

**Alabama Profit Sharing/401(k) Council Meeting**  
**Tuesday, May 6, 2014**

**ERISA Litigation: What Benefits and  
Other Professionals Need to Know**

**J.S. “Chris” Christie, Jr. ©**  
**Bradley Arant Boult Cummings LLP**  
**1819 Fifth Avenue North**  
**Birmingham, AL 35203-2119**  
**(205) 521-8387**  
[jchristie@babco.com](mailto:jchristie@babco.com)



BRADLEY ARANT  
BOULT CUMMINGS  
LLP

# *Stephens v. Citation Corp.* (N.D. Ala. 2010) (Acker, J.)

“The court concludes that none of the parties understands the vagaries and nuances of ERISA, a statute that is still the subject of legitimate debate by and between good lawyers, and that reflects confusion in anxious courts. *See Florence Nightingale Nursing Service, Inc. v. Blue Cross and Blue Shield*, 832 F. Supp. 1456, 1457 (N.D. Ala. 1993), *aff'd*, 41 F.3d 1476 (11th Cir. 1995), in which this court called ERISA ‘**Everything Ridiculous Imagined Since Adam**.’”

# ERISA TOPICS TODAY

- ERISA Preemption
- ERISA Claims – types
- ERISA Fiduciary (definition and duties)
- *Tussey, Tibble, Fifth Third, Rochow*
- Attorney-Client Privilege
- Fiduciary Exception to Attorney-Client Privilege
- Miscellaneous ERISA Issues (and Test?)

# ERISA Preemption: Good or Bad?

- Bad – ERISA administrative compliance
- Good – no juries
  - No punitive damages
  - No extra-contractual damages
  - Exhaustion of administrative remedies
  - Deferential review in Court

# Provident Internal Memorandum re: ERISA, Oct. 2, 1995:

A task force has recently been established to promote the identification of policies covered by ERISA and to initiate active measures to get new and existing policies covered by ERISA. The advantages of ERISA coverage in litigious situations are enormous: state law is preempted by federal law, there are no jury trials, there are no compensatory or punitive damages, relief is usually limited to the amount of benefit in question, and claims administrators may receive a deferential standard of review. The economic impact on Provident from having policies covered by ERISA could be significant. As an example, Glenn Felton identified 12 claim situations where we settled for \$7.8 million in the aggregate. If these 12 cases had been covered by ERISA, our liability would have been between zero and \$0.5 million.

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# Provident Internal Memorandum re: ERISA, Oct. 2, 1995 (typed):

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# Why Does ERISA Favor Employers in Litigation?

- ERISA intended “to encourage the maintenance and growth of [benefit plans]; [and] . . . to maintain the premium costs of such system at a reasonable level.” 29 U.S.C. § 1001b(c) (2, 5).
- The Supreme Court has instructed courts “to take account of [Congress’s] desire not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place.” *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996).

# What Does ERISA Preempt?

- ERISA expressly preempts state laws that relate to an ERISA plan
- ERISA impliedly preempts state laws that conflict with ERISA
- If employer provides employee benefit, ERISA probably preempts
  - even if no plan document, no SPD, no 5500s



# Unexpected ERISA Preemption

- Severance pay, if more than lump sum payment
- Termination pay by contract with executive
- Pay deferred to end of employment
- Voluntary insurance that is payroll deducted if employer endorses
  - Life, accident (AD & D), health, disability
- Day Care Centers

# *Williams v. Wright* (11th Cir. 1991)

- Letter to one employee, the General Manager
- Promised payments after end of employment
- Payments ended after 4 years, when company sold
- No formal documents, no ERISA compliance
  - (but Top Hat Plan?)
- ERISA covered plan created by letter

# Types of ERISA Claims

- § 502(a)(1)(A) – failure to provide document/notices
  - (e.g., requested plan documents, COBRA notices)
- § 502(a)(1)(B) – claims for benefits or to clarify plan rights
- § 502(a)(2) – breach of fiduciary duty, on behalf of plan
- § 502(a)(3) – breach of ERISA or of plan, on behalf of individual (appropriate equitable relief)
- § 502(a)(5) & (6) – Secretary of Labor claims
- § 502(g)(1) – discretionary attorneys' fees to prevailing party
- § 502(g)(2) – multiemployer plan delinquent contributions

# Who is an ERISA Fiduciary?

- Fiduciary by Position – by statute or named in plan document
  - Trustee, administrator, sponsor, investment manager
- Fiduciary by Function
  - Makes discretionary decisions, holds plan assets
- Fiduciary Responsibility Limited By
  - What Plan documents say
  - To the extent performs function
- *Tibbler v. Dlabal* (5<sup>th</sup> Cir. 2014) (investment advisor not fiduciary)
  - Only advised the fiduciary, the now bankrupt employer

# What are ERISA Fiduciary Duties?

- Loyalty: 1) act solely in the interests of plan participants  
2) defray reasonable expenses of plan administration
- Prudence – act like prudent expert
- Diversify investments, except eligible individual account plan
- Follow ERISA and Plan
- Watch co-fiduciaries

# *Tussey v. ABB* (8<sup>th</sup> Cir. 2014) (excessive 401k fees)

- Affirmed Plaintiffs' recovery of \$13.4M excessive 401k fees paid to service provider
- Deficient process: 1) no investigation, monitoring or negotiation and 2) revenue sharing not calculated, subsidized other services
- Remanded \$21.8M mapping recovery for review under abuse of discretion
- Reversed \$1.7M float recovery, because float not a plan asset
- Remanded attorneys' fees award of \$13.5M

# *Tibble v. Edison International* *(9th Cir. 2013) (401k fees)*

- Affirmed dismissal of breach of fiduciary duty claims as to many funds
  - Revenue sharing covering administrative costs did not violate ERISA
  - Investment in most funds prudent, deferring to fiduciary's evaluation of alternatives
- Affirmed breach of fiduciary duty judgment of \$370,000 (\$3.8B plan) for investment in retail mutual funds without investigating

# *Fifth Third Bancorp. v. Dudenhoeffer* (6th Cir. 2012) (employer stock)

- Plaintiffs not required to allege specific facts in complaint to overcome the presumption that ESOP fiduciaries' decision to invest in employer stock was not an abuse of discretion
- Other circuits applied this “Moench Presumption” at the motion to dismiss stage
- Employers' filings with SEC became ERISA fiduciary communications by referring to them in plan documents
- U.S. S. Ct. oral argument April 2, 2014



# *Rochow v. Life Ins. Co. of N. Am.* (6<sup>th</sup> Cir. 2013) (damages)

- Company president had HSV-Encephalitis, hospitalized
- Insurer denied disability claim
- Awarded over \$900,000 in benefits and ordered to disgorge profits of \$3,800,000
  - Profits based on insurer's return on equity ranging from 11% to 39%/year

# Attorney-Client Privilege

## What Law Applies?

In ERISA matters, federal law generally governs attorney-client privilege.

### **Fed. R. Evid. 501:**

Except as otherwise required by the [U.S.] Constitution . . . , **the privilege of a witness, person, government, State or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.**

# Attorney-Client Privilege (cont'd)

## 4 Elements of Attorney-Client Privilege

### The attorney-client privilege applies where:

- (1) the asserted holder of the privilege is or sought to become a client;
- (2) the person to whom the communication was made
  - (a) is a member of the bar of a court or his subordinate and
  - (b) in connection with this communication is acting as a lawyer;

# Attorney-Client Privilege (cont'd)

## 4 Elements of Attorney-Client Privilege

**The attorney-client privilege applies where:**

(3) the communication relates to a fact of which the attorney was informed

(a) by his client

(b) without the presence of strangers

(c) for the purposes of securing (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and

(d) not to commit a crime or tort;

# Attorney-Client Privilege (cont'd)

## 4 Elements of Attorney-Client Privilege

**The attorney-client privilege applies where:**

and

(4) the privilege has been (a) claimed and  
(b) not waived by the client.

*U.S. v. United Shoe Mach. Corp.* (D. Mass. 1950)

# Fiduciary Exception to the Attorney-Client Privilege

Fiduciary exception to attorney client privilege:

Where an ERISA trustee seeks an attorney's advice on a matter of plan administration and where the advice clearly does not implicate the trustee in any personal capacity, the trustee cannot invoke the attorney-client privilege against the plan beneficiaries.

*United States v. Mett* (9th Cir. 1999)

# Who is a Fiduciary for the Fiduciary Exception? *Stephan*

*Stephan v. Unum Life Ins. Co. of America*  
(9th Cir. 2012)

- Insurer's internal memoranda between administrator's claims analyst and its in-house counsel held discoverable
- Applied the fiduciary exception to insured ERISA plan

# Who is a Fiduciary for the Fiduciary Exception? *Stephan* (cont'd)

The Ninth Circuit's two rationales for applying the exception to ERISA fiduciaries:

- Duty to disclose: Exception derives from an ERISA trustee's duty to disclose to plan beneficiaries all information regarding plan administration and attorney-client privilege is subordinate to fiduciary's disclosure obligation



# Who is a Fiduciary for the Fiduciary Exception? *Stephan* (cont'd)

The Ninth Circuit's two rationales for applying the exception to ERISA fiduciaries (cont'd):

- The beneficiary is the real client: Because the ERISA fiduciary is a representative for the beneficiaries of the trust, the plan beneficiary, not the fiduciary, is the “real client.”

*Stephan v. Unum Life Ins. Co. of Am.* (9th Cir. 2012)

# Fiduciary Exception Limitations

Three limits to the fiduciary exception:

- Fiduciary Function vs. Settlor Function
- Mutual Interests vs. Divergent Interests
- Plan Administration vs. Personal Liability

# Fiduciary Exception Limitations (cont'd)

## Fiduciary Function vs. Settlor Function

No fiduciary exception for communications seeking legal advice regarding:

- Amending or terminating ERISA plan  
*In re Trans-Indus., Inc.* (N.D. Ohio 2011)
- Eliminating 2 stock funds from 401k plan  
*Tatum v. R.J. Reynolds Tobacco Co.* (M.D.N.C. 2008)

# Fiduciary Exception Limitations (cont'd)

## Mutual vs. Divergent Interests

When does beneficiary's interest diverge from claim administrator's interest?

### Before final administrative decision:

**Contested communications made shortly before the final denial was issued**

**Plaintiff's interest sufficiently adverse to claim administrator's interest because final decision to deny benefits had effectively been made**

*Carr v. Anheuser Busch Cos., Inc.* (8th Cir. 2012)

# Fiduciary Exception Limitations (cont'd)

## Mutual vs. Divergent Interests

### At final administrative decision:

Agreeing with weight of authority, not until after the final administrative appeal do interests of claim fiduciary and beneficiary diverge for purposes of fiduciary exception

*Stephan v. Unum Life Ins. Co. of America*  
(9th Cir. 2012)

# Fiduciary Exception Limitations (cont'd)

## Mutual vs. Divergent Interests

### Before final administrative decision *but* after lawsuit:

Documents created before final benefits determination

But after initiation of lawsuit and concerning pending lawsuit

Not discoverable under fiduciary exception

*Moss v. Unum Life Ins. Co.* (6th Cir. 2012)  
(unpublished)

# Fiduciary Exception Limitations (cont'd)

## Mutual Interests vs. Divergent Interests

### Before final administrative decision *and* after lawsuit:

- lengthy litigation history between the parties
- administrative proceedings began after a lawsuit had been filed but dismissed due to failure to exhaust
- communications between defendants' outside counsel and HR consultants relating to preparation of affidavits was subject to the fiduciary exception because communications did not address litigation nor fiduciary's personal liability

*Moyle v. Liberty Mut. Retirement Ben. Plan (I)*

(S.D. Cal. 2012)

# Fiduciary Exception Limitations (cont'd)

## Personal liability vs. Plan administration

When do communications concern personal liability rather than plan administration?

## Interpretation of plan terms = Plan Administration

- Notes of claims analysts' conversations with in-house counsel about how to interpret insurance policy
- Court found notes concerned matters of plan administration, so fiduciary exception applied

*Stephan v. Unum Life Ins. Co. of America*  
(9th Cir. 2012)



# Fiduciary Exception Limitations (cont'd)

## Personal liability vs. Plan administration

- Fiduciary exception applied to communications
  - during plaintiff's administrative proceedings
  - calculating plan benefits under hypothetical scenarios
  - even where outside litigation counsel initiated query
- Because no indication communications were in anticipation of litigation

*Moyle v. Liberty Mutual Retirement Benefit Plan (II)*  
(S.D. Cal. 2012)

# Fiduciary Exception Limitations (cont'd)

## Personal liability vs. Plan administration

### Relating to final denial – Personal Liability

- Emails related to substantive merits of plaintiff's claim and to content of final decision letter
- Not advice as to procedural duties owed to each beneficiary, therefore
- Related to fiduciary's personal liability and not subject to exception

*Carr v. Anheuser Busch Cos.* (8th Cir. 2012)

# Fiduciary Exception to the Attorney-Client Privilege

- If in doubt and privilege might matter, call your lawyer (don't write)

Example – should you email lawyer to ask “has our paying my brother-in-law’s company 2% in administrative fees plus not asking about revenue sharing for past 20 years created any problems?”

# Miscellaneous Employee Benefits Issues?

- Spousal Benefits in post-*Windsor*/DOMA: Retirement plan compliant?
- New COBRA proposed regulations and model notices
- ACA compliance (*e.g.*, counting full time employees)
- DOL audits

# Questions?



J.S. "Chris" Christie, Jr.  
Bradley Arant Boult  
Cummings LLP  
(205) 521-8387  
[jchristie@babbc.com](mailto:jchristie@babbc.com)