

Review of DOL amicus filings

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When the Department of Labor issued proposed regulations in October 2010, it expanded the definition of an investment advice fiduciary. The DOL indicated that one of its reasons for proposing the update was to support its enforcement efforts by making it easier for its litigators to prove the five elements necessary to confer fiduciary status. Sometimes, this works the other way around, and the DOL's litigation arm can be seen as supporting and, in the eyes of some observers, enlarging the consequences of policy objectives. A review of recent filings of amicus briefs by the Department at the district court and appellate court levels bears this out.

Support for equitable surcharge remedies. The Supreme Court ruled in *Cigna v. Amara* that an equitable surcharge is an acceptable remedy for a fiduciary breach under ERISA. A surcharge is monetary compensation to prevent a plan fiduciary from being unjustly enriched. Up to now, courts of appeal have rejected surcharge as a remedy, because ERISA Section 502(a)(3), which authorizes participants to sue for equitable relief, was thought to prohibit monetary damages. The DOL has briefed the surcharge issue in the Supreme Court on several occasions and has now filed amicus briefs in the Fourth and Seventh Circuits that follow-up on *Cigna v. Amara* by asserting that plaintiffs are entitled to make-whole relief from defendants found guilty of a fiduciary breach.

In *McCravy v. Metropolitan Life Insurance Co.* (brief filed May 31, 2011), the Department sought to reverse the ruling of a three-judge panel of the Fourth Circuit that surcharge in the form of life insurance benefits was not an available remedy where the insurance company had accepted premium payments for a child without telling the plaintiff employee that the child was too old for coverage. The brief indicates the Department's belief that the *Cigna* case corrects the narrow reading of Section 502(a)(3) adopted by most courts that monetary relief is unavailable under Section 502(a)(3). The Department thinks that this result should be restricted to non-fiduciary defendants.

Similarly, in *Kenseth v. Dean Health Plans, Inc.* (brief filed June 13, 2011), the Department argued to the Seventh Circuit that a health plan fiduciary that had breached its fiduciary duty by misleading the plaintiff as to whether an expensive surgical procedure was covered by the plan was subject to make-whole relief in the form of the plaintiff's medical bills. The Department also asserted that the plaintiff could, as part of an equitable remedy, elect to require the defendant to disgorge profits to the extent that its affiliates may have been unjustly enriched by the medical bills.

The DOL appears to believe that after *Cigna v. Amara*, Section 502(a)(3) allows plan participants injured by a fiduciary breach to seek either make-whole relief or

disgorgement of profits. Further, the Department seems poised to assert this position in future filings, including those that support claims of fiduciary breach made with respect to 401(k) plans.

Arguments against procedural defenses in stock drop and excess fee cases. The DOL supports private enforcement of ERISA and has indicated its interest in ensuring that evidentiary presumptions, such as the presumption of prudence (the so-called "Moench" presumption) with respect to ESOP fiduciaries, are not applied at the pleadings stage to bar stock drop claims. In *Quan v. Computer Sciences Corp.*, the Department filed a brief in November 2010 that unsuccessfully argued that the Ninth Circuit should not adopt the Moench presumption.

Where the Moench presumption has already been accepted, the Department has attempted to shape the test for plaintiffs to rebut the presumption. Thus, in *Taylor v. KeyCorp* (brief filed May 20, 2011) and *Pfeil v. State Street Bank and Trust Company* (brief filed May 31, 2011), the Department argued that requiring the plaintiffs to show the impending collapse of the company in order to rebut the presumption was too high a standard and that plaintiffs should be allowed to show that a prudent fiduciary would not invest in company stock under the prevailing circumstances.

Stand against excessively rigorous pleading standards. The DOL's concern with procedural defenses also is manifested in cases involving alleged excessive 401(k) fees. In *Renfro v. Unisys* (brief filed September 16, 2010), the Department argued that the district court's dismissal based on the plan's offering of 23 investment alternatives was improper. In the DOL's view, it was an error for the court to decide at the pleadings stage of the case that there was no possibility that the defendants could have acted imprudently based on the facts alleged by the plaintiffs. In other words, the DOL thought that the court had imposed an excessive pleadings standard and that it should only have been necessary for the plaintiffs to allege that the defendants failed to consider lower cost funds. The DOL's view is that the complaint need do no more than put the defendants on notice of the grounds for the claim. In this respect, it sees the complaint in *Braden v. Walmart* as a model. The DOL sees its role as supporting ERISA's mandate to provide plan participants "ready access to the Federal courts."

Section 404(c) does not provide a defense to imprudent selection of investment options. The DOL has consistently taken the position that plan fiduciaries are shielded by the 404(c) safe harbor only for losses that result from the participant's exercise of control and not from losses caused

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by the fiduciary's own misconduct, such as the imprudent selection of investment options. The Department's amicus filings continue to contest defendants' continued reliance on *Hecker v. Deere* for the proposition that the 404(c) defense is available if the plan offers a sufficient number of

investment choices. Examples of the Department's position are to be found in the *Renfro v. Unisys* filing and the recent brief in support of the lower court's decision rejecting the 404(c) defense in *Tibble v. Edison International* (filed May 25, 2011).

The DOL actively supports those positions it deems to be most important in its district and appellate court amicus briefs, frequently filing briefs

at both levels in the same case. Thus, the direction of both enforcement measures and policy initiatives can be determined by being aware of these filings and their content. ♦

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