's ability to amend or terminate the plan on account of clear language in the plan itself, a human resources director's statements made during a video conference, and additional confirmation statements mailed to participants between 2001 and 2004.
- In *Witmer v. Acument Global Technologies Inc.,* No. 08-12795, 2011 WL 2111899 (E.D. Mich. May 26, 2011), the district court granted summary judgment to Acument, holding that the company's reservation of rights clause unambiguously gave Acument the right to amend, modify, suspend, or terminate retirees' health care and life insurance benefits. The court held that the reservation of rights clause defeated the retirees' claims under ERISA and the Labor Management Relations Act. Among other claims, the retirees argued that their benefits vested because the governing collective bargaining agreements (CBAs) provided for "continuous" health benefits. The court rejected this argument, concluding that the CBAs' reservation of rights clause was entirely inconsistent with an intent to vest benefits. The district court also held that the fact that Acument chose not to exercise its rights until late 2007 did not constitute a waiver of such rights.

Proper ERISA defendant:

- In *Cyr v. Reliance Standard Life Insurance Co.*, Nos. 07-56869, 08-55234, 2011 WL 2464440 (9th Cir. June 22, 2011), expressly overruling its prior decisions and statements on this issue, the Ninth Circuit held that potential defendants in actions

for benefits under ERISA Section 502(a)(1)(B) should not be limited to plans and plan administrators. The plaintiff, a participant in her employer's long-term disability plan, brought suit against the insurer who effectively controlled her benefits determination decision, even though it was not the named plan administrator. The Ninth Circuit held that entities other than the plan or the plan administrator may be the "logical" defendants where, for example, they perform activities that a plan administrator ordinarily would, such as making benefit determinations and paying benefits. Considering the Supreme Court's decision in *Harris Trust & Savings Bank v. Salomon Smith Barney, Inc.*, 530 U.S. 238 (2000), that a non-fiduciary may be held liable under ERISA Section 502(a)(3), the Ninth Circuit concluded there are no statutory or regulatory limits on who may be sued under ERISA Section 502(a), and thus there was no reason to read a limitation into ERISA Section 502(a)(1)(B).

Standard of Review:

- In *Viera v. Life Ins. Co. of North America*, __ F.3d __, No. 10-2281, 2011 WL 2279175 (3d Cir. June 10, 2011), the Third Circuit held that language in an accidental death and dismemberment policy requiring that the claimant furnish "proof of loss satisfactory to us" was insufficient to confer discretion on the administrator to make a benefits decision. Therefore, LINA was not entitled to the deferential "abuse of discretion" standard of review, and the case was remanded to the district court to review LINA's decision to deny benefits *de novo*. In so holding, the court cited authority from the Second, Seventh, and Ninth Circuits, all of which have held that the ambiguity in the language "satisfactory to us" must be resolved in favor of the insured. The court also recognized the existence of a circuit split on this issue, given that the First, Eighth, and Tenth Circuits have found that the same language is sufficient to trigger discretionary review. The court held that to be insulated from *de novo* review, the plan must unambiguously communicate that the administrator has broad authority to interpret, implement, and even change the plan's rules. While there are no "magic words" required for a policy to reserve discretion, the court suggested the following safe harbor language: "Benefits under this plan will be paid only if the plan administrator decides in its discretion that the applicant is entitled to them."

ERISA Plan:

- In *Boos v. AT&T Inc.*, __ F.3d __, No. 10-50353-cv, 2011 WL 2163611 (5th Cir. June 3, 2011), the Fifth Circuit affirmed the district court's decision holding that a "concession" benefits program, which essentially provided free or discounted telephone services to AT&T retirees in the region and reimbursement for telephone services paid for by out-of-region ("ORR") AT&T retirees, was not a defined benefit

plan under ERISA because it did not provide “taxable income.” The court “conclude[d] that although Concession does provide income to some retirees, such income is incidental to the benefit. The ‘primary thrust’ of Concession is to provide retirees with discounted phone service, which the vast majority of the beneficiaries receive as ‘no additional cost’ service… We find it significant that a retiree’s status as either an in-region or an ORR beneficiary, and thus whether he receives income from Concession, is not immutable, but is purely a function of whether he lives in the Defendants’ service area. In short, no beneficiary of Concession has a certainty of income from it.”

Class Certification:

- In *Otte v. Life Ins. Co. of N. Am.*, __ F. Supp. 2d __, No. 09-cv-11537-RGS, 2011 WL 2307404 (D. Mass. June 10, 2011), the district court conditionally certified a class of 90,000 to 130,000 participants in 5,000 different life insurance plans as to claims that CIGNA and LINA violated ERISA in paying life insurance benefits by crediting accounts from which beneficiaries could withdraw their benefits. Specifically, plaintiffs alleged that the companies’ retention, comingling, use, and investment of benefits owed to participants constituted a breach of fiduciary duties and a prohibited transaction. In certifying the class, the court held that the claims met the typicality requirement, despite the fact that 5,000 different plans were involved, because the claims implicated a plan-wide practice rather than the language of individual plans or SPDs, and the companies were fiduciaries as to the benefits made available – but not actually transferred – to beneficiaries. The class was certified pursuant to Rule 23(b)(3), and the court determined that individual damage calculations would be limited to “a formulaic calculation of the share to be allocated to each class member from the proposed constructive trust.” The court also certified two subclasses based on the statute of limitations: (1) plaintiffs who had actual knowledge of the material aspects of the accounts at least three years before the suit, and (2) those who did not.
- In *Yost v. First Horizon Nat’l Corp.*, No. 08-2293, 2011 WL 2182262 (W.D. Tenn. June 3, 2011), the district court certified a class of 401(k) plan participants who alleged that plan fiduciaries breached their ERISA duties by permitting plan investments in company stock and proprietary mutual funds from 2003 to 2006, while the company was at risk due to, *inter alia*, its involvement with subprime mortgage-backed securities. In so ruling, the court held that the named plaintiffs had standing because they held the challenged investments during the proposed class period and alleged they suffered actual injury to their plan assets, but putative class members who suffered no loss lacked standing. The court also determined a class was appropriate despite defendants’ contentions that each participant controlled his own unique investments in up to eleven different investment funds and suffered

unique losses, if any, because the court found that the need for individual damage calculations does not defeat typicality. Further, the court held that defendants' potential ERISA Section 404(c) affirmative defense did not render the claims atypical because § 404(c) is not relevant at the class certification stage, opining that "it is far from clear that the § 404(c) safe harbor defense is available in cases like this one." The court created a subclass of participants who signed releases, and conditioned certification on the parties' ability to precisely define other appropriate subclasses. In an earlier ruling, the court refused to apply the "presumption of prudence" at the motion to dismiss stage (*see November 2010 Newsletter*).

Stock Drop Litigation:

- In *Tatum v. R.J. Reynolds Tobacco Co.*, No. 02-0373, 2011 WL 2160893 (M.D.N.C. June 1, 2011), following a four-week trial addressing whether defendants breached their fiduciary duties under ERISA by allegedly mismanaging the R.J. Reynolds Capital Investment Plan, plaintiffs, a class of employees and retirees of RJR who owned Nabisco stock when it was removed from the plan as an investment option, moved to amend their complaint to conform to the evidence presented at trial and requested a ruling on the subject of the proposed amended complaint: "whether defendants followed the proper amendment procedures in the Plan documents when they issued an amendment to the plan removing former company stock funds, and, if not, whether that amendment is invalid." The district court ruled that the plan amendment authorizing the liquidation of company stock from the plan was invalid because the plan's amendment procedures, which required a majority vote or written instrument from the plan's committee, were not followed. In so ruling, the court determined that the plan committee's prior decision to cease offering the Nabisco stock fund as an investment option did not authorize the liquidation of the stock held by the plan at that time, and rejected defendant's contention that "fraud, bad faith or detrimental reliance" must be shown to invalidate a plan amendment. A motion to decertify the class is currently pending.

Exhaustion:

- In *Kirkendall v. Halliburton, Inc.,* No. 07-cv-289-JTC, 2011 WL 2360058 (W.D.N.Y. June 9, 2011), the district court granted Halliburton's motion for judgment on the pleadings on class claims that sought, among other things, redetermination of plaintiffs' benefits under an ERISA pension plan. Plaintiffs argued that their benefits had been impermissibly reduced during a company merger. The court ruled that the named plaintiffs failed to allege any facts showing they had submitted a claim for benefits under the claims procedures established by the plan, rejecting the argument that an inquiry about eligibility and benefits constituted a claim. The court also determined that plaintiffs failed to make a clear and positive showing

that pursuing administrative remedies would have been futile. Thus, the court dismissed the case for failure to exhaust administrative remedies. The court also held that plaintiffs could not circumvent the exhaustion requirement by artfully pleading their benefit claims as breach of fiduciary duty claims. Lastly, the court held that Halliburton did not violate ERISA Section 204(g) (the "anti-cutback rule"), reasoning that the rule only applies when there has been an actual amendment to the terms of a plan, and rejecting the participants' contention that Halliburton's "systematic denial of vesting service" constituted a plan amendment triggering the anti-cutback rule.

Breach of Fiduciary Duty:

- In *Christopher v. Hanson*, No. 09-3703 (JNE/JJK), 2011 WL 2183286 (D. Minn. June 6, 2011), the district court denied in part and granted in part defendants' motion for summary judgment. The lawsuit involved two transactions between a company and its employee stock ownership plan ("ESOP"). Plaintiffs, a corporation and the trustees of the ESOP it sponsored, alleged that individuals who formerly were the company's owners, directors, and an ESOP trustee, breached their fiduciary duties by artificially inflating the price of the company's stock during transactions whereby the defendants sold ownership of the company to the ESOP. The court refused to grant summary judgment to defendants on various claims related to plaintiffs' allegations that defendants breached their fiduciary duties under ERISA. The corporation also alleged state-law claims under the Minnesota Business Corporation Act for breach of fiduciary duty and the duty of loyalty, which the court reasoned were not preempted by ERISA because the claims were brought by the corporation (rather than the ESOP plan itself) against its former directors and would have existed with or without the ERISA plan. The court did grant summary judgment to defendants with respect to the claim that the former members of the company's board of directors aided and abetted the alleged tortuous conduct of the former ESOP trustee because there was no evidence defendants had actual knowledge of the alleged conduct.

Preemption:

- In *Landree v. Prudential Ins. Co. of Am.*, No. 10-CV-05353-RBL, 2011 WL 2414429 (W.D. Wash. June 13, 2011), the court held that Washington's statute barring discretionary clauses in insurance contracts was not preempted by ERISA. Consequently, the state statute voided the plan's discretionary clause, and the court applied *de novo* review to the plan's decision denying plaintiff's long term disability claim. The court concluded that ERISA's savings clause, Section 514(b)(2)(A), saved the state law from preemption because the statute (i) is specifically directed to entities engaged in insurance, and (ii) substantially affects

the risk pooling arrangement between insured and insurer. Further, the court denied defendant's motion for summary judgment because it concluded there were genuine issues of material fact regarding plaintiff's ability to perform the duties of his regular occupation.

- In *Horizon Blue Cross Blue Shield of New Jersey v. Transitions Recovery Program*, No. 10-3197 (RBK/KMW), 2011 WL 2413173 (D.N.J. June 10, 2011), the district court denied a health care provider's motion to dismiss Horizon's state law claims as preempted by ERISA. Horizon's lawsuit against Transitions alleged that the provider submitted fraudulent claims resulting in payment of over $8 million for claims not covered by Horizon's plans. Horizon alleged claims under a New Jersey insurance statute, as well as common law fraud and misrepresentation claims. The court rejected Transitions' argument that ERISA's civil enforcement provision completely preempted the claims by falling within ERISA Section 502(a)(3). The court held that, while Horizon was a fiduciary that could bring a civil action, it could not bring an action under Section 502(a)(3) for the relief sought by Horizon, *i.e.,* monetary damages. The court also held that ERISA Section 514 did not expressly preempt Horizon's state law claims. Regarding the state insurance statute claims, the court held that because the statute creates rights and obligations separate and distinct from ERISA, and does not dictate or restrict the choices available under ERISA plans with regard to benefits or administration, it was not preempted. The court also held the state common law claims were not predicated on the existence of an ERISA plan and did not implicate ERISA concerns.
- In *Loffredo v. Daimler AG*, No. 10-14181, 2011 WL 2262389 (E.D. Mich. June 6, 2011), the district court held that ERISA preempted state law claims by a group of retired Chrysler LLC executives who alleged that the defendants -- including the former majority owner of Chrysler LLC Cerberus Capital Management LP -- breached their fiduciary duties by failing to protect plaintiffs' assets in a supplemental executive retirement plan during Chrysler LLC's descent into bankruptcy. The court reasoned that even though the plan at issue was a top-hat plan (one designed for a select group of management or highly compensated employees) exempt from ERISA fiduciary duty provisions, the state law claims were preempted by ERISA. Specifically, the fiduciary breach claims were completely preempted because they fell within the scope of ERISA's exclusive enforcement mechanism, and the remaining state law claims were preempted because they related to the ERISA top-hat plan and sought an alternate enforcement mechanism.

Injunctive Relief:

- In *Davis v. Unum Group*, No. 03-940, 2011 WL 2438632 (E.D. Pa. June 16, 2011), the district court granted Unum's motion for partial summary judgment with respect to plaintiffs' claim for injunctive relief under ERISA Sections 502(a)(2) and

(3). Plaintiffs sought injunctive relief in the form of an “independent and fair procedure” to review all of Unum’s long-term disability claim denials or terminations. After first holding that one of the plaintiffs lacked standing by virtue of having received all benefits due to him, the court noted that relief under Section 502(a)(3) is available only when there is no alternative remedy under other provisions of Section 502. Since plaintiffs had also alleged a claim under Section 502(a)(1)(B) for reversal of the termination of disability benefits, the court found they were precluded from seeking independent review under Section 502(a)(3). The court also precluded plaintiffs from bringing a claim for independent review of their benefit claims under Section 502(a)(2), as such relief would remedy their individual injuries, rather than any injuries to the plan. Moreover, the court held that a 2004 multi-state regulatory settlement agreement entered into by Unum and the Department of Labor rendered moot plaintiffs’ claim for independent review.

Rehearing denied:

- On May 26, 2011, the Seventh Circuit denied Kraft’s petition for rehearing *en banc* in *George v. Kraft Foods Global, Inc*., __ F.3d __, No. 10-1469, 2011 WL 1345463 (7th Cir. Apr. 11, 2011). Judge Cudahy, who dissented, in part, from the majority’s opinion, voted in favor of rehearing. In *George*, plaintiffs claimed that the Kraft 401(k) plan’s company stock fund was imprudently structured as a unitized fund, and that excessive fees were paid to plan service providers. The district court dismissed these claims on summary judgment. The Seventh Circuit’s decision revived plaintiffs’ fiduciary breach claims, holding that defendants’ failure to properly document their decision to continue the unitized nature of the company stock fund created a genuine issue of material fact.

Settlement:

- In *Eagan v. AXA Equitable Life Ins. Co.,* No. 06-7637 DSF (C.D. Cal. June 6, 2011), the court granted final approval to a $2.5 million settlement in a retiree rights class action. Plaintiffs alleged AXA improperly capped its contributions to the retirees’ health benefits because the plan documents containing the cost-sharing changes were not properly adopted. Under the terms of the settlement, AXA’s contributions toward retiree health costs will be frozen until December 31, 2011, and each class member will receive a portion of the settlement amount under the terms of the plan of allocation. After the freeze period, AXA may change the plan, but from January 1, 2012 to December 31, 2012, it cannot reduce its benefit cost contributions to any individual class member by more than twenty-five percent.

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[2] 2011 BL 118034.

[3] 2011 BL 118034 at *4.

[4] 2011 BL 118034 at *5.

[5] 2011 BL 118034 at *9.

[6] 2011 BL 146886.

[7] 2011 BL 30352.

[8] 2011 BL 28898.

[9] 2011 BL 22710.

[10] 2010 BL 218286.

[11] 2010 BL 75202.

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[13] In *Discover Bank v. Superior Ct.*, 36 Cal. 4th 148, 162 (2005), the California Supreme Court applied this framework to class-action waivers in arbitration agreements and held: "[W]hen the waiver is found in a consumer contract of adhesion in a setting in which disputes between the contracting parties predictably involve small amounts of damages, and when it is alleged that the party with the superior bargaining power has carried out a scheme to deliberately cheat large numbers of consumers out of individually small sums of money, then … the waiver becomes in practice the exemption of the party 'from responsibility for [its] own fraud, or willful injury to the person or property of another.' Under these circumstances, such waivers are unconscionable under California law and should not be enforced."

[14] Justice Scalia delivered the opinion of the Court. Justice Thomas concurred.

[15] *See, e.g.*, 65 F.R. 70246, 70253 (Nov. 21, 2000) (Department of Labor's Claims Regulations) (discussing limitations on imposing mandatory arbitration for benefit claims).

[16] *E.g., Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996) (concluding that Congress did not mean to exempt ERISA's statutory claims from the FAA).

[17] *See* ERISA § 514 (d), 29 U.S.C. § 1144(d) (providing that ERISA shall not be construed to alter, amend, modify or impair other federal law).

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