ERISA LITIGATION:
AN UPDATE ON RECENT CASES AND ACTIVITY

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Overview

1. *CIGNA Corp. v. Amara* – dual holdings
2. "Excessive Fee" Litigation
3. Stock Drop Litigation – *Moench* Presumption
4. Claims Review Process
5. Attorneys Fees Under ERISA – *Hardt* and its progeny

CIGNA Corp. v. Amara – The SPD is *Not* the Plan

- CIGNA converted traditional pension plan to cash balance plan
- Cash balance plan had undisclosed "wear-away" feature
- Plan: participants receive benefit equal to greater of "A" or "B"
- SPD: participants receive benefit equal to "A" ***plus*** "B"
- Supreme Court: Plaintiffs cannot seek to enforce SPD to obtain benefits under ERISA § 502(a)(1)(B)

Amara – Monetary Remedies Available Against Fiduciaries

- Lower court cannot rewrite the plan under § 502(a)(1)(B) to conform to fiduciary's representations
- Participants must seek relief under § 502(a)(3) – "appropriate equitable relief" (e.g. injunction)
    - *Knudson* (2002): Suits seeking to compel the defendant to pay money are suits for damages, not equitable relief
- Historical equitable remedies available against fiduciaries for breach of trust – reformation, estoppel, surcharge
- Surcharge – monetary compensation for a loss resulting from fiduciary's breach, or to recover fiduciary's profit resulting from breach
- Surcharge – must show "actual harm" and "causation"

“Excessive Fee” Litigation

- ERISA § 404(a)(1)(A)(ii) requires the fiduciary to discharge its duties for the exclusive purpose of . . . “defraying reasonable expenses of administering the plan.”
- September 2006 – Schlichter firm (St. Louis) filed first “excessive fee” cases against the fiduciaries of some of the largest d.c. plans in the country.

"Excessive Fee" Litigation (cont'd)

- *Hecker v. Deere* (7th Cir. 2009)
  - revenue-sharing not material and did not need to be disclosed
  - plan offered a sufficient mix of investments (2,500 funds through brokerage window) that the inclusion of some expensive funds did not constitute a fiduciary breach
- *Braden v. Wal-Mart* (9th Cir. 2009)
  - reasonable trier of fact could find that revenue-sharing information was material to participants
  - facts as pled were sufficient to state a claim that the fiduciaries' fund selection (of more expensive funds) was flawed

Multitude of Funds Sufficient – *Renfro v. Unisys*

- Unisys 401(k) plan had 73 investment options, including 71 Fidelity funds
- Plaintiffs alleged breach of loyalty and prudence by selecting ***retail*** funds. Fiduciaries should have negotiated for lower fees or for institutional funds.
- Third Circuit: In light of the reasonable mix and range of investment options, plaintiffs' allegations of breach are not plausible.
- Third Circuit adopted *Hecker* and distinguished *Braden*. Unlike *Braden*, there are no allegations that fiduciaries were engaged in "kickback" scheme as a quid pro quo for including particular funds in the investment portfolio

Participants Can Pay Fund Expenses – *Loomis v. Exelon Corp.*

- Exelon plan had 32 investment options. Fund expense ratios ranged from 0.03% - 0.96%.
- Plaintiffs – two theories:
  - Fiduciaries breached duty by offering "retail" funds (same expense ratios offered to general public)
  - Fiduciaries breached duty by having ***participants*** pay expense ratios, instead of the plan
- Seventh Circuit:
  - Nothing in ERISA requires fiduciaries to "scour the market" to find the cheapest possible funds (which might have other problems)
  - No breach to have participants pay expense ratios. This is a matter of plan design, and not a fiduciary function.

Vendor Selection Requires Process – *George v. Kraft Foods*

- Kraft paid recordkeeper fees to Hewitt out of plan assets.
- Hewitt originally retained in 1995 after competitive bid. No competitive since then. Hewitt charged $43-$65 participant.
- Plaintiffs alleged that fiduciaries failure to solicit competitive bids resulted in excessive fees paid to Hewitt.
- Kraft argued that it did not have to solicit competitive bids as long as fees were reasonable.
- Seventh Circuit: Plaintiff's expert affidavit that Hewitt fees were unreasonable created a fact issue for trial.

Stock Drop Litigation – *Moench* Presumption

- ERISA § 404(a)(1)(B) requires a fiduciary to discharge its duties "with the ***care, skill, prudence and diligence*** under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims."
- *Moench*: A fiduciary who invests the assets in employer stock is entitled to a ***presumption*** that it acted consistently with ERISA by virtue of that decision. However, the plaintiff may overcome the presumption by showing that the fiduciary ***abused its discretion*** by investing in employer stock.

Stock Drop Litigation – *Moench* Presumption (cont'd.)

- The Fifth, Sixth and Ninth Circuits have all adopted the *Moench* presumption.
- Second Circuit adopted *Moench* presumption in *In Re Citigroup ERISA Litigation* (2011), and held that it applies at the pleadings stage.
    - Only facts showing that the employer was in a "dire situation" could require fiduciaries to override plan terms and remove employer stock as an investment option.
- More recently, Sixth Circuit in *Pfeil v. State Street Bank & Trust Co.* (2012), held that the *Moench* presumption does ***not*** apply at the pleadings stage.

Fund Selection is Fiduciary Function – *Howell v. Motorola*

- Plaintiffs were participants in Motorola 401(k) who had invested in company stock fund.
- Plaintiffs sued for breach of fiduciary duty after Motorola stock declined significantly due to massive losses from failed business deal in Turkey.
    - Plaintiffs' theory: it was imprudent to select and maintain company stock fund as an investment option.

Fund Selection is Fiduciary Function – *Howell v. Motorola* (cont'd.)

- Threshold issue: does 404(c) safe harbor insulate fiduciaries from claims of impudent investment selection? (Issue side-stepped in *Hecker v. Deere*.)
- Seventh Circuit: No. Investment selection is a core fiduciary act.
- Here, there was insufficient evidence to overcome the *Moench* presumption.
    - Mere fluctuations in stock price are not enough to establish imprudence.
    - Motorola's stock did not collapse overnight. No signs of imminent collapse.

Claims Review Must Involve "Meaningful Dialogue"–*Salomma v. Honda LTD Plan*

- ERISA's claim procedure, § 503, requires plans to afford participants a "full and fair review" of any denied claims
- Plaintiff was a model, 20-year employee. Very healthy. Jogged two miles to and from work every day.
- Plaintiff had flu-like symptoms and his health rapidly declined. Initially diagnosed with depression. Later diagnosed with chronic fatigue syndrome.
- Plaintiff's personal physician: "completely disabled" -can't work 30 minutes (later 5 min.) without exhaustion
- Plan administrator denied Plaintiff's LTD claim
- Plaintiff appealed. Provided expert physicians' opinions. Appeal denied: experts "unpersuasive".

Claims Review–*Salomma* (cont'd)

- Plaintiff requested claims file. Plan administrator never responded.
- SSA determined total disability. Plan administrator affirmed denial.
- Ninth Circuit – Plan administrator abused discretion:
  - every examining physician determined Plaintiff was disabled
  - plan administrator denied tests to establish condition for which there are not objective tests
  - plan administrator failed to consider SSA award
  - reasons for denial shifted as they were refuted
  - plan administrator failed to engaged in a ***meaningful dialogue***

Attorneys' Fees – *Hardt v. Reliance Standard Life* and progeny

- ERISA § 502(g) – court in its discretion may allow reasonable attorneys' fees to either party
- Ms. Hardt sued Reliance Standard for wrongful denial of LTD benefits
- District court remanded to plan administrator with strong suggestion to award benefits to Ms. Hardt
- Issue: what is standard for awarding attorneys' fees under § 502(g)

Attorneys' Fees – *Hardt* (cont'd)

- Supreme Court: ***"some degree of success on the merits,"*** not trivial success or purely procedural victory
  - Ms. Hardt achieved "some degree of success on the merits" by securing remand with court's suggestion that administrator award benefits
- Unresolved Issue: does remand to plan administrator, without more, constitute "some degree of success on the merits"?
- Majority of lower courts have ruled that remand, without more, does constitute "some degree of success"

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