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BENEFITS LITIGATION UPDATE

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EXECUTIVE EDITORS

Joan A. Disler
jdisler@ebglaw.com

Mark J. Ugoretz
mugoretz@eric.org

CONTRIBUTING EDITORS

Paul A. Friedman
pfriedman@ebglaw.com

Kenneth J. Kelly
kkelly@ebglaw.com

John Houston Pope
jhpope@ebglaw.com

Daly D.E. Temchine
dtemchine@ebglaw.com

Welcome to the Benefits Litigation Update

Introducing the Benefits Litigation Update ("Update"), a joint project between Epstein Becker Green and The ERISA Industry Committee ("ERIC"). The Update is a quarterly publication provided to ERIC members, as well as Epstein Becker Green clients and friends, which provides two primary components:

1. a **Featured Article** addressing a trend or topic currently being discussed in the benefits community which (i) explains why the topic is important, (ii) explains the impact of the topic on the reader, and (iii) proposes some action that should be considered in response; and
2. select **Case Summaries** involving noteworthy benefits litigation issues across the country.

Epstein Becker Green and ERIC would like to acknowledge Adam Solander for his assistance in the development of the Update.

FEATURED ARTICLE

Benefit Claim Denial Litigation After *Glenn* and *Conkright*

By: Paul Friedman and John Houston Pope

No single issue accounts for more ERISA litigation than the denials of claims for benefits. ERISA Section 502(a)(1)(B) provides a vehicle for a dissatisfied participant to obtain judicial review of a denial of benefits. Although ERISA permits either a state court of competent jurisdiction or a federal court to hear a lawsuit seeking review of a claim denial, most suits end up in federal court, either by claimant's choice or the exercise of a plan's right to remove to a federal forum.

In a denial of benefits lawsuit, the role of the federal courts is to perform a review function, which is different than their role in a typical lawsuit.[1] Rather, the primary decision-making is left to plan administrators who presumably know the plan better, understand the broader strategies for providing employee benefits, and possess jurisdiction over the plan wherever it serves participants.

Despite the plethora of benefit denial lawsuits, the Supreme Court did not define a standard for judicial review of benefit claim litigation until 1989 in *Firestone Tire & Rubber Co. v. Bruch.*[2] In Bruch, the Supreme Court established that the standard for reviewing plan administrator decisions on benefit claims is *de novo*. Bruch also noted that plans could contractually increase the level of deference accorded to administrators by delegating discretion to them to decide facts and construe plan terms.[3] If a plan did so, the standard of review by a federal court would be an abuse of discretion, one of the most deferential levels of review.[4]

Bruch also addressed conflicts of interest generally in evaluating a potential abuse of discretion and directed lower courts to consider conflicting interests as "a factor" in the deferential review process.[5] This broad directive created a split among the federal courts of appeal as to what constitutes a conflict of interest and how to weigh a significant conflict of interest in the review process. Some courts viewed a conflict of interest arising when the paying party also decided whether the claims should succeed or fail as inherent in the structure itself. Other courts believed market forces would check any potential conflict. Courts recognizing the existence or possibility of a conflict of interest sought to incorporate the conflict into their process of deferential review through a range of approaches, from a burden-shifting, presumptively invalid approach, to scrutiny on a sliding scale, to the application of a presumption that a conflict had no significance without further proof of its impact on a decision.

The Supreme Court did not provide further guidance on the management of conflicting interests until 2008 in *Metropolitan Life Insurance Co. v. Glenn*.[6] Unanimously, the *Glenn* Court agreed that a conflict arises when the payer is also the decision-maker by explaining that a conflict of interest arises when "the employer both funds the plan and evaluates the claims" because "'every dollar provided in benefits is a dollar spent by … the employer; and every dollar saved … is a dollar in [the employer's] pocket.'"[7] The conflict results from the risk that the employer's "immediate financial interest" might override its fiduciary interest – consciously or unconsciously.[8] Unfortunately, a less-than-unanimous majority of the Court instructed the lower federal courts to put away their specialized tests and approaches and simply consider a conflict of interest as "a factor" in judging whether an abuse of discretion occurred.[9] Justice Scalia properly described the value of that "guidance" as "chuck[ing the factors] into a brown paper bag and shak[ing them] up to determine the answer."[10]

Glenn changed the focus for evaluating conflicts of interest from arguments over the existence of a conflict to arguments over the severity of an alleged conflict. Prior to *Glenn* the bare assertion of a conflict was not enough to warrant a court's attention.[11] However, after *Glenn*, once a conflict is asserted it must be factored into an analysis of the decision under review.[12]

Claimants who thought that *Glenn* would mean many more victories for them have been disappointed. Cases decided initially before *Glenn*, and reconsidered after *Glenn*, went against the claimant in both instances while others met with perfunctory remands.[13] Moreover, several of the circuits expressed the view that their prior tests for judging conflicts of interest were not changed, or changed only slightly, by *Glenn*.[14]

In its 2010 *Conkright v. Frommert*[15] decision, the Supreme Court strongly reaffirmed the role of the administrator in interpreting plan terms. The Court refused to take away the deference owed to an administrator merely because the administrator made "a single honest error" earlier in the claims process.[16] It explained that even conflicted administrators deserved the opportunity to re-review and reconsider aspects of a benefits claim decision on which they had not previously passed, or had done so only in combination with an issue on which a court subsequently found them to have been wrong. Deference should disappear only if the administrator showed that he was incapable of competent decision-making.[17]

Although *Glenn* opened the door wider to finding conflicts of interest, *Conkright* appears to signal a return to strong deference to administrators and their decisions. Due to the tensions between the two cases, employers need to be cognizant of several ongoing developments. The following discusses the treatment in recent cases of certain steps that a plan sponsor might employ to reduce its litigation risk over a benefits denial.

Using Trust-Based Plans

Naturally, plan sponsors look to restructure the claims decision-making process to eliminate the structural conflict identified by the Court. Before *Glenn*, an actuarially grounded plan funded out of an irrevocable, nonreversionary trust – the "typical" pension plan or some types of welfare benefit plans – was deemed to be free of structural conflicts of interests.[18] Although this presumption changed after *Glenn* in some courts of appeal, the Fourth and Eleventh Circuits continued to believe that funded plans, at least if fully funded, did not generate a structural conflict of interest.[19] The Fifth Circuit concluded that this factor diminished, but did not eliminate, the potential conflict.[20]

In contrast, the Ninth and Third Circuits decided that any hypothetized conflict arising out of trust-based plans always would be unfavorable to participants. The Ninth Circuit simply asserted that, in a trust-based actuarially grounded plan, the employer-administrator is "obviously still" conflicted[21] because "every dollar not paid in benefits is a dollar that will not need to be contributed to fund the trust" while the Third Circuit held that "[e]ven in an actuarially grounded plan, the employer provides the monetary contributions and any money saved reduces the employer's projected benefit obligation."[22]

The Second Circuit assumed that the resolution of the conflict would always be favorable to a participant even in a multi-employer Taft-Hartley plan, although the trustees of such a plan consist of an equal number of union and management representatives.[23] It "reasoned" that the half of the board composed of employer representatives might be tempted to reject claims to reduce future employer contributions.[24]

Not surprisingly these splits of analysis created confusion in the district courts. In "adapting" to these decisions lower courts have recited the possibility of conflict, but have accorded it "little weight" or viewed it as "approach[ing] the vanishing point" in the post-*Glenn* analysis.[25] In theory, a trust-based plan might be so severely under-funded, or be facing such a high potential exposure from a claim, or class of claims, that the *Glenn* principles on conflict of interest would come into play. Ordinarily, though, that would not be the case, and the general proposition that the conflict is of no consequence should prevail. Trust-based plans, then, should provide one of the stronger methods to minimize the assertion of a conflict of interest in claims decision-making.

Use of a third party administrator

Utilizing an independent claim fiduciary, such as a TPA, which lacks any financial interest in the outcome of the decision on a claim, should satisfy the *Glenn* standard. Several courts faced with such arrangements have rejected the implication that a structural conflict of interest remains after an employer outsources the claim decision-making this way.[26] However, other courts have indicated that even a TPA could be conflicted because of its desire to please its client, the employer, in order to encourage continued business.[27] On balance, though, use of a TPA works to a plan's benefit. Even those courts considering the possibility of a conflict will give it little weight.[28] Adding contractual language to any independent fiduciary arrangement that ties performance to claims accuracy further strengthens the usefulness of this approach.

Creation of a well-written detailed decision

Glenn demonstrates the value of well written, detailed decisions that contain a wealth of useful information for review purposes. Administrators should take more time to explain and to cover comprehensively the issues raised by a claimant, perhaps even the issues not raised that could have been. A comprehensive claim denial decision in the post-*Glenn* era should document the procedures that the employer has in place to mitigate the effect of any structural conflict on the administrator's decision-making.[29] These steps will reduce the likelihood that broad, intrusive discovery will be ordered. They also can enhance the likelihood that the conflict issue will be resolved on summary judgment rather than requiring a mini-trial.

Communicate with Participants

An administrator should communicate to the unsuccessful claimant all of the steps taken to ensure accuracy and impartiality. This communication serves two purposes. First, it provides assurances to the employee about the fairness of the claims procedures. Second, from a litigation standpoint, the open and candid nature of the decision under review should leave courts less inclined to find other arguments for a claimant.

Request for Remand

If *Glenn* provided the means to overturn administrator decisions, then *Conkright* illuminates a path for administrators to ask for a second bite at the apple. The right to reconsider honest mistakes should be asserted through a request for remand. Although remands are not automatically granted, *Conkright* said that remands would be appropriate when only a single honest mistake is at issue. [30]

Although there is never a guarantee that a plan sponsor will not be sued in a denial of benefits situation, the above steps should serve to minimize the risk of an adverse court ruling.

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[1] See, e.g., Evans v. Eaton Corp. LTD Plan, 514 F.3d 315, 321 (4th Cir. 2008).
[2] 489 U.S. 101 (1989).
[3] Id. at 112.
[4] Jenkins v. Price Waterhouse LTD Plan, 564 F.3d 856, 861 (7th Cir. 2009).
[5] Id.
[6] 554 U.S. 105 (2008).
[7] Id. at 112 (quoting Bruch v. Firestone Tire & Rubber Co., 828 F.2d 134, 144 (3d Cir. 1987)).
[8] Id.
[9] Id. at 115-19.
[10] Id. at 129 (Scalia, J., dissenting).
[11] Crowell v. Shell Oil Co., 541 F.3d 295, 311-12 (5th Cir. 2008).
[12] Id.
[13] See, e.g., Denmark v. Liberty Life Ins. Co., 566 F.3d 1 (1st Cir. 2009).
[14] See, e.g., Murphy v. Deloitte & Touche Group Ins. Plan, 619 F.3d 1151, 1158 (10th Cir. 2010); Denmark, 566 F.3d at 9.
[15] 130 S. Ct. 1640 (2010).
[16] 130 S. Ct. at 1646-47.
[17] Id. at 1651.
[18] See, e.g., Post v. Hartford Ins. Co., 501 F.3d 154, 164 n.6 (3d Cir. 2007); de Nobel v. Vitro Corp, 885 F.2d 1180, 1191-97 (4th Cir. 1989).
[19] Lance v. Retirement Plan of Int'l Paper Co., 331 Fed. Appx. 251, 255 (4th Cir. 2009); White v. Coca-Cola Co; 542 F.3d 848, 857 (11th Cir. 2008).
[20] Holland v. Int'l Paper Co. Retirement Plan, 576 F.3d 240, 248-49 (5th Cir. 2009).
[21] Burke v. Pitney Bowes Inc. LTD Plan, 544 F.3d 1016, 1026 (9th Cir. 2008).
[22] Miller v. American Airlines, Inc., 632 F.3d 837, 847-48 (3d Cir. 2011).
[23] Durakovic v. Building Service 32-BJ Pension Fund, 609 F.3d 133, 139 (2d Cir. 2010).
[24] Id.
[25] See, e.g., Katsanis v. Blue Cross-Blue Shield Ass'n, 803 F. Supp. 2d 256, 261 (W.D.N.Y. 2011); Ashley v. Prudential Ins. Co. of Am., 2011 WL 1467819, at *9 (E.D. Va. Apr. 18, 2011).
[26] See, e.g., White, 542 F.3d at 857; Stump v. Metropolitan Life Ins. Co., 531 F.3d 84, 88 (1st Cir. 2008); Day v. AT&T Disability Income Plan, 733 F. Supp. 2d 1109, 1113 (N.D. Cal. 2010); Zoller v. INA Life Ins. Co. of N.Y., 2008 WL 3927462, at *13 n.13 (S.D.N.Y. Aug. 25, 2008).
[27] See, e.g., Barron v. Ashland, Inc., 2011 WL 502590, at *8 (C.D. Cal. Oct. 21, 2011); Burnett v. Ratheon Co. STD Basic Benefit Plan, 2011 WL 1429575, at *10 (C.D. Cal. Apr. 14, 2011).
[28] See, e.g., Barron v. Ashland, Inc., 2011 WL 502590, at *8 (C.D. Cal. Oct. 21, 2011); Burnett v. Ratheon Co. STD Basic Benefit Plan, 2011 WL 1429575, at *10 (C.D. Cal. Apr. 14, 2011).
[29] Denmark, 566 F.3d at 10.
[30] 130 S. Ct. at 1646-47.

Paul Friedman is a member of the Employee Benefits practice in Epstein Becker Green's New York office. He has more than 25 years of experience in litigating cutting-edge ERISA issues before United States bankruptcy courts, district courts, and courts of appeal on behalf of employers, plan sponsors, and fiduciaries across a wide variety of industries, including pharmaceutical, energy, telecommunications, entertainment, hotel and restaurant, trucking, construction, printing, meat, and financial services. He can be reached at pfriedman@ebglaw.com.

John Houston Pope is a member of the Employee Benefits, Litigation, and Labor and Employment practices in Epstein Becker Green's New York office. He litigates at the trial and appellate level in courts across the country. His practice includes a special emphasis in single- and multi-plaintiff ERISA litigation, focusing on the defense of breach of fiduciary duty actions and cases involving other significant, complex benefit plan issues. His involvement in ERISA litigation stretches back to the start of his legal career twenty-five years ago, as a law clerk to a federal district judge in Jacksonville, Florida. He can be reached jhpope@ebglaw.com.

CASE SUMMARIES

What's Hot: Newsworthy ERISA Decisions from the First Quarter of 2012

Pfeil v. State Street Bank & Trust Co., **No. 10-2302, 2012 WL 555481 (6th Cir., Feb. 22, 2012)**

- Participants in General Motors' 401(k) plan ("Plan") sued State Street Bank for breach of fiduciary duty due to the bank's failure to divest the Plan of its GM stock after the company's reported net third-quarter losses in 2008 totaling 15.5 billion dollars and the likely exhaustion of its cash reserves by the middle of 2009. The District Court dismissed the complaint for failure to state a claim.

- On appeal the Sixth Circuit held, contrary to other circuit courts and creating a conflict between them, that allegations in the complaint need not rebut the Moench presumption (i.e., that a prudent fiduciary acting under similar circumstances would have made a different investment decision). As a result, the dismissal was vacated and the case remanded for further proceedings.

Shelter Distribution Inc. v. General Drivers, Warehousemen & Helpers Local Union No. 89**, No. 11-5450, 2012 WL 880601 (6th Cir., March 16, 2012)**

- In a matter of first impression for the Sixth Circuit regarding a question of law which had only previously been considered by the Third Circuit, the Court held that a union's agreement in a collective bargaining agreement to indemnify an employer for withdrawal liability owed to a multi-employer pension plan was permitted, noting that it was no different than fiduciary insurance and did not violate the public policy of ERISA.

Skinner v. Northrop Grumman Retirement Plan B, **No. 10-55161, 2012 WL 887600 (9th Cir., March 16, 2012)**

- In one of the first circuit decisions post-*Amara* to address the possible remedies of unjust enrichment and reformation, the Ninth Circuit held that reformation of the master plan documents was not appropriate because there was no evidence that the plan failed to reflect the drafter's true intent and that plaintiffs had failed to demonstrate that the trustees had benefited by failing to ensure that the participants received an accurate summary plan description.

Savani v. Washington Safety Management Solutions LLC, **No. 11-1206, 2012 WL 928212 (4th Cir., March 20, 2012)**

- A participant in the Washington Safety Management Solutions Pension Plan ("Plan") sued his employer alleging that a plan amendment which eliminated an early retirement supplement violated ERISA's anti-cutback provision.

- The Fourth Circuit agreed, holding that the amendment violated ERISA's anti-cutback provision because "Accrued Benefit" was defined in the Plan as the participant's "normal retirement Pension… plus any applicable supplements as described in § 4.12", and § 4.12 referred specifically to the early retirement supplement.

Cinotto v. Delta Airlines Inc., **No. 10-14704, 2012 WL 967356 (11th Cir., March 23, 2012)**

- The Eleventh Circuit in a class action ruled that a plan amendment which reduced a participant's social security offset benefit did not violate ERISA's anti-cutback provision because the plan definition of "Accrued Benefit" expressly provided that "[n]o Participant shall have an Accrued Benefit based on future or projected service or Earnings…" and that the named-plaintiff had not yet reached the age of retirement when the amendment had been adopted.

Tussey v. ABB, Inc., No. 2:06-CV-04305-NKL 2012 WL 1113291 (W.D. Mo., March 31, 2012)

- After bench trial, federal district court awarded total of approximately $37 million to participant accounts in 401(k) plan based on violations of fiduciary duties relating to administration of plans.
- Court held ABB Inc. and its retirement benefits committees responsible for $13.4 million based on a failure to monitor recordkeeping costs or negotiate a more favorable fee schedule with their recordkeeper.
- Court held ABB defendants liable for $21.8 million lost by improperly "mapping" - transferring - movement of plan assets from one investment fund to another that did not match the prior fund's performance. Court held their recordkeeper and its affiliates responsible, as fiduciaries, to compensate participants for $1.7 million in lost "float income" not credited to participant accounts.
- Court declined to remove ABB as a plan fiduciary, but ordered a competitive bidding process for future recordkeeper selection.
- The court's imposition of liability on ABB for its knowledge that its revenue sharing arrangement with its recordkeeper improperly subsidized the corporate services their recordkeeper provided to ABB reflected the court's deliberate, considered departure from the Seventh Circuit's approach extending considerable deference to ERISA fiduciaries in bargaining for fee arrangements, set forth in *Hecker v. Deere & Co.,* 556 F.3d 575 (7th Cir. 2009), and *Loomis v. Exelon Corp.,* 658 F.3d 667 (7th Cir. 2011). It tees up this issue for a resolution in the Eighth Circuit, with the potential to create a split among the circuits.

Please send questions, comments, and related requests to Mark Ugoretz or Joan Disler.