ERISA CLAIMS, LITIGATION AND LITIGATION AVOIDANCE
ERISA'S STATUTORY FRAMEWORK
ERISA’s Remedial Scheme

- ERISA Section 502(a)(1)(A) / Section 502(c)
- ERISA Section 502(a)(1)(B)
- ERISA Section 502(a)(2)
- ERISA Section 502(a)(3)
- ERISA Section 510
- No common law or other state law claims against plans
Suits to Redress Failure to Provide Required Information

- **ERISA Section 502(a)(1)(A) / Section 502(c)**
  - Plan administrator required to produce information and documents in response to **written request** from participant or beneficiary
  - Covers broad range of information and documents
    - **Examples**: SPDs, governing plan documents, summary of material modifications
  - Failure to respond timely may result in $110 penalty per day (court has discretion)
  - Educate HR and legal to watch for requests; docket deadlines; respond timely
Claim for Benefits: ERISA Section 502(a)(1)(B)

- Benefit claims
  - Claims for benefits under terms of the plan
  - Claims to clarify future benefits or rights under the plan
- Exhaustion of administrative remedies required
- Remedies are monetary relief (benefits) or declaratory relief (right to benefits)
Claims for Breach of Fiduciary Duty: ERISA Section 502(a)(2)

- Claims against plan fiduciaries
- Must seek to redress harm to plan
- Remedies include making the plan whole for a loss, or disgorgement of gain by fiduciary
- Recovery goes to the plan; no individual recovery
Catchall Provision: ERISA Section 502(a)(3)

- Suit to enforce ERISA or the plan
- May be brought by participant, beneficiary or fiduciary
- Remedy limited to “other appropriate equitable relief”
  - Examples: injunction, equitable restitution (against a fiduciary), accounting
ERISA’s Anti-Discrimination Provision: ERISA Section 510

♦ Bars employers from taking adverse employment actions against individuals to interfere with the attainment of ERISA rights
♦ Bars retaliation against employees for seeking to exercise ERISA rights
♦ Examples:
  ■ Discharge to prevent retirement plan vesting
  ■ Discharge in retaliation for large medical claim
♦ ERISA Section 510 has no enforcement or remedial provision
  ■ Courts look to ERISA Section 502(a)(3) and ERISA Section 502(a)(1)(B)
More on ERISA Remedies
Participants’ Limited Ability to Obtain Monetary Relief

♦ Obtain benefits under the terms of the plan
  ■ Not otherwise able to recover personal monetary relief
    ➢ Example: misrepresentations about coverage
  ■ Remedies formerly limited to “equitable” remedies under ERISA Section 502(a)(3), which did not include money

♦ CIGNA v. Amara, a 2011 Supreme Court decision
  ■ “Surcharge” against fiduciary possible under ERISA Section 502(a)(3)
  ■ Opened the possibility plaintiffs could recover monetary relief from fiduciaries
Attorneys’ Fees

♦ ERISA Section 502(g)(1) permits courts to award a “reasonable attorney’s fee and costs of action to either party”

♦ Not limited to “prevailing party”

♦ Can be awarded to party achieving some degree of success on the merits
Other Limitations on Remedies

♦ Consequence of preemption:
  ■ Only remedies are those expressly provided by ERISA
♦ No extra-contractual or consequential damages
♦ No punitive damages
♦ No other state remedies (preempted)
ERISA Parties: Impact on ERISA Actions
ERISA Parties: Who Winds Up In The Lawsuit?

- Plan parties
  - Plan Administrator
  - Plan Sponsor
  - Participants and beneficiaries
ERISA Parties: Fiduciaries

- Named fiduciaries
  - Trustees
  - Plan Administrator
  - Plan Committees
  - Company and its Board of Directors

- Other fiduciaries
  - Investment advisors or managers
  - Discretionary claims administrators
  - Functional fiduciaries
ERISA Parties: Non-Fiduciaries

- Administrative parties
  - Record keepers
  - Non-fiduciary claims processors
  - Insurance brokers
  - Third party administrators

- Carriers

- Professionals
  - Actuaries and consultants
  - Attorneys
  - Accountants

- Medical providers
ERISA Parties: Governmental

- Secretary of the Treasury (IRS)
- Secretary of Labor (DOL)
- PBGC
ERISA Parties: Why Does It Matter?

- Determines scope of preemption
- Determines whether state claims in state court are viable
- Limits who may sue and standing to sue
- Determines available claims
- Determines available remedies
- Biggest determiner: fiduciary status
ERISA Preemption
What is ERISA Preemption?

- ERISA is supreme law of the land; supersedes state laws
- ERISA spells out the exclusive remedial scheme
- Purpose of preemption is to ensure uniformity and eliminate conflicting or inconsistent patchwork of state and local regulation
How does ERISA Preemption Actually Work?

♦ Gets you into federal court (complete preemption)
  - Removal to federal court even if no ERISA claim on face of pleadings

♦ Serves as a basis for dismissal of state law claims
  - State and local laws and claims that “relate to” an employee benefit plan are preempted
Statutory exceptions to ERISA preemption

♦ “Savings clause” – allows states to regulate traditional insurance carriers
  - By dictating contents of insurance contracts, including contracts purchased by insured ERISA plans, allows indirect regulation of insured ERISA plans
♦ **BUT**, ERISA’s savings clause only impacts fully insured plans
  - “Deemer clause” – ERISA plans cannot be “deemed to be an insurance company”
  - Practical effect: self-insured ERISA plans not subject to indirect regulation through the savings clause
Other exceptions to ERISA preemption?

♦ Suits between non-core parties
  ■ Providers suing administrators that have verified coverage or benefits
  ■ Provider suits under network agreements

♦ Non-ERISA claims
  ■ Suits under employment agreements
  ■ Suits involving non-ERISA severance arrangements

♦ Breach of duties independent of ERISA
  ■ Professional malpractice
  ■ Routine breach of contract claims (landlord/tenant suit)
ERISA Procedural and Evidentiary Issues
Administrative Process: Exhaustion of Administrative Remedies

- Depending on the type of claim, claimant required to exhaust administrative remedies
  - Benefit claims must be exhausted
  - Depending on jurisdiction, statutory claims also must be exhausted, especially if duplicative of benefits claim
  - Courts split regarding Section 510 claims
What Does Exhaustion Mean?

♦ Claimant must follow plan’s claims procedures prior to filing suit
  ▪ Administrative claims procedures set forth in the plan documents
  ▪ ERISA requires “reasonable claims procedures”

♦ Strict deadlines
  ▪ Claimant’s submission of claim and appeal(s)
  ▪ Plan’s determinations
  ▪ Extensions allowed in certain circumstances

♦ Availability of external review in certain situations

♦ Necessity for expert opinions
  ▪ Example: disputes regarding medical necessity
Exceptions to Exhaustion Requirement

♦ Failure to comply with the claims procedure
  ■ Non-compliance by plan → administrative remedies deemed exhausted → claimant may file lawsuit
  ■ Non-compliance by claimant → claim will be dismissed

♦ Futility
  ■ High standard
  ■ Argument that claim likely would have been denied not sufficient
  ■ Conflicts of interest not sufficient
  ■ Failure to include claim procedures in plan may result in futility finding

♦ Irreparable harm – imminent threat to life or health
Discovery Issues

- Limited or no discovery beyond administrative record (closed record)
- What is the administrative record?
  - Evidentiary record compiled by the plan administrator in connection with claim adjudication
    - Includes information submitted during appeals process
    - Includes information considered by the plan administrator
    - May also include minutes of the committee adjudicating the claim
What’s Left for Trial? NOTHING!

- **THIS IS THE TRIAL!**
  - Consider and respond to ALL arguments advanced by claimant
  - Investigate all aspects of the claim and all relevant facts
  - Ensure a complete administrative record
    - Include all required expert reports
    - Include all relevant witness statements
    - Include all relevant documents
  - Be objective!
  - Do not rubber stamp or cut-and-paste previous denials
Standard for Reviewing the Administrative Record

- "Firestone" language → plan confers discretionary authority on its administrator to determine eligibility for benefits or to construe the terms of the plan
  - Results in arbitrary and capricious standard of review (deferential)
  - Court may not substitute its own opinion or determination for that of the fiduciary
- No "Firestone" language → de novo standard of review (no deference)
  - In some jurisdictions, may also result in expansion of the administrative record
Effect of conflicts of interest or procedural violations

- Conflict of interest
  - Limited discovery may be allowed into nature and extent of conflict
  - Only considered a “factor” if conflict found to exist
  - Does not heighten the standard of review

- Violation of ERISA or its claim regulations
  - **Example:** failure to compile complete administrative record or consider all available evidence
  - May change standard of review
  - May also result in remand to plan administrator to properly consider certain evidence
Privilege Issues

♦ You should assume there is no attorney-client privilege during the administrative claims process!

- “Fiduciary exception”: generally, “pre-decisional” communications (while claim is being adjudicated) are discoverable and not subject to the attorney-client privilege

- Certain narrow exceptions apply
  - Example: where litigation is already pending and legal advice is rendered in connection with plan administrator’s litigation defense

- Communications with counsel after a final benefit determination are more likely to be privileged
Standing Issues

♦ Participant and beneficiary standing
  ▪ Have ERISA standing
  ▪ Must also demonstrate Article III standing (injury in fact)

♦ Provider standing
  ▪ No standing to bring direct claim under ERISA
  ▪ May sue as assignee of participants/beneficiaries
    ➢ Scope of the written assignment matters!
  ▪ Anti-assignment provision in plan enforceable
    ➢ Risk of waiver
    ➢ Adverse impact on claims administration
    ➢ Consider limited anti-assignment provision
Pleading Requirements for ERISA Claims

♦ Notice pleading
  ■ Historically, only general “notice” of claim required
  ■ All factual allegations assumed to be true for initial challenges to face of complaint

♦ “Twombly” and “Iqbal” requirements
  ■ Notice pleading not enough
  ■ Allegations must rise to the level of plausibility (not just “defendant harmed me” allegations or recitals of the basic elements of a cause of action)
Trials

♦ No jury trial
♦ Trial is to the Court on the administrative record
♦ Generally no “live” trial; Court generally tries the case on the written submissions of the parties
ERISA requires claims for breach of fiduciary duty be brought before the EARLIER of:
- 6 years after the date of the last action that constituted part of breach; or
- 3 years after the earliest date the plaintiff obtained “actual knowledge” of the breach

ERISA is silent with respect to other claims:
- Courts look to the most analogous state statute of limitation
- Wide variation in limitations, depending on type of claim
  - Discrimination or retaliation claims – as short as 6 months
  - Breach of contract claims – as long as 20 years
Limitation Periods Imposed by Plan

- Plans can impose limitation periods shorter than those imposed by state law
  - Must be reasonable
  - Must be timely communicated to participants and beneficiaries
Class Actions

♦ ERISA class actions subject to same class action requirements as other types of claims
  - Rule 23 prerequisites must be satisfied
    ➢ Generally involve an issue that applies uniformly to all or a group of participants/beneficiaries

♦ Examples:
  - Changes to retiree health
  - Fee and stock drop litigation

♦ Allows plan to resolve/settle claims in a single lawsuit without fear of multiple or future lawsuits
Examples of ERISA Claims
Confronting Our Clients
Welfare Benefit Claims

♦ Eligibility
  - Effect of life events of which the plan has no knowledge
♦ Pre-existing condition
♦ Medical necessity
♦ Experimental
♦ UCR (the “usual, customary and reasonable” rate of reimbursement)
♦ Disability claims
♦ Severance claims
  - Reason for termination
  - Same chair rule
Retirement Benefit Claims

♦ Service counting
♦ Compensation calculations
♦ Coordination of benefits among successor plans
♦ Benefit conversions/transferring vested benefits to a different type of plan
♦ Identifying beneficiaries upon participant’s death
  - Beneficiary designations
  - Plan default provisions
Misrepresentation Claims

- Fiduciary duty not to misrepresent the plan, plan eligibility or plan benefits
- Misrepresentations regarding eligibility for benefits
  - Eligibility for life or medical insurance
- Misrepresentations regarding the amount of benefit
  - Retirement plan estimates
- Disagreement – and importance – re “who is a fiduciary”
- *Amara* brings new life to these claims
  - Only applies to misrepresentation by a fiduciary
  - Claimant must typically show detrimental reliance
Stock Drop Cases

♦ Employees claim fiduciary violations for fiduciary’s keeping employer stock in plan
  - ESOP safe harbor provisions
  - “Moench” presumption: No prudence violation if plan requires investment in employer stock

♦ Effect of federal securities laws
  - Prohibited by securities laws from acting on undisclosed material information

♦ Keep benefit administration separate from company financial management
Fee cases

- Class action lawsuits arguing fiduciary violations for not negotiating lower fees
- Generally dismissed at the very early stages
- Impact of new DOL fee disclosure regulations?
Subrogation

- Claims by ERISA plans for reimbursement of paid benefits, where participant/beneficiary has recovery against responsible third party
  - Impact of state anti-subrogation laws
  - What if the participant/beneficiary does not recover all damages?
  - Who pays the attorneys?
- Plan must contain “magic language”
  - No language: no relief for plan
Retiree Health Care Claims

- Welfare benefits not “vested”
  - Contractual vesting
  - Fiduciary claims based on representations
  - Effect of “reservation” clauses
- Non-union claims
- Union claims
- Usually class actions
Life Insurance Conversion Claims

- Typical scenario: former employee fails to convert group coverage to individual coverage within the deadline; dies soon thereafter
  - Effect of no notice
  - Who is responsible?
Severance

Severance: Payroll practice? HR benefit? Or ERISA employee welfare benefit plan?

Do we want ERISA?
- Pros = ERISA preemption; exhaustion; standard of review
- Cons = Compliance with reporting and disclosure requirements

ERISA plan?
- Does program require ongoing administrative scheme for processing claims and paying benefits?
- Very factual inquiry made by Court, based on individual facts
- Impact of discretion: the less discretion, the less likely to be found an ERISA plan

Circumstances of termination
COBRA

♦ Notice penalties
  ■ Plan administrators can be assessed penalties of up to $110/day for failure to provide initial notice or election notice
  ■ Generally only ERISA participants and beneficiaries may sue to recover statutory penalties

♦ Liability for failure to extend coverage
  ■ Benefit claims and breach of fiduciary duty claims
  ■ Remedies:
    ➢ Damages for incurred medical expenses less COBRA premiums
    ➢ Restore COBRA coverage as equitable relief

♦ Oftentimes uninsured!
Section 510 Claims

♦ Plant Closings
  ▪ Timing plant closing to maximize benefit savings
  ▪ Avoid liability by effecting changes in your “settlor” role
    (e.g., through plan amendment or, in union environment,
    through the collective bargaining process)

♦ Layoffs/limiting hours as a result of health care reform
  ▪ Liability under ERISA Section 510 for cutting hours or
    issuing layoffs to avoid offering health benefits required
    by health care reform??
    ➢ Seeking to avoid penalties, not to interfere with ERISA
      rights
    ➢ Exchanges are not employer plans
Multiemployer Plan Litigation: What is a Multiemployer Plan?

♦ Multiple employers participating in one plan
♦ One or more unions and collective bargaining agreements (“CBAs”)
♦ Sponsored and administered by joint board of trustees
♦ Types of plans
  ■ DB plans
  ■ Welfare plans
  ■ 401(k) plans
♦ Voluntary participation (e.g., CBA) or as a result of an acquisition, bankruptcy, etc.
Multiemployer Plan Litigation: Collection Actions

♦ Contribution Liability
  ■ Contributions
  ■ Interest
  ■ Liquidated damages
  ■ Mandatory attorneys’ fees

♦ Audits
  ■ Required to provide audit data
  ■ Liability for audit costs
Multiemployer Plan Litigation: Withdrawal Liability

- Partial or total withdrawal
- Liable for pro-rata share of the fund’s unfunded vested benefits ("UVBs") (i.e., its underfunding)
- Rigid deadlines for disputing plan’s assessment
- Very limited ability to dispute plan’s assessment
- Responding to audit inquiries
- Ability to obtain relevant data
Multiemployer Plans in Financial Distress

♦ What is distress?
  ▪ Critical status (65%/red)
  ▪ Endangered status (80%/yellow)

♦ What are consequences?
  ▪ Unilateral contribution increases
  ▪ Limitations on benefits (no increases, elimination of lump sum option, etc.)
  ▪ Surcharges
  ▪ Loss of benefits

♦ Conflicts between federal labor law and ERISA
  ▪ What if benefit increases are required by CBA but prohibited by ERISA?
PBGC Litigation

- 4062(e) claims
- Involuntary plan terminations
- Distress plan terminations
ERISA Section 4062(e) Claims

- 4062(e) event:
  - Cease operations at a facility
  - Cessation results in termination of >20% of plan participants

- Statute imposes liability WITHOUT REGARD TO RISK to plan, participants or PBGC
  - PBGC announced pilot program in November 2012; generally will not enforce liability against “financially sound” or “creditworthy” companies

- Usually results in negotiated settlement
  - Collateral
  - Additional plan contributions
CONCLUSION: AVOIDING RANDALL, EMILY AND LORNA
Avoiding and Preparing for ERISA Litigation

- Clear plan documents and clear delegations
- Buy all the options!
  - Fiduciary discretion
  - Limitation periods
  - Subrogation “magic language”
- Instruct HR and line personnel how to respond to inquiries; use disclaimers on communications
- Document your communications and decisions
- Behave like a fiduciary
  - Be pro-active
  - Be objective