Proskauer

The ERISA Litigation Newsletter

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Editor's Overview

This month, we discuss the Fourth Circuit's decision in *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (4th Cir. 2011), wherein the court held that ERISA's duties of prudence and diversification require more than a showing of a failure to investigate or diversify to equate to causation of loss and therefore liability. As discussed below, the court's opinion is significant for several reasons, including its teachings on the importance of procedural prudence. It also is consistent with the Supreme Court's recent ruling in *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011), in that both cases require proof of actual harm and causation to justify findings of fiduciary breach and remedy.

Next, we analyze whether the discovery permitted in a post-*Glenn* world is eroding the purpose behind the exhaustion requirement and the development of an administrative record. In *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008),the Supreme Court purported to resolve the split among the federal courts as to the applicable standard of review when reviewing a claim for benefits in which there are structural conflicts in the administrative process. The decision did not resolve, however, the existing state of uncertainty as to the permissibility of discovery, outside the administrative record, of information related to conflicts issues. Below, we provide a review of several court decisions decided at the end of 2011, which suggest that, in some jurisdictions, courts have seemingly abandoned the policy and purpose behind the exhaustion doctrine's creation: namely, to keep the courts from acting as surrogate plan administrators.

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

Proof of Imprudence, Causation, and Damages in Fiduciary Breach Claims Involving Plan Investments[1]

Contributed by Robert Rachal

In *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (4th Cir. 2011), the Fourth Circuit Court of Appeals addressed whether the failure to investigate or diversify plan investments constitutes a breach of fiduciary duty and causes damages. As detailed below, the Fourth Circuit held that, even when there is a failure to investigate or diversify, plaintiffs must still prove that the investments were imprudent in light of the prevailing circumstances, including plan goals and demographics, and that the imprudent investments caused loss.

Background

Current trustees of a multi-employer pension plan sued two former trustees over their investment of the plan's assets. After a predecessor plan had suffered substantial financial losses in the 1970s and 1980s, the Board of Trustees (Board), which consisted of the former trustees and other trustees, implemented a new defined contribution plan in 1987. In creating this new plan, the Board's objective was to avoid further losses of the plan's assets; as the Board members stated, they did not "want to lose a dime of the men's money." In February 1992, the Board voted to invest the plan in bank CDs of less than $100,000, and in 1995, the Board determined that part of the assets also could be invested in one- and two-year Treasury Bills.

In 2001, the Board asked an investment banker to make an investment presentation, but one of the former trustees asked him to leave. Later, the Board asked the banker to draft a portfolio discussing alternative investment strategies. It was not clear from the record if this proposal was discussed, and the Board voted not to change the plan's investments because they were pleased with the security of the investments. Thus, from 1995 until the former trustees left in 2005, the plan was invested in CDs worth $90,000 and one- to two-year Treasury Bills.

District Court Decision

The current trustees who took over in 2005 sued the former trustees, claiming they failed to adequately investigate and diversify plan investments. The current trustees' expert witness testified that a prudent investment strategy would have been 50% in the S&P 500 and 50% in a bond portfolio. The current trustees' expert claimed that this strategy would have resulted in $432,000 more in earnings for the three-year period of December 2002 to December 2005, but admitted his 50% stock/50% bond portfolio was only $103,000 better if applied to the six-year period of 1999 to 2005.

The former trustees' expert opined that the conservative bank CD/T-Bill investment strategy could be prudent under the prevailing circumstances, including: (i) there was a declining union membership; (ii) this was a defined contribution plan investing the members' accounts; (iii) the markets had been uncertain in the early and mid-2000s; and (iv) the Board's stated conservative objectives. The former trustees also argued that their conservative portfolio outperformed the current trustees' expert's 50% stock/50% bond portfolio over the six-year period.

After a bench trial, the district court ruled in favor of the current trustees. In doing so, the district court ruled that the former trustees breached their duty to investigate alternative investment strategies, and adopted the current trustees' damages estimate of $432,000 for the 2003 to 2005 time frame. The district court admitted this period was "somewhat picked out of the air," but justified its decision on the grounds that it was within the statute of limitations and was a period in which the former trustees had not investigated alternative investment strategies.

Fourth Circuit Decision

The Fourth Circuit reversed and remanded. The Fourth Circuit agreed that there was a failure to investigate and to diversify, but held that this does not necessarily mean the investment was imprudent and caused loss. Joining the Second, Third, Fifth, Sixth, Eighth, Ninth, Eleventh and D.C. Circuits, the Fourth Circuit held that the alleged fiduciary breach must cause loss to be actionable, and that only an imprudent investment — not simply a failure to investigate or diversify — could cause loss.[2] In evaluating this prudence, the Fourth Circuit explained that fiduciary duties must be evaluated "under the circumstances then prevailing" and for an enterprise "of like character and with like aims." The Fourth Circuit further advised the district court that in making its finding on remand, the district court must consider the reasons why the fiduciaries had not diversified, and had instead followed a conservative investment strategy, including but not limited to considering: (i) the plan's size and type; (ii) the plan members' demographics; and (iii) the Board's goals and objectives.

The Fourth Circuit also addressed causation and damages. With regard to causation, the Fourth Circuit noted that all courts require plaintiffs to prove a prima facie case of breach that caused loss, but noted there was a circuit split (which it did not resolve) on which party must show that the loss resulted from that breach. With regard to damages, the Fourth Circuit noted that the time period used was critical to measuring any damages, and held that the district court's adoption of a three-year period without justification was error. The Fourth Circuit held the district court must instead justify whatever period it adopts, and noted that the parties had offered various arguments, including ERISA's three-year and six-year statute of limitations, that depended on certain factual findings.

Proskauer's Perspective

The Fourth Circuit's reference to evaluating fiduciary investment prudence "under the circumstances then prevailing" and for an enterprise with "like character and with like aims" is significant. The Board's stated goal was to avoid loss, and given the plan's demographics (apparently an aging and declining workforce) and plan type (a defined contribution plan involving investment of the member's accounts), this goal may ultimately be considered reasonable "under the circumstances then prevailing." Particularly when compared against the market turmoil occurring both during and after the relevant period (*e.g.*, the "dot-com" bust and the great recession of 2008), it is not so clear that this conservative strategy was inherently imprudent under those circumstances. Indeed, it appears that whether the current trustees' more aggressive proposed 50% stock/50% bond portfolio is more profitable depends on the time period chosen. Of interest in light of the Board's stated goals, this 50/50 portfolio carried with it a significant risk of loss to justify the mixed returns.

The Fourth Circuit's holding in this case is also consistent with the Supreme Court's recent ruling in *Cigna Corp. v. Amara*, 131 S. Ct. 1866 (2011). In *Amara*, the Court made clear that courts cannot use judge-made short cuts to avoid ERISA's harm and causation requirements. Although *Amara* arose under a different civil enforcement provision of ERISA (Section 502(a)(3) versus Section 502(a)(2)), both cases require proof of actual harm and causation to justify findings of fiduciary breach and remedy.

Finally, this case teaches the importance of procedural prudence. Even if the former trustees' ultimately prevail based on a finding that their investment strategy turned out to be substantively prudent, they have undergone the risk and costs of trial. Neither the district court nor the Fourth Circuit approved of what appears to have been a "set and forget" investment strategy, and there is still a risk it may be found substantively imprudent on remand. In contrast, the procedural prudence of holding periodic meetings in which alternative investment strategies are evaluated and the strategy chosen is justified in light of the prevailing circumstances and plan goals, provides a powerful defense and may have defeated any claim and obviated the need for trial.

The Slow Erosion of the Judicial Doctrine of Administrative Exhaustion[3]

Contributed by Nicole A. Eichberger

ERISA claims for benefits have differed historically from other types of civil lawsuits because of the limited scope of contemplated discovery. The limitations on discovery in Section 502(a)(1)(B) cases, involving claims challenging the denial of benefits, are attributable to the judicially-created policy favoring the exhaustion of administrative remedies. Every circuit requires exhaustion of plan remedies before a plaintiff can file for benefits under ERISA. *See, e.g., Wert v. Liberty Life Ins. Co. of Boston*, 447 F.3d 1060, 1062 (8th Cir. 2006). The purpose behind the administrative exhaustion doctrine is to limit the scope of a court's review of a plan administrator's decision and to prevent the court from becoming a *de facto* plan administrator. *Id.* at 1066.

Although the exhaustion doctrine retains its vitality, its purpose and practical impact may have been unwittingly eroded by the Supreme Court's decision in *Metropolitan Life Insurance Co. v. Glenn*, 128 S. Ct. 2343 (2008). In *Glenn,* the Supreme Court purported to resolve the split among the federal courts as to the applicable standard of review when reviewing a claim for benefits in which there are structural conflicts in the administrative process; however, the decision did not resolve the existing state of uncertainty as to the permissibility of discovery, outside the administrative record, of information related to conflicts issues. A review of recent decisions handed down at the end of 2011 suggests that, in some jurisdictions, the opportunity for discovery beyond the administrative record is so broad as to vitiate effectively the exhaustion doctrine and its goal of limited judicial review.

The Supreme Court's Glenn Decision

In *Glenn,* the 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 suggest a "higher likelihood" that the conflict affected the benefits decision, or where there was a history of biased claims administration. *Id.* at 2351. The ruling thus resolved any inconsistency among the circuit courts as to the applicable standard of review in denial of benefit claim litigation under Section 502(a)(1)(B) of ERISA where a structural conflict existed. However, it led to even more confusion as to: (1) what, if any, discovery related to an alleged or apparent conflict of interest should be permitted; and (2) if conflict of interest discovery is permitted, what consideration, if any, should the court give to the information gathered outside the administrative record in determining the claim for benefits. The inconsistent treatment of these two issues by the courts now threatens to undermine the objectives behind the judicial doctrine of administrative exhaustion.

Discovery Beyond the Administrative Record

Under the judicial doctrine of administrative exhaustion, discovery in Section 502(a)(1)(B) cases is limited to the so-called "administrative record." Since *Glenn*, however, courts remain divided on whether to permit discovery outside the record relating to conflict of interest issues. Courts authorizing such discovery have generally permitted inquiry into: (1) claims administration policies and manuals; (2) treatment of similar past claims; and (3) relationships among the entities providing and deciding benefit claims. *See, e.g.*, *Kruk v. Metropolitan Life Ins. Co.*, 267 F.R.D. 435 (D. Conn. May 27, 2010) (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); *Emery v. American Airlines, Inc.,* No. 08-22590, 2010 WL 457151 (S.D.Fla. Feb. 4, 2010) [4] (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); *Hall v. Life Ins. Co. of North America*, 265 F.R.D. 356 (N.D. Ind. Feb. 25, 2010) (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; *Zewdu v. Citigroup Long Term Disability Plan*, 264 F.R.D. 622 (N.D.Cal. Feb. 12, 2010) (discovery on carrier's compensation arrangement with the retained physician).

This past year, several courts have permitted discovery beyond the administrative record because of an alleged conflict of interest, and have allowed inquiries into a broad assortment of issues. For example, in *Ferry v. Prudential Ins. Co. of Am.*, No. 10-CV-211, 2011 WL 322000 (D. Me. Jan. 30, 2011),[5] the district court permitted limited discovery on (1) the rate and amount of compensation the defendant paid to the two referral service providers involved in the plaintiff's claim, including compensation for the services of any parties engaged by them to review that claim; (2) the total number of claims administered by the defendant under the applicable disability plan during the three and one half years preceding the date of the plaintiff's claim; (3) the total number of claims referenced in paragraph 2 that were referred to each of the two referral companies involved in the plaintiff's claim; (4) the total number of claims referenced in paragraph 3 that resulted in a recommendation by the third-party reviewer that benefits be denied or terminated; and (5) the total number of claims referenced in the fourth area of discovery that actually resulted in a denied claim. The court did not permit a request concerning each specific doctor's track record.

Similarly, in *Joyner v. Cont'l Cas. Co.*, 2011 WL 6382567 (S.D.N.Y. Dec. 19, 2011), the court determined that plaintiff could obtain plan documents that showed whether the disability carrier was a proper "named fiduciary," and plaintiff could also "seek discovery on the issue of [the carrier's] alleged conflict of interest as both payor and evaluator of plaintiff's disability claim, limited to document requests and a deposition of a Hartford representative pursuant to Rule 30(b)(6)." In *Clark v. Unum Life Ins. Co. of Am.*, 799 F. Supp. 2d 527 (D. Md. Jul. 27, 2011), the court acknowledged that *Glenn* may require a departure from the Fourth Circuit's previous position of denying discovery in ERISA individual benefits cases and held that "extra-record discovery" was needed to see if the plan administrator's conflict of interest affected its benefits decision.

Conversely, there are some courts which have refused to permit discovery beyond the administrative record, notwithstanding conflict of interest allegations. In *Parent v. Principal Life Ins. Co.*, 763 F. Supp. 2d 257 (D. Mass. Feb. 3, 2011), plaintiff sought discovery regarding her receipt of SSDI benefits and subsequent termination of LTD benefits, insofar as it supported her conflict of interest allegations. The court denied plaintiff's request, reasoning that, absent a "very good reason," a court should only review the administrative record. Similarly, in *Tyree v. Hartford Life & Acc. Ins. Co.*, No. 11-CV-32, 2011 WL 4352006 (S.D. Miss. Sept. 15, 2011)[6] *reconsideration denied*, 2011 WL 4975932 (S.D. Miss. Oct. 19, 2011),[7] the district court denied plaintiff's discovery request and attempt to supplement the administrative record, holding that discovery beyond the administrative record was impermissible. In *Boison v. Insurance Services Office, Inc.*, No. 11-CV-32, 2011 WL 6293161 (E.D.N.Y. Dec. 17, 2011),[8] the court granted defendants' Rule 12(b)(6) motion to dismiss, despite plaintiff's conflict of interest allegations, and restricted its review to the administrative record and the plan administrator's interpretation of the plan.

Impact on the Exhaustion Doctrine

Courts that expand the scope of permissible discovery into conflict issues have tended to reach beyond a review of the administrative record in determining the underlying claim for benefits. For example, in *Clark v. Unum*, the court permitted discovery of the alleged conflict of interest and, as a result, had to evaluate what weight, if any, to give the additional evidence. Noting the tension between the arbitrary and capricious standard of review and the desire not to unnecessarily expand the court's role in ERISA cases, the court determined that it should first "scrutinize the relevance and necessity of Plaintiff's proposed extra-record discovery at the outset, by determining whether or not the administrative record contains enough information to allow the court to properly weigh Defendant's admitted conflict of interest." 799F. Supp. 2d at 527.[9] Following that analysis, the court then stated it would determine the additional discovery needed and how to weigh the additional discovery outside of the administrative record.

In *Puri v. Hartford Life & Acc. Ins. Co.,* 784 F. Supp. 2d 103 (D. Conn. 2011), the court found that plaintiff asserted sufficient specific allegations of conflicts, including that the claims manager had a bias towards denying the claims, to warrant discovery. The court then used that additional discovery to evaluate the extent of the plan administrator's conflict of interest and its influence on the plan administrator's decision. Similarly, in *Carten v. Hartford Life & Acc. Ins. Co.*, No. 10-CV-4019, 2011 WL 768683 (N.D. Cal. Feb. 28, 2011),[10] the court considered plaintiff's conflict of interest evidence that was introduced outside of the exhaustion process. The court then expanded the scope of discovery further in light of the additional evidence, and stated that the evidence would be considered by the court in reviewing the plan administrator's decision.

These are just some examples of decisions issued in 2011 where the courts went beyond the administrative record in reviewing the administrative denial of benefits. The consideration of additional evidence re-shaped the court's role and, in some instances, effectively rendered the court a substitute plan administrator.

Proskauer's Perspective

While the Supreme Court attempted to insert uniformity and predictability in benefits claim litigation in issuing its decision in *Glenn*, it perpetuated, and in fact may have exacerbated, the confusion with respect to the well-established judicial doctrine of exhaustion. Analysis of the 2011 decisions in Section 502(a)(1)(B) cases shows that, post-*Glenn*, some courts, by permitting discovery of conflicts-related evidence outside the administrative record, have stepped farther and farther away from the exhaustion doctrine. In the process, these courts have seemingly abandoned the policy and purpose behind the exhaustion doctrine's creation: namely, to keep the courts from acting as surrogate plan administrators.

These unintended consequences of *Glenn* create uncertainty for plan administrators and plan counsel in their attempts to achieve uniformity in administering their benefit plans. Absent strict adherence to the exhaustion doctrine, and the corollary limitations on the role of the courts in reviewing administrative determinations, the defense of these types of cases will continue to be risky and potentially expensive.

Rulings, Filings, and Settlements of Interest

Construction of ERISA plan terms:

- In *Fortier v. Principal Life Insurance Company*, --- F.3d ----, No. 10-1441, 2012 WL 76021 (4th Cir. Jan. 11, 2012), the Fourth Circuit held that a disability benefits plan administrator did not abuse its discretion when, based on its interpretation of plan provisions in conjunction with Internal Revenue Code provisions, it determined that a participant's pre-disability income did not meet the plan's income level threshold requirement. The participant argued that the administrator improperly calculated his gross income by factoring in one-time deductible business expenses claimed by the participant on his federal income tax returns. Recognizing that the plan granted the administrator complete discretion to interpret the plan's provisions, the Fourth Circuit held that the administrator's construction of ambiguous plan terms was reasonable and thus not an abuse of discretion. In so holding, the court approved the administrator's recognition of a nexus between the terms of the plan and the Internal Revenue Code. The dissenting opinion criticized the majority for approving the plan administrator's reliance on the Code in interpreting the plan.

Interference with ERISA plan rights:

- In *Gambill v. Duke Energy Corp.*, No. 10-3333, 2012 WL 204497 (6th Cir. Jan. 25, 2012), the Sixth Circuit held that terminating an in-house counsel during a reduction-in-force (RIF) did not unlawfully interfere with his attainment of early

retirement benefits in violation of ERISA Section 510, because the employee could not have qualified for the early retirement pension enhancement that was offered as part of the RIF. The enhancement offered extra "points" toward "Rule of 85" early retirement benefits, but plaintiff did not qualify for that enhancement. The court also ruled that the failure to grant plaintiff's request to allocate his "points" differently, so as to qualify him for the enhancement, was not unlawful interference because Section 510 protects only those benefits to which a participant may become entitled under the plan terms and does not require a company to alter its ERISA plan on a case-by-case basis to accommodate those who do not otherwise qualify.

Subject matter jurisdiction:

- In *Leeson v. Transamerica Disability Income Plan*, --- F.3d ---, No. 10-35380, 2012 WL 171598 (9th Cir. Jan. 23, 2012), the court held that participant status is a substantive element of a participant's ERISA claim, and not a prerequisite for subject matter jurisdiction. Acknowledging the "muddled" state of the law because prior rulings conflated the two concepts, the court overruled its precedent to the extent it signaled that the failure to properly allege participant status should result in dismissal of a claim on jurisdictional grounds. Instead, the court ruled that participant status is an element of the *prima facie* ERISA case, and if a claimant asserts a colorable claim that he is a participant, he satisfies the threshold for establishing subject matter jurisdiction. Because the district court dismissed Leeson's claim for lack of subject matter jurisdiction based on its determination that the plaintiff was not a participant, the matter was remanded for further review.

Life Insurance Benefits:

- In *Knopick v. Metro. Life Ins. Co.*, No. 10-4707-cv, 2012 WL 147887 (2d Cir. Jan. 19, 2012) (by summary order), the Second Circuit upheld the administrative denial of a claim for supplemental life insurance benefits where the participant died before the insurance carrier had made a determination with resect to the paricipant's insurability. The certificate of insurance stated that any supplemental life insurance benefits that were in excess of the $100,000 of insurance that was provided to all participants of the plan, irrespective of their medical condition, must be approved by MetLife after reviewing the participant's "statement of health." The participant in question applied for $420,000 in supplemental life insurance benefits on April 1, 2008, the first day that the policy became effective. On April 3, 2008, the participant completed the statement of health and authorized MetLife to receive his medical records. On April 8, 2008, the participant died. The participant's beneficiaries claimed they should be awarded the supplemental life insurance benefits, but MetLife denied the claim, stating that the participant was not entitled

to any benefits in excess of the $100,000 because the supplemental benefits were not approved before the participant's death. Applying the abuse of discretion standard of review and looking beyond the administrative record due to MetLife's "conflict of interest," the district court ruled in favor of the beneficiaries, reasoning that a letter from MetLife informing the employer of the effective date of the group coverage policy "must be construed as writings from MetLife accepting coverage for Knopick for the entirety of supplemental life benefits for which he applied and providing an effective date of April 1, 2008." The Second Circuit reversed and remanded, stating that the letter from MetLife did not constitute a writing that the participant's supplemental life insurance benefits were in effect and, under the terms of the certificate, if there was no such writing, those excess benefits were not effective. Notably, the Second Circuit did not determine whether it was appropriate for the district court judge to use the arbitrary and capricious rather than the *de novo* standard of review and whether the judge properly expanded the scope of his review beyond the administrative record, because the court found that the result of the case would have remained unchanged

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[2] *Diduck v. Kaszycki & Sons Contractors, Inc.,* 974 F.2d 270, 279 (2d Cir.1992); *In re Unisys Savings Plan Litig.,* 173 F.3d 145, 154 (3d Cir.1999); *Bussian v. RJR Nabisco Inc.,* 223 F.3d 286, 300 (5th Cir. 2000); *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995); *Roth v. Sawyer–Cleator Lumber Co.,* 16 F.3d 915, 919 (8th Cir.1994); *Wright v. Oregon Metallurgical Corp.,* 360 F.3d 1090, 1099 (9th Cir.2004); *Willett v. Blue Cross & Blue Shield of Alabama*, 953 F.2d 1335, 1343 (11th Cir.1992); *Fink v. National Savings & Trust Co.,* 772 F.2d 951, 961–65 (D.C.Cir.1985) (Scalia, J., dissenting in part and concurring in the judgment).

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

[4] 2010 BL 24139.

[5] 2011 BL 23998.

[6] 2011 BL 236795.

[7] 2011 BL 269707.

[8] 2011 BL 327630.

[9] 2011 BL 196971, at *7.

[10] 2011 BL 58180.

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