Bloomberg BNA

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ERISA Litigation

Jacklyn Wille of Bloomberg BNA invited attorneys who represent plan participants, plan sponsors and industry groups to reflect on some of the most significant court decisions decided under ERISA over the past 40 years. Each was asked, ''How did this case change the landscape of ERISA litigation, plan design or plan administration?''

Attorneys Reflect on 40 Years of ERISA's Biggest Court Rulings

How did these ERISA court decisions change the legal landscape of ERISA litigation, plan design, or plan administration?

1. Mass. Mutual Life Ins. Co. v. Russell

Massachusetts Mutual Life Insurance Co. v. Russell sent participants down the rabbit hole to time travel to the days of yore to figure out whether Congress really meant to make it harder for participants to get relief after ERISA was passed. Not only did *Russell* limit remedies, but it also muddied the waters as to what was the proper section of ERISA to sue under for relief. Forty years and 9 Supreme Court cases later (depending on how you count), participants are still litigating what they can sue and ask for. So much for a simple system for protecting participants.

— Mary Ellen Signorille, senior attorney at AARP Foundation Litigation, Washington, discussing Mass. Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 6 EBC 1733 (U.S. 1985)

2. Fort Halifax Packing Co., Inc. v. Coyne

The *Fort Halifax* case was a preemption case involving a challenge to a Maine statute that required employers who shut down operations to pay a one-time severance benefit. The court held that ERISA did not preempt the Maine statute because it 'neither established nor required an employer to maintain a plan' and, therefore, does not 'relate to' an employee benefit plan. The court's decision provided important guidance on the types of state laws that could trigger ERISA preemption, however, the most significant part of the court's opinion was that it established a definition of what constitutes an employee benefit plan. The court held that an employee benefit plan requires an 'ongoing administrative scheme,' and 'to do little more than write a check hardly constitutes the operation of a benefit plan.' The court's decision caught a lot of employers by surprise because many had severance policies and executive agreements that were never previously thought to be covered by ERISA. The court's definition of employee benefit plan in *Fort Halifax* has had a huge and lasting impact on how employers draft and administer their employee benefit plans.

— Jonathan G. Rose, partner at Alston & Bird LLP, Washington, discussing Fort Halifax Packing Co., Inc. v. Coyne, 482 U.S. 1, 8 EBC 1729 (U.S. 1987)

3. Firestone Tire & Rubber Co. v. Bruch

Approximately 15 years after the enactment of ERISA, the Supreme Court clarified the standards for courts to apply in evaluating participant benefit claim lawsuits. The court held that, consistent with traditional trust law, courts should apply a de novo review standard unless the plan provides broad discretionary authority for the administrator or other fiduciary to resolve benefit disputes, interpret the plan, and clarify ambiguities. If the discretionary language is included and the administrator or fiduciary was operating in accordance with it, the plan decision should be upheld by a court unless the decision is considered arbitrary and capricious or unreasonable or the administrator or fiduciary was operating under a material conflict of interest that affected the decision. This is commonly known as the *Firestone* deference standard (i.e., deference to the decision or interpretation of the administrator or other fiduciary). Since the 1989 decision, most plans have been amended to include the discretionary language in order to assure application of the deferential standard.

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The *Firestone* case was a landmark decision for both plaintiffs and defendants in benefit claim cases, has significantly affected the process and outcome of litigation, and has probably resulted in the early dismissal of many cases. A current case (*Tibble v. Edison*) seeking certiorari before the Supreme Court is requesting the court to determine whether the *Firestone* deference standard applies to non-claim matters (i.e. not a 502(a)(1)(B) claim), including decisions by administrators and fiduciaries involving fiduciary matters, interpretations and decisions.

— Scott J. Macey, president and CEO of ERISA Industry Committee, Washington, discussing Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 10 EBC 1873 (U.S. 1989)

4. Mertens v. Hewitt Assocs.

The Supreme Court's decision in *Mertens* regarding the 'equitable remedies' available under ERISA Section 502(a)(3) rendered ERISA's fiduciary duty provisions toothless in cases not involving losses to employee benefit plans themselves. Under Justice Scalia's reading of selected portions of certain treatises (which came to be called 'the sacred texts' by practitioners), no monetary relief was available under Section 502(a)(3). While monetary remedies remained available to employee benefit plans under Section 502(a)(2), plan fiduciaries were free to, among other things, lie to plan participants so long as the plan suffered no losses. *See, e.g., Farr v. U.S. West*, 151 F.3d 908 (9th Cir. 1998). Fortunately, in its more recent opinion in *CIGNA Corp. v. Amara*, the Supreme Court stepped away from the cramped analysis of *Mertens*. As a result, the scope of equitable remedies against a breaching fiduciary is broadening, and even monetary relief in the form of 'surcharge' may be available.

— Jeffrey Lewis, shareholder and founding partner of Lewis, Feinberg, Lee, Renaker & Jackson PC, Oakland, Calif., discussing Mertens v. Hewitt Assocs., 508 U.S. 248, 16 EBC 2169 (U.S. 1993)

5. Curtiss-Wright Corp. v. Schoonejongen

In *Curtiss-Wright Corp. v. Schoonejongen*, the Supreme Court underscored the critical importance of following plan amendment procedures. Reviewing the lower courts' determination that a plan amendment ending post-retirement health benefits was invalid because the plan did not include an amendment procedure, the Court held that the simple reference to the employer's authority in that regard was sufficient. More specifically, the Court opined that, in such circumstances, application of state corporate law would control and, that said, the corporation's actions were sufficient to modify the plan terms, even in the absence of specific plan requirements. Subsequent lower court opinions have invalidated plan amendments, based on *Curtiss-Wright*, for failing to abide the plan's terms. All should remember that, before looking to amend the plan, the relevant provisions should be carefully reviewed and, where the provisions are too onerous, they should be jettisoned in favor of a less stringent approach, so that the principle set forth in *Curtiss-Wright* can be invoked (if litigation should ensue).

— Brian T. Ortelere, partner at Morgan, Lewis & Bockius LLP, Philadelphia, discussing Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 18 EBC 2841 (U.S. 1995)

6. Varity Corp v. Howe

How *Varity Corp. v. Howe* changed the landscape of ERISA litigation is captured in the following Haiku:

ERISA provides
Fiduciary breaches
Relief for just one

Varity's holding that ERISA authorizes individualized equitable relief caused by plan administrators' breaches of fiduciary duty expanded the theories of liability available to ERISA plaintiffs on the one hand, but on the other hand limited the available causes of action by (arguably) foreclosing the availability of appropriate equitable relief in circumstances where ERISA provided for (in)adequate relief of a beneficiary's injury. *Varity*'s specter continues to emerge in litigation presenting concurrent Section 502(a)(1)(B) and 502(a)(3) claims involving plan benefits. Some courts have dismissed the 502(a)(3) claim where a plaintiff has alleged a cognizable Section 502(a)(1)(B) claim, while others have permitted both to move forward if the type of equitable redress sought under 502(a)(3) is not available under 502(a)(1)(B). Until the Supremes state explicitly that both claims can never be brought together, plaintiff's attorneys will always try to marry the two.

— Michelle L. Roberts, partner at Springer & Roberts LLP, Oakland, Calif., discussing Varity Corp. v. Howe, 516 U.S. 489, 19 EBC 2761 (U.S. 1996)

7. Great-West Life & Annuity Ins. Co. v. Knudson

In *Great-West Life & Annuity v. Knudson*, the Court once again underscored the distinction between equitable remedies, which are authorized by ERISA, and legal ones, which are not. In doing so, the Court admonished lower courts to reject 'lawyerly inventiveness' attempting to pass off monetary awards as equitable ones. Some courts interpreted *Great West* as requiring remarkably counter-intuitive outcomes–for example, dismissal of a claim based on clearly established fiduciary misrepresentation, simply because the district judge could not discern any 'equitable' remedy. In my view, these interpretations eventually led a majority of the Court—in *CIGNA Corp. v. Amara*—to detour into identifying potential ERISA remedies in a case where there was no remedies issue before the Court. The interpretation of ERISA's remedial authorization remains a critically important issue in ERISA litigation today.

— Charles F. Seemann III, shareholder at Jackson Lewis PC, New Orleans, discussing Great-West Life & Annuity Ins. Co. v. Knudson, 534 U.S. 204, 27 EBC 1065 (U.S. 2002) (6 PBD, 1/9/02)

8. Cent. Laborers' Pension Fund v. Heinz

The Supreme Court's opinion in *Central Laborers' Pension Fund v. Heinz* made clear that the 'accrued benefit' pension plan participants have already earned cannot be cutback by amendments that add new conditions to the receipt of benefits. Mr. Heinz was receiving benefits under a pension plan with a noncompetition

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provision that initially did not prohibit his particular employment. However, the plan was amended to expand the definition of prohibited employment, which resulted in a suspension of his benefits. The Court noted that employers are free to add new conditions precedent to the receipt of benefits to be earned in the future, but they cannot add conditions to the receipt of benefits that have already been earned prior to the amendment. This decision provides useful guidance about the type of amendments a plan sponsor can adopt without violating the anti-cutback rule.

— Patrick C. DiCarlo, counsel at Alston & Bird LLP, Atlanta, discussing Cent. Laborers' Pension Fund v. Heinz, 541 U.S. 739, 32 EBC 2313 (U.S. 2004)(109 PBD, 6/8/04; 31 BPR 1295, 6/15/04)

9. Cooper v. IBM Pers. Pension Plan

Because of the age-sensitive nature of benefit accruals in traditional defined benefit plans, these plans make it difficult to deliver retirement benefits that provide equal pay for equal work, accommodate workers who move in and out of the workforce (e.g., to raise children or learn new skills), and attract workers of all ages to work for the plan sponsor. As an alternative, plan sponsors in the 1990s began turning to hybrid pension plan designs—such as cash balance and, to a lesser extent, pension equity plans—that provide economically age-neutral benefit accruals. This move was met with a floodtide of ERISA class actions, the most serious of which charged that hybrid pension plans inherently violated federal age discrimination rules. *Cooper v. IBM Personal Pension Plan* was the first case to reach the federal courts of appeals. In a seminal opinion by Judge Easterbrook, the Seventh Circuit ruled that the economically age-neutral benefit accruals in hybrid pension plans did not violate federal age discrimination rules, in essence, that federal law did not require pension plans by their very nature to include the age-sensitive benefit accruals of traditional defined benefit plans. The other federal courts of appeals followed *Cooper* in short order, and Congress in the Pension Protection Act of 2006 adopted the same logic prospectively. Whether one agrees with the Seventh Circuit or not, it's clear that *Cooper* had a profound impact on the future of pension plan design.

— Richard C. Shea, partner at Covington & Burling LLP, Washington, discussing Cooper v. IBM Pers. Pension Plan, 457 F.3d 636, 38 EBC 1801 (7th Cir. 2006) (151 PBD, 8/8/06; 33 BPR 1867, 8/8/06)

10. Metro. Life Ins. Co. v. Glenn

Metropolitan Life Ins. Co. v. Glenn injected fresh air into the debate over the level of deference that courts should apply in reviewing the adverse decisions of insurers of welfare benefit plans. Expressly recognizing that a benefits determination by an insurer is a fiduciary act in which the insurer owes a special duty of loyalty to the participant, *Glenn* imposes on insurers who have discretionary authority to make those determinations the correlative duties of a fiduciary, thus requiring 'higher-than-marketplace-quality standards on insurers' of benefit plans. The court also confirmed that insurers who both evaluate claims for benefits and pay benefits claims have a conflict of interest of which a court must take account in reviewing the insurer's decisionmaking. Among the many circumstances that suggest a higher likelihood that the conflict affected the benefits decision, *Glenn* endorsed a court's questioning the fact that the insurer encouraged the claimant 'to argue to the Social Security Administration that she could do no work, received the bulk of the benefits of her success in doing so . . ., and then ignored the agency's finding in concluding that [the claimant] could in fact do sedentary work.' The Social Security Administration's approval of benefits now provides to claimants an easy-to-apply factor by which to determine procedural unreasonableness. While insurers continue to deny meritorious benefits claims by selective review of the records submitted by the participant and biased reviews by consultants, *Glenn* provides better tools to participants to overturn standardless decisionmaking.

— Tybe A. Brett, of counsel to Feinstein Doyle Payne & Kravec LLC, Pittsburgh, discussing Metro. Life Ins. Co. v. Glenn, 554 U.S. 105, 43 EBC 2921 (U.S. 2008) (119 PBD, 6/20/08; 35 BPR 1501, 6/24/08)

11. LaRue v. DeWolff, Boberg & Assocs.

Before the *LaRue* decision there was a serious question whether defined contribution pension plan participants had any remedies for fiduciary breaches that reduced their individual plan account balances but did not affect everyone in the plan. While these participants could have brought suit for individual relief under Section 502(a)(3), this was not a meaningful option because the circuit courts had uniformly held (pre-*Amara*) that make whole relief was not available under that section. By holding that participants could sue under sections 409 and 502(a)(2) for relief to the plan for breaches that hurt some, but not all, participants, the court enabled defined contribution plan participants to recover losses resulting from fiduciary breaches involving, among other things, excessive fees, employer stock, and improper 401(k) plan investment choices. The decision not only had an impact on ERISA litigation, but it ensured that defined contribution plan fiduciaries would live up to their fiduciary responsibilities or be accountable for losses.

— Karen L. Handorf, partner at Cohen Milstein Sellers & Toll PLLC, Washington, discussing LaRue v. DeWolff, Boberg & Assocs., 552 U.S. 248, 42 EBC 2857 (U.S. 2008) (34 PBD, 2/21/08; 35 BPR 467, 2/26/08)

12. Hardt v. Reliance Standard Life Ins. Co.

In *Hardt v. Reliance Standard Life Ins. Co.*, the Supreme Court addressed the issue of when a party to an ERISA action may be entitled to attorneys' fees under ERISA's fee award provision. While the Supreme Court resoundingly rejected the position that a court may exercise its discretion in providing fees only to the 'prevailing party,' it opened up a host of new questions by requiring that a party that might be entitled to fees must only have achieved 'some success on the merits.' Similar to many of the court's recent ERISA holdings which have posed more questions than they answered, it offered little guidance regarding the meaning of 'some success on the merits,' offering only that some success is more than 'trivial success' or 'purely procedural victory.' This leaves the litigating parties to argue over whether the party requesting fees has achieved 'some

success on the merits' rather than looking to the more established 'prevailing party' standard. Because of the uncertainty surrounding the meaning of 'some success on the merits,' there is a heightened threat of a party, particularly a plaintiff, receiving a fee award, which in turn must influence both the plaintiff's calculus regarding what claims to bring and the defendant's calculus regarding the strategy for fighting those claims.

— Sara Pikofsky, partner at Jones Day, Washington, discussing Hardt v. Reliance Standard Life Ins. Co., 560 U.S. 242, 49 EBC 1001 (U.S. 2010) (99 PBD, 5/25/10; 37 BPR 1294, 6/8/10)

13. CIGNA Corp. v. Amara

Prior to *Cigna v. Amara*, the Supreme Court's 'mishandling of ERISA remedy law' under Section 502(a)(3), rendered the robust statutory protections of ERISA illusory, despite the law's plain language and Congress's design: this 'trail of error' has precluded remedy in a host of situations in which wrongful plan administration, typically involving a breach of fiduciary duty, 'caused expense, physical harm, or other suffering' to plan participants and beneficiaries. John H. Langbein, ''What ERISA Means by 'Equitable': The Supreme Court's Trail of Error in Russell, Mertens and Great-West,'' 103 Colum. L. Rev. 1317 (2003). With *Amara*, the Supreme Court corrected course by allowing the plaintiffs (plan participants) to seek make-whole money damages (the equitable remedy of 'surcharge') under Section 502(a)(3) once they demonstrate that the defendant breached its fiduciary duties to them (through misleading communications) and caused their harm (reduced future pension benefits). The Court also recognized the availability of equitable estoppel and reformation—thus rejecting *Great-West*'s erroneous restriction of 'equitable' remedies to injunction, mandamus, and certain types of restitution and properly defining the panoply of available remedies to include all those available in the common law of trusts and fiduciaries that Congress imported to federal statutory law in enacting ERISA.

Amara's emphasis on the flexibility of equity and its tenet that 'equity suffers not a right to be without a remedy,' announced clear guidance to lower courts that they have a wide range of remedies at their disposal in applying Section 502(a)(3) and they should not be afraid to use them as justice requires. Additionally, in distancing the case before it from the likes of *Mertens* and discussing the availability of 'make-whole' surcharge to harmed individuals for consequential injury, *Amara* also makes clear that suits against breaching fiduciaries are different than suits against nonfiduciaries or beneficiaries. *Amara* has indisputably changed the landscape of ERISA remedies to bring the scope of 'appropriate equitable relief' for participants and beneficiaries back into line with the broad range of options available to equitable courts dealing with breaching fiduciaries—who were always subject to the equivalent of monetary damages for the fallout from their breaches of duty (called surcharge), as well as a multitude of other options. It will continue to be up to the district courts and federal appellate courts to define what these other options are as they apply Section 502(a)(3), and ERISA remedies may soon return to the Supreme Court for further clarification as courts grapple with *Amara*.

— Gretchen S. Obrist and Erin M. Riley of Keller Rohrback LLP, Seattle, discussing CIGNA Corp. v. Amara, 131 S.Ct. 1866, 50 EBC 2569 (U.S. 2011) (95 PBD, 5/17/11; 38 BPR 990, 5/24/11)

14. Fifth Third Bancorp v. Dudenhoeffer

In *Fifth Third Bancorp. v. Dudenhoeffer*, the Court held that no presumption of prudence applies to a fiduciary's decision to purchase, hold, or sell employer stock, that is, the stock of the plan sponsor. This is a very significant decision for two main reasons. First, it overruled every circuit that had decided the issue, likely breathing new life into company stock litigation that had largely faded after the heydays of Enron, Worldcom, Tyco, and other cases in the early 2000s in which plaintiffs recovered tens of millions of dollars a case. Second, and perhaps more importantly, the Court held that a plan document cannot diminish fiduciary standards of care. Thus, a plan term that requires a particular investment in no way reduces the level of care of the responsible fiduciary. This was very significant because employers were starting to adopt plan terms requiring specific investments in an effort to diminish fiduciary responsibility for managing plan assets. In its holding, the Court bolstered a core purpose of ERISA, preserving plan assets, by maintaining the high standards of care delineated in the statute.

— Gregory Y. Porter, attorney at Bailey & Glasser LLP, Washington, discussing Fifth Third Bancorp v. Dudenhoeffer, 134 S.Ct. 2459, 2014 BL 175777, 58 EBC 1405 (U.S. 2014) (123 PBD, 6/26/14; 41 BPR 1360, 7/1/14)

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