Fiduciary Liability: What's Hot/What's Not?
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Today’s Discussion Topics

• Communication of benefits changes - How far does \textit{CIGNA v. Amara} reach?
• Short course on Affordable Care Act fiduciary issues
• 401(k) fee disclosure cases – these are not going away.
• Employer stock cases – new developments, continuing exposures.
• “De-risking” and spinning off benefit plan liabilities: Fiduciary implications
Communication of Benefits Changes - 

_CIGNA Corp. v. Amara_, 131 S.Ct. 1866 (2011)

• Underlying facts – pension plan conversion from defined benefit plan to cash balance plan
  – CIGNA’s promise in communications that conversion would benefit all
    • But what about benefits earned prior to conversion date – January 1, 1998?
    • CIGNA promised to contribute an amount equal to value of already earned benefits but cash balance formula reduced initial deposit and cash balance formula diminished contributions in face of falling interest rates
    • Plus, the risk of diminishing returns shifted from employer to employee
Amara – Judicial History

• History in lower courts
  – Claim restated as a claim for benefits due under the terms of the plan as described in CIGNA’s communications – ERISA § 502(a)(1)(B); 29 U.S.C. § 1132(a)(1)(B)
Amara - Holding

- Reversed lower court - § 502(a)(1)(B) inapplicable
  - Rights may only be derived from the plan itself
  - Plan summaries and other communications cannot rewrite terms of plan;
    HOWEVER,
Amara – Holding (Cont’d)

• Misrepresentations remediable pursuant to § 502(a)(3)
  – Equitable reformation
  – Equitable estoppel
  – Surcharge
Amara – Significance/Questions

• No more remedies gap for misrepresentations
• Monetary remedies available for breach of fiduciary duty
• Are the described remedies the “holding” or “dictum” as Justice Scalia maintains
• Is an intentional misrepresentation required?
  – 7th Cir. docket – Kenseth v. Dean; Killian v. Concert
Amara – Subsequent Litigation

- *Skinner v. Northrup*, __ F.3d __ (9th Cir. 2012) (narrowly interpreting *Amara*, rejecting reformation and surcharge remedies under Section 502(a)(3))
  - Even if remedies in *Amara* deemed dictum, recent Supreme Court dictum authoritative
  - Only focused on surcharge remedy – retiree medical insurance
Amara – Subsequent Litigation (Cont’d)

• If discretionary language only in summary plan description (SPD), it will not be enforceable
Lessons Learned From Amara

• Harmonize SPD with Plan
  – Discretionary language
  – Time limits for claim appeals

• Monitor written communications

• Train HR/Benefits employees to avoid making representations
Remaining Issues

• *U.S. Airways v. McCutchen* – Does “appropriate equitable relief” trump plan language
  – Common fund doctrine
  – Make whole doctrine
  – Other equitable principles

• *Bilyeu v. Morgan Stanley*, 683 F.3d 1083 (9th Cir. 2012)
  – Reimbursement claims – does the fund over which the reimbursement is sought have to be in existence – *Thurber v. Aetna*, 2013 U.S.App.LEXIS 5022 (2nd Cir. March 13, 2013)
Affordable Care Act

• Sweeping legislation intended to extend health insurance to 31 million uninsured by 2019
• Requires US citizens and legal residents to obtain and maintain health insurance
• Requires large employers to provide health insurance or face potential penalties
• Establishes Essential Health Benefits
• Establishes Health Care Exchanges
• Expands Medicaid
• Accountable Care Organizations
Affordable Care Act

• Health Insurance will be obtained through:
  – An employer’s plan
  – Health Insurance Exchange
    • Marketplace to purchase health insurance
    • Premium contingent on coinsurance and co-pays
    • Tax credits will be provided to purchasers who make between 133% and 400% of federal poverty level
  – Medicaid
Affordable Care Act

• Employers Obligation
  – Employers with 50 Full Time Equivalent Employees (FTE) must provide health insurance to full time employees, or face a potential penalty.
  – Coverage offered must cover at least 60% of health care costs
  – Cost cannot exceed 9.5% of employee’s household income

• How are Full Time Equivalent Employees Calculated? Sum of:
  – Employees who work 30 hours per week, plus
  – Hours of all part time employees divided by 120
Affordable Care Act

• Employers face penalties:
  – If at least one employee obtains a tax credit on the exchange, an annual penalty applies:
    • (Number of Full time employee – 30) x $2000
  – If the coverage offered is not affordable (in excess of 9.5% of employee’s household income) or it does not cover at least 60% of benefits?
    • $3000 penalty for each employee who obtains a tax credit.
Affordable Care Act

• Timeline
  – 10/1/2013: Open enrollment in healthcare exchanges opens
  – 1/1/2014: U.S. citizens and legal residents must obtain health insurance or face a penalty/tax.
    • Health Insurance Exchanges must be running.
    • New plans prohibited from imposing limits or discriminating based on pre-existing conditions
  – 1/1/2015: Physician compensation tied to quality of care
Affordable Care Act

• Possible Claims:
  – Misclassification of independent contractors
  – Misrepresentation claims relating to benefit communications
  – Independent Review Organizations
  – Discrimination/Retaliation
  – Privacy challenges
  – Contraception mandate
  – Common ownership issues
Fee Litigation Against Plan Sponsors and Service Providers – Alive and Well

• Plaintiffs allege plan sponsors violate ERISA by *inter alia*:
  – Offering mutual funds instead of separate accounts (on theory that separate accounts have lower fees);
  – Offering actively managed funds instead of index funds (arguing active management costs more and generally does not yield better net results);
  – Offering retail-class mutual funds instead of institutional or institutional-class mutual funds (on theory that the latter are cheaper); excessive compensation
Fee Litigation Against Plan Sponsors and Service Providers (Cont’d)

• Plaintiffs challenge the basic business model of 401(k) providers:
  – Contend insurance companies and other providers are fiduciaries
  – Challenge revenue sharing, claiming it results in excessive compensation
  – Claim that service providers engage in prohibited transactions by using their own propriety funds or by participating in fiduciary breaches with plan sponsors
Fee Litigation Strategy and Settlements

• In this arena, often plaintiffs’ goal is to survive a motion to dismiss, serve burdensome discovery and settle

• Sponsor settlements:
  – *Caterpillar*, $16.5 million
  – *General Dynamics*, $15 million
  – *Bechtel*, $18.5 million
  – *Wal-Mart*, $13.5 million
  – *Kraft*, $9.5 million
Fee Litigation Strategy and Settlements (Cont’d)

• Service provider settlements:
  – *Hartford Life* (revenue sharing paid to service provider from mutual funds claimed to be a prohibited transaction), $14 million (almost half of which went to plaintiffs’ attorney’s fees) plus business changes

*  *  *

• Do we think these are large settlements? Should the defendant litigate?
Fee Case Trial Outcomes

• *Tibble v. Edison International*, No. 10-56406 (9th Cir. March 21, 2013)
  – Plaintiffs claimed hundreds of millions in damages, but *Edison* prevails on all claims except comparatively small claim that *Edison* could have offered institutional class shares, rather than retail, as to one investment
  – Court adopts DOL position as Section 404(c)
  – Court enforces rigorous 6-year statute of repose analysis
Court rejects plaintiffs’ categorical challenge to offering retail class funds
Rehearing petition likely

• *Tussey v. ABB*, 2012 WL 1113291 (W.D. Mo. March 31, 2012)
  – Court rejects plaintiffs’ request for $343 million.
  – Total damages of approximately $37 million plus injunctive relief:
    • $13.4 million in losses as a result of ABB’s alleged failure to monitor
      recordkeeping costs and negotiate for rebates
    • $21.8 million in losses due to allegedly imprudent fund changes
Fee Case Trial Outcomes (Cont’d)

• After four week trial, Court rejects majority of claims:
  – Using revenue sharing to pay for recordkeeping is legal
  – It can be prudent to monitor the reasonableness of fees by monitoring the overall reasonableness of expense ratios.
However, ABB’s IPS allegedly created a more stringent standard:

- ABB defendants found to have breached fiduciary duties by allegedly failing to monitor revenue sharing separately from mutual fund expense ratios and not obtaining rebates of “excessive” fees.
- Part of this “overpayment” purportedly subsidized (unspecified) non-Plan services ABB would otherwise have paid.

Fidelity allegedly breached its duties by retaining float.

Case is on appeal to Eighth Circuit
Recent Notable Fees/Investment Cases

  
  – Claims that *Transamerica* received excessive fees through revenue sharing and that Transamerica was a fiduciary.

  – On motion to dismiss, court minimizes contractual agreement to establish fees; says that because *Transamerica* and employers bargained for fees to be paid by participants, Transamerica was a fiduciary. Also had authority to adjust fees.
Recent Notable Fees/Investment Cases (Cont’d)

  – Court denies motion to dismiss, allows claims to go forward that *Ameriprise* breached ERISA duties by offering its own propriety funds to its participants, by charging excessive recordkeeping fees, and by engaging in prohibited transactions.

  – Court also permits claim that sale of recordkeeping business subsidiary generated unlawful profits.
Recent Notable Fees/Investment Cases (Cont’d)

• *Johnson v. Board of Pensions of Evangelical Lutheran Church in America*, No. 11-00023 (MJD/LIB) (D. Minn. March 26, 2013):
  
  – Plaintiffs challenged reductions to annuity interest crediting rates by Board driven by financial crisis loss of fund asset value and fund ability to generate earnings.
  
  – Court denies class certification of breach of fiduciary duty, contract and disclosure claims.
Recent Notable Fees/Investment Cases (Cont’d)

– Court holds that Board, through its expert, demonstrated that plaintiffs’ economic interests were contrary to significant majority of plan’s 12,000 participants who preferred to endure temporary reductions to preserve long-term solvency of fund. Plaintiffs’ claims therefore were not common, typical or adequate.

– Disclosure claims could not be certified because of numerous communications and plaintiffs’ failure to show reliance on alleged miscommunications.
Recent Notable Fees/Investment Cases (Cont’d)

• *Comcast Corp. v. Behrend*, No. 11-864 (U.S. March 27, 2013):
  – Case involved use of experts in antitrust context to support class certification.
  – Case holdings may make it more difficult to certify classes in ERISA fee context.
    • Damages must be capable of class wide determination under Rule 23(b)(3).
    • Damages theory must be directly linked to theory as merits.
ERISA Employer Stock Claims – They Are Not Going Away

• As goes the market, so go filings of employer stock cases.

• Plaintiffs’ theories

  – Fiduciaries knew or should have known adverse information and overridden plan terms and sold stock.

  – Fiduciaries misled participants through deceptive company communications and/or failed to disclose material information.
ERISA Employer Stock Claims – They Are Not Going Away (Cont’d)

• Core defense – *Moench* presumption
  – Holds that investment in employer stock is presumptively prudent
  – Plaintiffs can overcome presumption by presenting evidence implicating the company’s viability or showing both a precipitous decline in stock price and that the company was on the brink of collapse.
Recent Employer Stock Decisions

- **Pfeil v. State Street Bank & Trust Co.,** 671 F.2d 585 (6th Cir. 2012) (Departing from holding of numerous other circuits, Sixth Circuit held that presumption of prudence does not apply at pleadings stage). Supreme Court review denied.

- **Taveras v. UBS AG,** No. 12-1662 (2d Cir. Feb. 27, 2013) (court considered whether presumption applied to two different plans, one stated company stock “shall” be offered and the other did not; because second plan did not require or even “strongly encourage” investment in stock, presumption did not apply).
Recent Employer Stock Decisions (Cont’d)

  - ERISA “stock rise” case
  - Nabisco spun off its tobacco business into R.J. Reynolds and Nabisco 401(k) plan was split into separate plans.
  - Nabisco stock held by the R.J. Reynolds plan was frozen and the following year the R.J. Reynolds plan sold all of its Nabisco stock at a substantial loss. Six months later, the stock had rebounded to three times its sale price.
Recent Employer Stock Decisions (Cont’d)

- Based on claims by a participant that R.J. Reynolds had wrongfully forced participants to sell their Nabisco stock court finds:
  - Defendants breached their duty of procedural prudence.
  - Court nonetheless ruled in defendants’ favor because the fiduciaries’ actions “objectively prudent” given the inherent risk of owning individual stock investment.
Recent Employer Stock Decisions (Cont’d)

  - Suit by Secretary of Labor, claiming that ESOP trustee relied on a flawed appraisal report in stock purchase from Sierra Aluminum, and that indemnification agreement between trustee and Sierra Aluminum to reimburse defense costs violated ERISA anti-exculpatory provisions in Section 410.
Recent Employer Stock Decisions (Cont’d)

– Court holds for ESOP trustee, finding that Sierra’s agreement to indemnify trustee lawful because it did not require Sierra to indemnify for proven misconduct.

– Couturier inapplicable because indemnification was required there for proven violations.
“De-risking” Meets ERISA - Efforts to Transfer Benefit Plan Liability

• GM paid Prudential $25 billion for purchase of group annuity contract to cover pension benefit obligations for 110K GM salaried employees (as of Nov. 2012)

• United Steel Workers are covered by more than 30 VEBAs providing for health and other benefits (see Pension Trusts Strapped, Wall Street Journal (Nov. 7, 2011) online.wsj.com)

• In December 2012 Verizon paid Prudential $2.6 billion for group annuity to cover $7.5 billion in pension plan liability covering 41,000 workers who retired and began receiving benefits before January 2010 (see www.businessinsurance.com)

• In 2010 Ford transferred its retiree medical benefits to a VEBA trust. (i.e., the UAW Retiree Medical Benefits Trust).
Are Liability Transfers Fiduciary Acts?

- ERISA allows delegation of responsibility
- Is the transfer of liability through purchase of an annuity or use of a VEBA a fiduciary act?
  - At least one court has said “no” with respect to decision to purchase annuities -- because actions to amend or terminate plans are settlor actions of plan design and not fiduciary acts of management or administration, and reservation of rights clause present. *Lee v. Verizon Communications, Inc.*, No. 12-4834, 2012 WL 6089041 (N.D.Tex. Dec. 7, 2012). However, court further stated there is a fiduciary obligation in selecting appropriate annuity provider.
  - If it can be a fiduciary act, what are areas of exposure?
    - Responsibility to act prudently with plan assets
    - In purchasing an annuity, might there be fiduciary liability if the fees charged for the annuity are not reasonable?
Transfers of Liability Through Mergers & Acquisition

• Where new company acquires liability for ERISA plans, are there similar fiduciary issues regarding the transfer?

• Does the seller have an obligation to insure health plan benefits of retirees are protected? *Schriever v. Philips Display Components Co.*, No. 10-1370, 2012 WL 5351279 (6th Cir. Oct. 31, 2012). Court holds that, absent prior promise of lifetime benefits, no obligation to retirees.

• What about liability for improper amendment decreasing benefits/termination of plans at issue as a result of sale or merger? *Kirkendall v. Halliburton, Inc.*, 707 F. 3d 173 (2d Cir. 2013). Benefits here were not automatically reduced; “reductions” attributable to participant termination upon sale.