U.S. Legal Update

Katherine A. Hesse, CEBS
Partner
Murphy, Hesse, Toomey & Lehane
Quincy, Massachusetts

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PARTNERS IN EDUCATIONAL EXCELLENCE
International Society of Certified Employee Benefit Specialists
International Foundation of Employee Benefit Plans

Overview

- Selected United States Supreme Court Cases
- Ten Tips to Avoiding Litigation and Other Recent Cases and Trends

Litigation Trends

- According to a recent article *BenefitsPro* magazine, the ERISA class action settlements topped $807.4 million in 2016, and $1.3 billion in 2014.

Litigation: Why do you want to avoid it?

- Knowing what types of cases end up in court and how those cases are decided can help keep you out of court.
- It can also help you learn how to document your own due diligence and attention to process which can help you win many cases.
- It will make you aware of the mistakes made by your peers and how to avoid them.

Overview

- **Part 1—Selected United States Supreme Court Cases**
- Part 2—Ten Tips to Avoiding Litigation and Other Recent Cases and Trends

Part 1—Selected United States Supreme Court Cases

- Church Plan Case—
  *Advocate Health Care Network v. Stapleton**
- EEOC Subpoena Powers—
  McLane Co. Inc. v. E.E.O.C.
- Federal Vacancies Reform Act—
  NLRB v. SW General, Inc.

Advocate Health Care Network v. Stapleton, 137 S.Ct. 1652 (June 5, 2017)

- Unanimous Supreme Court decision holds that "church plans," which are exempt from many regulatory provisions of ERISA, includes plans that are created by organizations controlled by, or affiliated with, a church
- Court rejects arguments advanced by current/former employees of three church-affiliated non-profit hospitals that a "church plan" must be originally established by a church

Advocate Health Care Network v. Stapleton, (continued)

- Court noted that Congress amended ERISA in 1980, following an IRS interpretation of the definition of "church plan" that was seen as too restrictive in its attempts to define the structure and operation of a church

McLane Co., Inc. v. E.E.O.C., 137 S.Ct. 1159, 129 FEP 1825 (BNA)(4/3/2017)

- An appeals court must apply an abuse of discretion standard of review when reviewing a district court's decision of whether to enforce an EEOC subpoena.

McLane Co., Inc. v. E.E.O.C., (continued)

- In *McLane*, the employer required its employees to undergo a physical evaluation upon returning to work from leave. The employee in *McLane* was terminated after failing the physical evaluation three times upon returning from maternity leave; and was subsequently terminated.
- Employee then filed suit under Title VII of the Civil Rights Act of 1964, and the EEOC began an investigation.
- Title VII grants the EEOC the right to issue a subpoena to obtain evidence from an employer that is relevant to an investigation.

McLane Co., Inc. v. E.E.O.C., (continued)

- The employer refused to provide "pedigree information" (*e.g.*, names, social security numbers, addresses and telephone numbers of employees required to undergo the physical evaluation).
- The EEOC then issued a subpoena requesting this information. The employer once again refused → EEOC filed suit seeking enforcement of the subpoenas.
- District Court—declined to enforce, quashing the subpoenas.
- Ninth Circuit reversed after a *de novo* review.

McLane Co., Inc. v. E.E.O.C., (continued)

- The Supreme Court granted *certiorari* to resolve disagreement re: appropriate standard of review for the decision of whether to enforce an EEOC subpoena.
- The Supreme Court held that the Ninth Circuit should have reviewed the case for abuse of discretion, rather than conduct a *de novo* review.
- The Supreme Court vacated the Ninth Circuit decision and remanded the case so that the Ninth Circuit can give the District Court decision deferential appellate review under the appropriate abuse of discretion standard.

McLane Co., Inc. v. E.E.O.C., (continued)

- Case went before the Ninth Circuit Court of Appeals on remand from the U.S. Supreme Court decision.
- In applying an abuse of discretion standard of review, the Ninth Circuit holds that the pedigree information that the EEOC sought is relevant to its investigation.
- The EEOC does not need to prove that the information sought is necessary → the governing standard is not necessity, it is relevance.

NLRB v. SW General, Inc., dba Southwest Ambulance, 137 S.Ct. 929 (3/21/2017)

- A complaint issued by an NLRB Regional Director who exercised authority on the General Counsel's behalf was deemed invalid as the General Counsel was ineligible to serve in the role while simultaneously nominated for it under the Federal Vacancies Reform Act.

NLRB v. SW General, Inc., (continued)

- Background: Article II of the Constitution requires that the President obtain "the Advice and Consent of the Senate" before appointing "Officers of the United States."
- Under the *Federal Vacancies Reform Act of 1998 (FVRA)*, The President may, however, direct certain officials to temporarily act out the duties of a vacant office that requires Presidential appointment and Senate (PAS office) confirmation in an acting capacity without Senate confirmation. This is important in situations where a vacancy arises and the Senate and President cannot quickly agree on the replacement.

NLRB v. SW General, Inc., (continued)

- FVRA also prohibits certain individuals from serving as acting officers if the President nominates them to fill a vacant position permanently.
- Question before the Supreme Court:
  - Does this prohibition only apply to assistants who automatically assume such acting duties, or does it also apply to officers and senior employees serving as acting officers at the President's request?
- In analyzing the language set forth in FVRA, the Supreme Court holds that it applies to all three.

Overview

- Part 1—Selected United States Supreme Court Cases
- **Part 2—Ten Tips to Avoiding Litigation and Other Recent Cases and Trends**

The Guiding Principles: The “D”s

- “D”s to Remember:
  - Dignity
  - Discretion
  - Diversity
  - Disclosure
  - Due Diligence
  - Due Process
  - Documentation
- “D”s to Avoid:
  - Delay
  - Discrimination
  - Deceit

Dignity

"Don't look at this as a demotion, look at it as the stripping away of your last shred of dignity."

Dignity

- Treat employees with courtesy and respect.
- Listen carefully.
- Be as responsive as possible.
- Practice the Golden Rule.
- Example this year? *Scoles*.*

Scoles v. Intel Corp. Long Term Disability Benefit Plan, 657 Fed.Appx. 667 (9th Cir. 7/29/2016)

- Judicial review of denial of claim under an abuse of discretion standard was warranted as the plan administrator removed any conflict of interest by delegating the duty to decide benefit claims to unconflicted third parties.

Scoles v. Intel Corp. LTD Plan, (continued)

- The denial could not be upheld even under an abuse of discretion standard because discontinuing the benefit and issuing the decision on the first-level administrative appeal did not:
  A. Engage in the required meaningful dialogue with the participant;
  B. Provide the participant with any guidance as to why the medical evidence that she provided was insufficient;

Scoles v. Intel Corp. LTD Plan, (continued)

C. Provide guidance as to the meaning of objective medical finding in mental health context;

D. Explain why she was ineligible for benefits despite receiving social security disability insurance benefits and;

E. Explain precise reasons for denial on review.

Scoles v. Intel Corp. LTD Plan, (continued)

Ninth Circuit:

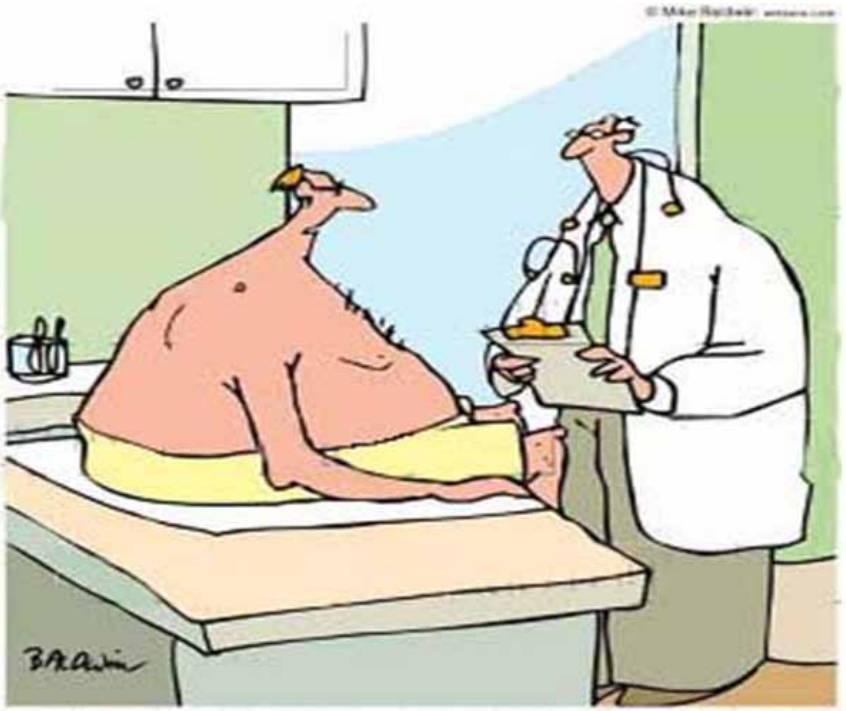
- As part of denying LTD benefits, ERISA requires a claims administrator to tell the claimant " 'in a manner calculated to be understood by the claimant,' '[t]he specific reason or reasons for the adverse determination' and '[a] description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary.' " 29 C.F.R. §2560.503–1(g)(1).
  - This in turns means that a "meaningful dialogue between ERISA plan administrators and their beneficiaries" is required.

Scoles v. Intel Corp. LTD Plan, (continued)

- There was no "meaningful dialogue"
- Denial of benefits letter did not explain why Scoles did not qualify for benefits, relying on the lack of sufficient "Objective Medical Findings" in Scoles' claim file
- Letter affirming denial of benefits was "opaque and uninformative"—did not provide Scoles with information concerning specific reason(s) for adverse determination
- 9th Cir. holds that there was an abuse of discretion—Scoles was not given an opportunity to provide evidence to satisfy the "unexplained interpretation of the term 'Objective Medical Findings' "

Discretion

- Retain discretion,
- But exercise it
- Consistently!



"But I do exercise. I exercise discretion."

Discretion

- Make sure plan and SPDs provide discretion to the employer/administrator
  - To construe, interpret and apply terms and to resolve ambiguities;
  - To amend or change those policies/handbooks/plans at any time.
- Employee communications such as employee handbooks should also include both discretionary language and right to amend.

Discretion

- Exercise discretion reasonably and consistently.
  - Provide adequate notice/avoid retroactive amendments whenever possible.
- Still must comply with the law, the plan and the SPD.
- Example: *Scoles*, *O'Shea*,* *Rodríguez-López*,* *Stephanie C.*, *Orzechowski*.*

O'Shea v. UPS Retirement Plan, 837 F.3d 67 (1st Cir. 9/13/2016)

- Where an ERISA plan provides the administrator with the authority and discretion to interpret the plan and determine one's eligibility for benefits, the administrator's decision will be upheld unless it was arbitrary, capricious or an abuse of discretion.
- Interpretation by UPS found reasonable despite sympathetic plaintiff.

O'Shea v. UPS Retirement Plan, (continued)

Background:

- 37 year UPS employee was diagnosed with cancer and decided to retire upon becoming eligible. Not knowing that the employee was terminally ill, HR advised him to maximize his time on payroll by taking his accrued vacation and personal time → doing this, the employee delayed his retirement date.
- January 7, 2010: Employee's last date of employment and employee submits retirement application, indicating that his annuity starting date would be March 1, 2010.
- Employee's children listed as beneficiaries of plan.

O'Shea v. UPS Retirement Plan, (continued)

- Employee selected a "Single Life Annuity with 120-Month Guarantee" payment plan option selected → under this plan, a reduced benefit would be paid to the employee for his lifetime, with a guarantee of 120 payments.
  - Section 5.4 of Plan states: "[i]f a Participant **dies after the Annuity Starting Date** but before receiving 120 monthly payments, the monthly payments shall be paid to the Participant's Beneficiary."
- Retirement application **did not** state that the employee needed to survive the annuity starting (March 1, 2010) date as a prerequisite to the 120 payment guarantee; HR also never said this to employee.

O'Shea v. UPS Retirement Plan, (continued)

- Retirement application did state, however, as follows: "I will receive a monthly benefit for my lifetime with a guarantee of monthly payments for a period of 10 years. If I die within the 10-year guarantee period, my beneficiar[ies] will continue to receive my monthly benefit amount for the remainder of the guarantee period."
- Only provision of the UPS Retirement Plan which provides for a retirement benefit if a participate dies *prior* to the annuity starting date, states the participant's spouse/domestic partner would be entitled to receive benefits. (Section 5.6 of Plan).

O'Shea v. UPS Retirement Plan, (continued)

- **February 12, 2010:** Employee, through counsel, accepts UPS' Special Restructuring Program, incentivizing early retirement → employee receives one year's compensation in exchange for signing a release of claims → release of claims did not bar claims accrued *after* execution of agreement but did release "all known and unknown claims"
- **February 21, 2010:** Employee passes away—clearly before the March 1st annuity starting date → Plan's administrator sent O'Sheas a letter denying payments under annuity plan, explaining that the decedent's spouse (if he had one) would be able to recover under the plan.

O'Shea v. UPS Retirement Plan, (continued)

- O'Sheas appealed twice → appeals denied both times by the UPS Retirement Plan Administrative Committee. O'Sheas then filed suit, alleging a claims for (a) benefits under ERISA §502(a)(1)(B); and (b) equitable relief under ERISA §502(a)(3)(B) → District Court dismisses claim
- On appeal to the First Circuit, the dismissal is upheld:
  - Plain language of Section 5.4 of Plan guarantees 10 years of payment if the participant survives the annuity starting date.
  - O'Sheas would have been eligible for benefits if their father passed away *after* the March 1st annuity starting date.
  - Since O'Shea passed away *before* March 1st, only his spouse/ domestic partner (if he had one) would be eligible to receive benefits.

O'Shea v. UPS Retirement Plan, (continued)

- First Circuit also notes that:
  - Despite UPS not having cited specific provision of the plan, the court could still rely on those provisions as the O'Sheas were on notice of the implications of such provision → ERISA's notice provision was met.
  - Equitable relief also denied as any alleged misrepresentation made to the decedent when he selected his retirement benefits was released when the decedent executed the release of claims on February 2010—*after* the alleged misrepresentation had occurred.

Rodríguez-López v. Triple-S Vida, Inc., 850 F.3d 14 (1st Cir. 3/1/2017)

- *De novo* review of a denial of a long-term disability claim is warranted as the plan made no clear delegation of discretionary authority to Triple-S.
- Thus the Plan's decisions were not entitled to deference.

Rodríguez-López v. Triple-S Vida, Inc., (continued)

Background

- Employer: Plan Sponsor and administrator
- Jefferson-Pilot (JP): Plan specified that JP was to receive the forms and proof of loss for disability benefits
- Triple-S: Allegedly replaced JP → however, the Plan was never amended to reflect such replacement; and the participants were not otherwise notified of this change
- Triple-S denied Rodriguez's request for long-term disability benefits → Rodriguez then filed suit

Rodríguez-López v. Triple-S Vida, Inc., (continued)

- District Court granted Triple-S' motion for summary judgment, applying the arbitrary and capricious standard of review.
- Rodriguez then filed, arguing that incorrect standard of review had been applied.
- First Circuit held that Rodriguez was correct, and that the District Court should have applied a *de novo* standard of review . . .

Rodríguez-López v. Triple-S Vida, Inc., (continued)

- When reviewing a challenge to a denial of benefits, it "is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan."
- If a participant/covered beneficiary receives adequate notice of such reservation, then "a deferential arbitrary and capricious or abuse of discretion standard" is applied.

Rodríguez-López v. Triple-S Vida, Inc., (continued)

Here, there was no clear grant of authority to Triple-S to make eligibility determinations under the Plan; and it cannot be implied. The District Court's decision is vacated and remanded.

Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., 856 F.3d 686 (9th Cir. 5/11/2017)

- Orzechowski was an employee of The Boeing Company
- Boeing has a long-term disability plan
- When a plan grants discretion to an administrator to determine benefits, a court's review of a denial of benefits is ordinarily under an abuse of discretion standard

Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., (continued)

- Orzechowski challenged Aetna's decision to terminate her long-term disability benefits
- The district court upheld the denial, holding that a California statute that voids provisions conferring discretionary authority to ERISA plan administrators did not apply
- Ninth Circuit, however, disagreed

Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., (continued)

- At issue in this case is this California statute that voids provisions conferring discretionary authority to ERISA plan administrators
- Ninth Circuit notes that because of the risk associated with insurers using discretionary clauses to increase profits by denying claims, states have enacted legislation to ban and/or limit such clauses.

Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., (continued)

- Court rejects Boeing's argument that the California statute is preempted, highlighting ERISA's *savings clause*
- To be covered by ERISA's *savings clause*—and not preempted—the California statute must satisfy the two-part test set forth in *Kentucky Ass'n of Health Plans v. Miller*, 538 U.S. 329, 342 (2003):
  1. Statute must be "specifically directed toward entities engaged in insurance," and
  2. Statute "must substantially affect the risk pooling arrangement between the insurer and insured."

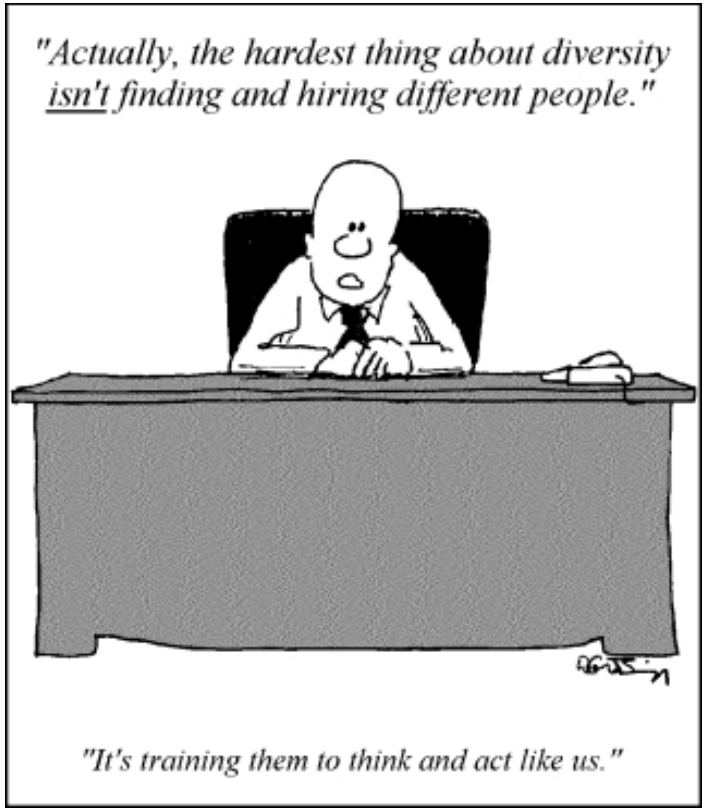
Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., (continued)

- Court holds that the California statute meets the two-part test; and is therefore, not preempted by ERISA.

Orzechowski v. Boeing Co. Non-Union Long-Term Disability Plan, et. al., (continued)

- On remand, the district court is instructed to consider Orzechowski's diagnoses of fibromyalgia and chronic fatigue syndrome—which Aetna ignored in its denial of benefits.
- Ninth Circuit further notes that although Aetna demanded that Orzechowski provide documents showing that her disability was caused by a non-psychological condition, it has "previously acknowledged [that] fibromyalgia and chronic fatigue syndrome are not established through objective tests or evidence."

Diversity


"Actually, the hardest thing about diversity isn't finding and hiring different people."
"It's training them to think and act like us."

Diversity

- Age
- Gender
- Ethnic background
- Race
- Religion
- National origin
- Disability
- Color
- Gender identity
- Sexual orientation
- Military service or Veteran status
- Genetic Information

Diversity

- Cultural competency is the watchword.
- Be sensitive to people's varying backgrounds and special needs.
- Develop a communication style that works for you and then adapt as needed to each individual's needs.
- Create an atmosphere of dignity and respect where each person feels that their contributions are valued and where diversity is celebrated.
- Be alert to possible accommodations that may be needed.
- This year's example: *Abdus-Shahid*.*

Abdus-Shahid v. Mayor of City Council of Baltimore, 2017 WL 35725 (4th Cir. 1/4/2017)

- Individual is unable to prevail on Title VII religious discrimination claim as a result of his inability to furnish a civil marriage certificate. Employer's requirement for a civil marriage to establish spouse's health coverage was generally applicable and neutral toward religion.

Abdus-Shahid v. Mayor of City Council of Baltimore, (continued)

Background

- Plaintiffs were married in an Islamic ceremony in Baltimore, MD; they never obtained marriage license and/or marriage certificate. As part of their Muslim faith, the Plaintiff's believe that their relationship is governed by Islamic law and that do not need a marriage license and its contrary to their beliefs

Abdus-Shahid v. Mayor of City Council of Baltimore, (continued)

Background *(continued)*

- Abdus-Shahid worked as civil engineer for City's Dept. of Transportation → had health insurance and enrolled spouse/children. Following a city-wide audit, his spouse's insurance was revoked as he could not provide official court-certified state marriage certificate; marriage cert. insufficient

Abdus-Shahid v. Mayor of City Council of Baltimore, (continued)

- Plaintiffs then filed suit → district court dismissed complaint.

Fourth Circuit

- First Amendment's Free Exercise clause
  - Plaintiffs failed to articulate claim; individual is not excused from complying with neutral laws that are generally applied. City's requirement for court-issued certificate before recognizing any marriage for health insurance eligibility is "a valid and neutral law of general applicability"; requirement is "facially neutral"

Abdus-Shahid v. Mayor of City Council of Baltimore, (continued)

- Maryland Local Government Tort Claims Act
  - Claim barred because Plaintiffs did not fulfill notice requirements.

Abdus-Shahid v. Mayor of City Council of Baltimore, (continued)

Fourth Circuit

- Title VII claim
  - A plaintiff must pursue administrative remedies before filing a Title VII lawsuit; and a federal court may *only* consider the allegations asserted in an EEOC charge
  - Here, Abdus-Shahid's disparate impact claim cannot survive motion to dismiss because it was not asserted in Abdus-Shahid's EEOC complaint

Disclosure/Loose Lips Sink Ships

Disclosure/Loose Lips

- Use all available communications opportunities and frame communications so that they will be most likely to be understood by all.
- Avoid legal or highly technical language.
- And always remember: Loose lips sink ships!

Disclosure/Loose Lips

- Cases this year include: *Scoles*, *Severstal*, *O'Shea*, *Troiano*,* *Tedesco*,* *Barton*, *Stephanie C.*, *and Rhea.**

Troiano v. Aetna Life Insurance Company, et. al., 844 F.3d 35 (1st Cir. 12/16/2016)

- Long-term disability benefits are off-set by the gross pre-tax amount of Social Security disability insurance benefits.

Troiano v. Aetna Life, (continued)

- Under provisions of plan, long-term disability benefits were subject to offset by "other income benefits" payable.
- **December 2003-March 2010:** Troiano receives long-term disability benefits under Plan
- **April 2010:** Troiano continues receiving benefits, but benefits were offset by her Social Security income

Troiano v. Aetna Life, (continued)

- **October 2009:** Troiano becomes entitled to monthly Social Security benefits as of January 2004 and receives a lump-sum payment for the amount that had been due to her through January 2010
- **April 2010:** Aetna begins offsetting Troiano's LTD payments by gross amount of her Social Security payment

Troiano v. Aetna Life, (continued)

- Aetna also sought reimbursement, totally $126,526, for amount it had overpaid Troiano
- Troiano's request that Aetna offset her LTD benefits by the net amount, versus gross amount, of her Social Security benefits was denied → in denying Troiano's request, Aetna noted that it was "industry standard" to offset by gross amount → litigation ensued.

Troiano v. Aetna Life, (continued)

- Language of the plan stated that a monthly benefit payment would be "minus all other income benefits" and defines "[o]ther income benefits" to "include those, due to your disability or retirement, which are payable to: you; your spouse; your children; your dependents."

Troiano v. Aetna Life, (continued)

- First Circuit:
  - Aetna was allowed to offset Troiano's LTD payments by the gross amount of her Social Security Benefits—the amount that the was eligible to receive regardless of taxes she may need to pay on the gross sum

Troiano v. Aetna Life, (continued)

- *Contra proforentem* canon, which counsels "that the policy terms must be strictly construed against the insurer and in favor of the insured . . . when courts undertake a *de novo* review of plan interpretations[,]" does not apply since the terms of the plan were not ambiguous
- Discovery also not improperly denied

Tedesco v. I.B.E.W. Local 1249 Insurance Fund, et. al., 2016 WL 7436029 (2nd Cir. 12/21/2016)

- Adverse benefit notification that was not in compliance with ERISA's claims-procedure regulation warranted remand to the district court in light of the decision in Halo to determine whether the procedural deficiencies warranted *de novo* review.

Tedesco v. I.B.E.W. Local 1249, (continued)

- Claim re: denial of benefits dismissed on grounds that adverse benefit decision was not arbitrary and capricious. While the appeal was pending, court issued decision in Halo.
- Court remanded case so that the lower court could consider whether the procedural deficiencies in case warranted a *de novo* review, and if so, whether the claim should still be dismissed.

Tedesco v. I.B.E.W. Local 1249, (continued)

- Although the overpayment notifications Tedesco received were procedurally deficient, the plan entitled trustees to recover amount that Tedesco's employer would have paid toward her health insurance had she not declined coverage from her employer.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., 858 F.3d 340 (5th Cir. 5/30/2017).

- A summary plan description is enforceable in the absence of a separate written instrument so long as it is compliant with the requirements set forth in ERISA and does not conflict with other plan documents.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- Donna Rhea was the beneficiary of an employee benefit plan under ERISA (the Plan). Rhea suffered injuries as a result of medical malpractice and the Plan covered some of her medical expenses. The Plan had one document that served as its summary plan description (SPD) and its written instrument.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- The document contained a reimbursement provision that required reimbursement of benefits paid by the Plan to a beneficiary if a third party paid a settlement to the beneficiary for having caused the injuries. The SPD alludes to the existence of a separate "official Plan Document" but no such document existed. The SPD was the only document that described Rhea's rights and obligations under the Plan.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- Adhering to the Plan's reimbursement provision, after Rhea settled her medical malpractice case, the Plan sought reimbursement from Rhea for the medical expenses it had covered. Rhea refused to reimburse the Plan, arguing that it did not have an enforceable written instrument.
- Rhea filed suit, seeking a declaratory judgment that she was not required to reimburse the Plan and both parties moved for summary judgment. The district court granted summary judgment in favor of the Defendants. Rhea appealed.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- The decision was upheld by the Fifth Circuit Court of Appeals.
- Fifth Circuit notes that ERISA requires plan administrators to provide beneficiaries with SPDs and that plans "be established and maintained pursuant to a written instrument."

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- An SPD must
  - "Reasonably apprise [plan] participants and beneficiaries of their rights and obligations under the plan" and
  - Be "written in a manner calculated to be understood by the average plan participant."

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- ERISA sets forth the requirements of a plan's written instruments, *e.g.*,
  - Procedure to establish and carry out a funding policy,
  - Procedure for allocation of responsibilities for the operation and administration of the plan,
  - Procedure for amending the plan, and
  - Setting forth the basis on which payments are made to and from the plan).

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- Court rejected Rhea's contention that Supreme Court decision *CIGNA Corp. v. Amara*, requires that a SPD and a written instrument be separate documents.
- Fifth Court holds that a single document may satisfy both requirements so long as it complies with ERISA.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- Contrary to *CIGNA Corp v. Amara*, this case does not present a situation with a conflict between a SPD and a plan document.
- The question before the court is simply whether a SPD can serve as a written instrument in the absence of a separate written instrument.

Rhea v. Alan Ritchey, Incorporated Welfare Benefit Plan, et. al., (continued)

- Rhea's contention that the SPD was never adopted as the Plan's written instrument was likewise rejected
- Courts "assume" that the SPD is the written instrument where "SPD is a plan's only plausible written instrument."

Due Diligence

"Benson is conscientious to a fault..."

Due Diligence

- Due diligence means doing your homework.
- Investigate thoroughly: Don’t rely on stereotypes, hearsay, or assumptions.
- Due diligence is important in all aspects of plan design and administration from development of the SPD and the ensuring of consistent treatment, to the adoption of an investment policy and the careful selection of investments and the regular review and monitoring of same.

Due Diligence

- Stay current and get appropriate advice before taking the action
  - Retain appropriate expertise if you are not adequately qualified.
  - Remember to monitor the professionals that you do select; sift all recommendations with an eye to practicalities, financial and legal ramifications and public perception.
  - Document your review process and why you made the decisions you did.

Due Diligence

- Examples this year? *Tibble*,* *Severstal*,* *Sec'y of Labor v. Doyle*, *Loeza*,* *Tedesco*, *Barton* and *Rhea*.

Tibble v. Edison International, 843 F.3d 1187 (9th Cir. 12/16/2016)

- The Ninth Circuit Court of Appeals revives a lawsuit against Edison's 401(k) plan administrators.
- Following a Supreme Court decision that retirement plan administrators have a continuing duty to monitor plan investments, Ninth Circuit panel held that the beneficiaries forfeited any duty-to-monitor argument.
- On rehearing the case, the full court decided that it was Edison that had forfeited the forfeiture argument.

Tibble v. Edison International, (continued)

Background

- Edison sponsors a defined-contribution 401(k) Savings Plan. "[P]articipants' retirement benefits are limited to the value of their own individual investment accounts, which is determined by the market performance of employee and employer contributions, less expenses." → expenses may "significantly reduce the value of an account in a defined-contribution plan."

Tibble v. Edison International, (continued)

Background *(continued)*

- This case concerns claim that Edison breached its fiduciary duties by offering "higher priced retail-class mutual funds as Plan investments when materially identical lower priced institutional-class mutual funds were available"

Tibble v. Edison International, (continued)

- Six-year statute of limitations under relevant ERISA provision
- At least three of disputed funds were added *more* than six years before complaint was filed → case has been subject to a great deal of litigation

Tibble v. Edison International, (continued)

Ninth Circuit

- Beneficiaries did not forfeit failure-to-monitor argument either on appeal or in the district court; Edison, on the other hand, did

Tibble v. Edison International, (continued)

Ninth Circuit

- Case is remanded "on an open record for trial on the claim that, regardless of whether there was a significant change in circumstances, Edison should have switched from retail-class fund shares to institutional-class fund shares to fulfill its continuing duty to monitor the appropriateness of the trust investments"
- On remand, district court is to reevaluate beneficiaries' request for attorneys' fees and costs

Severstal Wheeling, Inc., et. al., v. WPN Corp., et. al., 659 Fed.Appx. 24 (2nd Cir. 8/30/2016)

- Fiduciaries of pension benefit plans were successful in their suit against the plans' investment managers in light of the investment managers' failure to prudently and loyally manage and diversify the plans' assets.

Severstal Wheeling, Inc., (continued)

Background

- WPN and its sole employee, LaBow were named fiduciaries of two contribution plans sponsored for the employees of Severstal
- Plans were funded and maintained through trust sponsored by WHX Corp. (Combined Trust)

Severstal Wheeling, Inc., (continued)

Background *(continued)*

- Severstal separated from WHX → portion of assets transferred from the Combined Trust into a separate trust (Severstal Trust); before/after transfer, trust managed by WPN/LaBow
  - No liability imposed on WHX, *not* a fiduciary. *See Severstal Wheeling, Inc. v. WHX Corp.*, 659 Fed.Appx. 28 (2nd Cir. 2016).

Severstal Wheeling, Inc., (continued)

- Following a bench trial, district court found that WPN and LaBow breached their fiduciary duties ERISA, finding that:
  - WPN and LaBow were investment managers to the plans and fiduciaries with discretionary authority and responsibility for administration of plans
  - LaBow had directed treasurer of WHX to transfer *all* of the assets in one account (undiversified portfolio) from the Combined to the Severstal Trust

Severstal Wheeling, Inc., (continued)

- LaBow breached his fiduciary duties by selecting the assets in that account as the *only* assets to be transferred without notice to Retirement Committee either before or after the transfer as to which investments had been transferred.
- LaBow
  - Knew that the account manager for that account was not going to manage the assets AND
  - Did not take steps to ensure the ongoing and prudent management of the assets.

Severstal Wheeling, Inc., (continued)

- Second Circuit holds that it had no basis to set aside the lower court's decision in light of LaBow's and WPN's failures to present any arguments that suggest that the lower court's factual findings were "clearly erroneous"
- Law only requires "grant of discretionary authority, not its actual exercise."
- Argument that they were not fiduciaries had also been rejected by lower court upon making explicit factual findings, and there was nothing on appeal to indicate findings were "clearly erroneous"

Loeza, et. al. v. John Does 1-10, et. al., 659 Fed.Appx. 44, 62 EBC 1828 (2nd Cir. 9/8/2016)

- Conclusory allegations that remedial measures would have caused a 401(k) plan more harm than good were insufficient to allow the Plaintiffs to proceed with their breach of duty of prudence claims against JPMorgan Chase, among others, and the claims were dismissed.

Loeza, et. al. v. John Does, (continued)

Background

- Plaintiffs are current/former employees of JPMorgan Case who participated in its 401(k) Savings Plan and invested portions of their retirement in a JPMorgan Chase Fund that primarily invests in common stock → its an employee stock ownership plan under ERISA
- Plaintiffs filed putative class action against JPMorgan Chase, among others, alleging they breached the duty of prudence by failing to prevent the fund from buying stock at a price inflated by alleged securities fraud

Loeza, et. al. v. John Does, (continued)

Background *(continued)*

- Plaintiffs alleged that two of JPMorgan's executives could have discharged duty of prudence and prevented harm to the fund . . . by
  - (a) Freezing its purchases of JPMorgan stock; or
  - (b) Publically disclosing the related securities fraud → Plaintiffs allege that doing this would not have caused the fund more harm than good

Loeza, et. al. v. John Does, (continued)

District Court

- Dismissed the complaint, finding that it did not "plausibly allege that a prudent fiduciary could not conclude that freezing purchases or disclosing the alleged securities fraud would cause the Fund 'more harm than good,' " as required to by Fifth Third Bancorp and Amgen

Second Circuit

- Agreed—allegations conclusory, insufficient under Amgen

Barton v. Constellium Rolled Products-Ravenswood, LLC, 851 F.3d 349 (4th Cir. 5/11/2017)

- Using traditional principals of contract law, the court found retiree benefits did not vest but terminated upon expiration of the governing collective bargaining agreement.

Barton v. Constellium Rolled Products-Ravenswood, LLC, (continued)

- Class of retirees and their union filed suit after their former employer unilaterally altered its retiree health benefits program.
- Because the CBA did not provide for vested retiree health benefits, the Fourth Circuit affirmed the lower court's grant of summary judgment in favor of the employer.

Due Process

Due Process

- Develop sound policies and procedures and adhere to them.
- Beware of overly complicated processes.
- Usually, processes should be in writing or otherwise clearly published.
- Importance of both procedural and substantive due process.
- This year's example: *Jones*.*

Jones v. Aetna Life Insurance Company, et. al., 856 F.3d 541 (8th Cir. 5/8/2017)

- Decision resolves conflict within the Circuit regarding whether an individual may bring a claim under
  - 29 U.S.C. § 1132(a)(1)(B) to "*recover benefits due to him under the terms of his plan*"; **and**
  - §1132(a)(3) "*to obtain benefits (as 'other appropriate equitable relief' for a breach of fiduciary duty by a plan administrator).*"

Jones v. Aetna Life Insurance Company, et. al., (continued)

Background

- Count I: alleged that Aetna denied Jones short and long-term disability benefits in violation of the plan, thereby violating § 1132(a)(1)(B)
- Count II: alleged that Aetna breached its fiduciary duty to Jones in violation of § 1132(a)(3) by its claims handling process including, "failing to obtain medical records, failing to tell her where to send evidence of disability, and using claims examiners with conflicts of interest[.]"

Jones v. Aetna Life Insurance Company, et. al., (continued)

- Court holds that Jones may proceed with both claims → claims are not necessarily duplicative because they are asserted under different theories of liability, despite the fact Jones sought "functionally identical relief"

Jones v. Aetna Life Insurance Company, et. al., (continued)

- Liability under (a)(3) flows from alleged deficit in the process, *not* the denial of benefits itself
- Administrators who make a decision with procedural irregularities that "serious[ly] breach" their duties to a beneficiary, are not necessarily liable under (a)(1)(B) but the breach may cause a 'more searing' review of the benefits denial.

Documentation

Documentation

- The reasons for good documentation are many, not the least of which is that judges, juries, arbitrators, and administrative agencies expect it.
- Know the difference between good and bad documentation.
- Don’t promise more documentation then you can deliver.
- Document facts rather than conclusions.
- Example this year: *Stephanie C.**

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, 852 F.3d 105 (1st Cir. 3/24/2017)

- An ERISA beneficiary bears the burden of proving that she was entitled to the denied coverage
- The court will closely scrutinize the language of the plan to determine whether eligibility for the claimed benefits is provided for by the plan.

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

Background

- Stephanie C. sought reimbursements from Blue Cross for medical expenses that she incurred for her son, without getting prior approval from Blue Cross.
- Blue Cross denied her request.
- She then sued.

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

Background *(continued)*

- District Court entered judgment in favor of Blue Cross in summary judgment motion → Stephanie appealed → First Circuit held that the lower court could should have reviewed *de novo* → on remand, the District Court once again entered judgment in favor of Blue Cross, this time applying a *de novo* standard of review → Stephanie appealed once again.

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

- In her appeal, Stephanie argues that the First Circuit should apply a *de novo* standard of review when reviewing the lower court's decision.
- First Circuit notes that the result in this case—regardless of which standard of review is applied—would be the same; and it "assume[s], favorably to Stephanie that [its] review is de novo[.]"

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

- First Circuit notes: "an ERISA beneficiary who claims the wrongful denial of benefits bears the burden of demonstrating, by a preponderance of the evidence, that she was in fact entitled to coverage" → this is the overarching principle that applies to both aspects of district court's decision, which were as follows:
  (1) Plan does not provide coverage for services rendered in an educational setting
  (2) Services in question were not medically necessary within purview of the plan
- First Circuit upholds the lower court's decision . . .

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

- Plan's exception from coverage for services rendered in an educational setting was set forth "unequivocally" in the plan.
  - Stephanie's contention that she was not properly notified that a reason for the denial of benefits had been because services had been rendered in an educational setting does not withstand scrutiny.
  - Although "a plan administrator in terminating or denying benefits, may not rely on a theory for its termination or denial that it did not communicate to the insured prior to litigation[,]" Blue Cross had communicated this reason to the child's father in a phone call.

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

- Stephanie's argument that the phone call should be disregarded on appeal because the notice had to have been in writing fails as she did not present this argument to the lower court.
- Stephanie failed to provide that services were medically necessary.

Stephanie C. v. Blue Cross Blue Shield of Massachusetts, (continued)

"To sum up, **an ERISA plan is a form of contract**. Thus, contract-law principles inform the construction of an ERISA plan, and the plain language of the plan provisions should normally be given effect. Seen in this light, **the dispositive issue here is** not whether M.G.'s course of treatment at Gateway was beneficial to him but, rather, **whether that course of treatment was covered under the Plan**. Applying the plain language of the Plan, we hold that the clear weight of the evidence dictates a finding that the disputed charges were not medically necessary (as defined by the Plan) and, thus, were not covered." (internal citations omitted)

Delay

Delay

- Act/respond as promptly as possible under the circumstances.
- Always adhere to any time limits set forth in your plan documents, SPD, CBA, or other relevant source.
- Document agreements to extend timelines.
- Investigations should be as prompt as possible under the circumstances.
- Keep employees informed of need for additional time.

Delay

- Be proactive—try to anticipate potential issues and plan your strategy ahead of time so that you can respond quickly.
- Example this year? *Lee*,* *Tibble*.

Lee v. ING Groep, N.V., 829 F.3d 1158, 62 EBC 1712 (9th Cir. 10/28/2016)

- A penalty against a plan administrator for failing to timely produce plan documents concerning a participant's claim for long-term disability benefits is warranted under ERISA.
- A penalty is not warranted under ERISA for the failure to timely produce email communications.

Lee v. ING Groep, N.V., (continued)

Background

- Lee is a former employee of ING Investment Management
- 2008: Lee is diagnosed with serious medical condition
- January 2009: Lee begins receiving LTD benefits
- December 2009: LTD benefits are terminated

Lee v. ING Groep, N.V., (continued)

Background *(continued)*

- June 2010: Lee is terminated
- Lee filed suit, alleging that his LTD benefits were wrongfully terminated and that he was terminated in retaliation for exercising his rights under ERISA.
- District Court: Dismissed claims, granting the Defendants' motion for summary judgment → appeal ensues

Lee v. ING Groep, N.V., (continued)

Legal standard

- When employee benefits plan gives claim administrator discretion in making claims decisions, courts must review decisions for abuse of discretion; if the administrator, however, is "suffering from a conflict of interest, the abuse of discretion standard must be tempered with some level of skepticism."

Lee v. ING Groep, N.V., (continued)

Ninth Circuit

- Regardless of whether the district court should have applied more skepticism in reviewing the termination of his LTD benefits, the claims administrator did not abuse its discretion
- Lee refused to attend IME as required by plan

Lee v. ING Groep, N.V., (continued)

Ninth Circuit

- As to retaliatory discharge claim, Lee filed it outside of the statute of limitations and argued on appeal that the district court should have applied equitable tolling or equitable estoppel to his claim
  - *Equitable tolling of SOL*—available for periods of time where "reasonable plaintiff would not have known of the existence of a possible claim"
  - *Equitable estoppel of SOL*—applies when defendant engaged in "affirmative misconduct" that has caused plaintiff to be unable to file during limitations period

Lee v. ING Groep, N.V., (continued)

- Lee argues that he is entitled to both doctrines because he did not that he was discharged for exercising his ERISA rights until he received an internal ING email in discovery that evidences retaliatory motive. That said, Lee knew that he had a "possible" claim for retaliatory discharge *before* receiving that email

Ninth Circuit holds

- Lee "is <u>not</u> entitled to equitable tolling up until the point he is certain that he was fired in retaliation . . . the suspicious timing of ING's decision was sufficient to allow Lee to file a complaint"; Lee also <u>not</u> entitled to equitable estoppel as he knew he had possible claim even *before* he was terminated

Lee v. ING Groep, N.V., (continued)

- In an earlier, July 25, 2016, decision, the Ninth Circuit:
  - Affirmed the district court's decision to impose a penalty on ING for failure to produce a plan document, requested by Lee, within 30 days as required under 29 U.S.C. §1132(c)(1)
  - Held that "a failure to follow claims procedures imposed on benefits plans, such as outlined in 29 C.F.R. §2560.503–1(h)(2)(iii) does not give rise to penalties under 29 U.S.C. §1132(c)(1)."

Discrimination

"Why me and not you?"

Discrimination

- Avoid illegal discrimination or the appearance of it.
  - Remember an intent to discriminate is not necessary if there is an adverse disparate impact on a protected class.
- Consistency is perhaps the single most important guiding principle in handling workplace issues.

Discrimination

- This consistency should include:
  - Consistency with the plan/SPD/policy and how it has been previously interpreted and applied to other employees.
  - Consistency among departments, divisions, locations, and supervisors.
  - Internal consistency vis-à-vis the employee.
- Example this year: *Savage*.*

Savage v. Federal Express Co., et. al., 856 F.3d 440 (6th Cir. 5/10/2017)

Background

- Kenneth Savage worked as a Senior Aircraft Mechanic for FedEx and participated in FedEx's pension plan
- The administration and calculation of the retirement benefits under the pension plan were done by an actuarial and retirement benefits administrative firm, Mercer

Savage v. Federal Express Co., et. al., (continued)

- During the course of his employment with FedEx, Savage served as a lieutenant in the United States Naval Reserves
- Savage raised concerns regarding a discrepancy in his pension calculations with his manager, the human resources advisor, others at FedEx's benefit department, and with the FedEx Retirement Center (an entity made up of Mercer employees)

Savage v. Federal Express Co., et. al., (continued)

- Shortly thereafter—and just 34 days after completing his military service—Savage was suspended pending an investigation concerning whether he abused his shipping privileges.
- The investigation concluded that he had abused such privileges, and his employment was summarily terminated
- Savage filed a complaint with the Department of Labor Veterans' Training Service.

Savage v. Federal Express Co., et. al., (continued)

- An investigation revealed that FedEx miscalculated his pension benefits because his imputed earnings for certain short-term leaves were not captured
- FedEx then recalculated his earnings for the time he was on military leave
- When doing so, it used the "12-month look-back methodology," required by USERRA, because his rate of pay during such time was not "reasonably certain due to shift differential pay, overtime pay, and premium license pay"

Savage v. Federal Express Co., et. al., (continued)

- Savage argued that the recalculation was still incorrect because
  - It did not capture his potential overtime hours and
  - USERRA requires that FedEx calculate his benefits "in one step based on the average compensation he earned for all hours that he worked during the 12 months before each period of military service"
- Litigation ensued.

Savage v. Federal Express Co., et. al., (continued)

- Savage's claims under USERRA:
  - **(1)** FedEx discriminated against him on the basis of his military service;
  - **(2)** FedEx retaliated against him for exercising his USERRA rights; and
  - **(3)** FedEx improperly denied him retirement benefits that he was entitled to under USERRA's pension provision.

Savage v. Federal Express Co., et. al.,
(continued)

Holding

(1) *Discrimination claim*—he did not prevail as FedEx would have terminated him for violation of shipping privileges regardless of complaints he had raised

(2) *Retaliation claim*—he did not prevail, he would have been terminated regardless of complaints raised

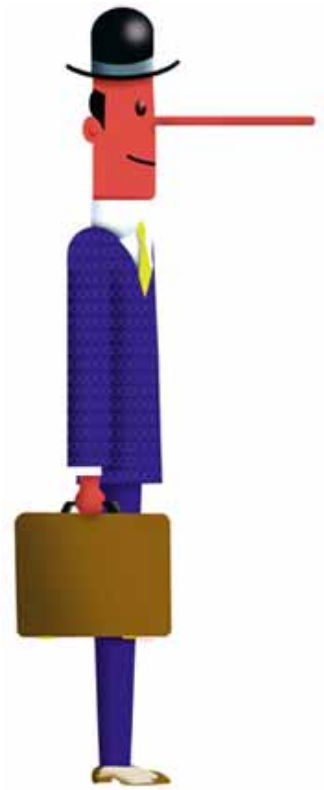
(3) *Miscalculation of retirement benefits claim*—summary judgment not warranted as there remains a genuine issue of material fact as to whether FedEx miscalculated his pension contributions under §4318

Savage v. Federal Express Co., et. al., (continued)

Under USERRA, pension contributions must be made to an employee as if he was continuously employed

- When the rate of contribution is not reasonably certain (*e.g.*, employees who earn overtime pay or commissions), USERRA establishes a 12-month look-back rule to estimate compensation during the period of service to determine the appropriate amount of pension contribution → employer must calculate compensation during the period of service based on the "employee's average rate of compensation during the 12-month period immediately preceding military service."

Deceit



Deceit

- It is better to say nothing than to lie.
- Using a false reason for a job action can cause an inference of discrimination.
- Example this year? *Sec'y of Labor v. Doyle*.*

Secretary of Labor v. Doyle, et. al. 657 Fed.Appx. 117 (3rd Cir. 08/18/2016).

- Owner of marketer of professional employer organization's services
  - Was a functional fiduciary of a union-funded health and welfare plan under ERISA alleged to have breached his fiduciary duty because he . . .

Secretary of Labor v. Doyle, (continued)

- Caused the marketer to retain employer-client contributions for administrative fees that were excessive or contrary to the plan documents and
- The employer-clients believed that their contributions were for the cost of health insurance.

Secretary of Labor v. Doyle, (continued)

- Doyle owned PCMG which marketed PEO services and access to a health fund by paying two checks each month.
- As to Check 1, PCI/NP retained a portion of it, sent a portion back to Doyle's company as a refund, paid a portion to PITWU as "union dues" and sent to the remainder to claim administrators
- PCMG retained Check 2 for fees and marketing

Secretary of Labor v. Doyle, (continued)

- Secretary of Labor—enters cease and desist order against PCI, PCMG and 2 marketing affiliates, finding that they were engaging in unauthorized sale of insurance → new administrator is then put in place.
- Louisiana Insurance Commissioner—issues cease and desist order, finding that PCI/NP was selling health insurance without authorization, there was no collective bargaining by PITWU on behalf of its members, and that client-employers *only* had access to the Fund and no other benefit/rep. from PITWU

Secretary of Labor v. Doyle, (continued)

- Union official of Holloway learns of problems re: unpaid claims for member-employees; problems re: lack of funding → she resigns
- Secretary of Labor initiates action against Doyle, Holloway, the Fund, among others → litigation ensues

Secretary of Labor v. Doyle, (continued)

Third Circuit

- All the contributions (Checks 1 and 2) from employer-clients are "assets" under ERISA → employers believed those payments were for the cost of health insurance.
- Because those monies were assets, Doyle's argument that he did not breach the duties of loyalty and prudence because he was not a functional fiduciary of the Fund fails

Secretary of Labor v. Doyle, (continued)

Third Circuit

- Remands the case as to Holloway, for the lower court to determine the extent of her liability after she learned of red flags re: the diverted participant contributions.

Questions?