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*Representing deserving beneficiaries of ERISA plans since 1987.*

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**July 1, 2003, ERISA Highlights**

Dear Fellow Attorney,

Since mid-April a number of ERISA cases have been decided which impact on *areas other than benefit claims* under ERISA-governed employee benefit plans. Here are a few.

*Preemption of bad faith claims.* After the new “saving clause” analysis announced by the Supreme Court in Kentucky Ass’n. of Health Plans, Inc. v. Miller, 123 S. Ct. 1471 (2003), the Pennsylvania bad faith denial of claims statute was held not substantially to affect the risk pooling arrangement between the insurer and the insured and thus not saved from ERISA preemption. McGuigan v. Reliance Standard Life Ins. Co., 256 F.Supp. 2d 345 ( E.D. Pa., 2003).

*Preemption of severance pay claims.* Claims to one-time severance payments not calling for an administrative scheme by former employees who were not participants in the former employer’s severance pay plan were not preempted by ERISA. Eide v. Grey Fox Tech. Services Corp., 329 F.3d 600 (8<sup>th</sup> Cir. 2003).

On the other hand, an employer that provided monthly grocery vouchers in a fixed amount, \$216, to retirees with at least 20 years of service and who were at least 60 upon retirement and also had at least one year’s work at a supervisory level created an ERISA-governed pension plan. Musmeci v. Schwegmann Giant Super Markets, Inc., 2003 WL 21221728 (5<sup>th</sup> Cir. June 11, 2003).

*Claims of state consumer protection claims.* Claims under state consumer protection statutes against drug companies for fraudulently state price figures on which Medicare B reimbursements and copayments were based are not preempted by ERISA or Medicare law. In Re Pharmaceutical Industry Average Wholesale Price Litigation, 2003 WL 21208371 (D. Mass. May 13, 2003).

*Employers’ cooperative’s state law claims.* ERISA did not preempt claims by cooperative of employers for fraud and breach of contract brought against administrator and sponsor of its employee welfare benefit plan. Independent Distributors Cooperative USA v. Advanced Ins. Brokerage of America, Inc., 2003 WL 21263766 (S.D. Ind. May 29, 2003).

*Claims for bad faith and breach of contract not preempted.* Claims by health plan participant against health insurer for denial of coverage for surgery for participant’s son were remanded to state court. Insurer’s denial was based on decision made under state law by an external reviewer.

Glickman v. U.S. Healthcare Systems of Pennsylvania, Inc., d/b/a Aetna U.S. Healthcare, Inc., 2003 WL 21246482 (E.D. Pa. May 30, 2003).

*QDRO entered after participant's death.* The 10<sup>th</sup> Circuit affirmed a lower court's ruling that a domestic relations order entered after the participant had died was a QDRO. Patton v. Denver Post Corp., 326 F.3d 1148 (10<sup>th</sup> Cir. 2003). The former wife was not required to give the plan administrator notice of the entry of the QDRO before the employee died. The state court entered the order *nunc pro tunc* to the date of divorce 11 years earlier, because the order concerned benefits from a plan not known about at the time of the divorce settlement. It resulted in no increase in liability for the plan. E.g., the plan had not paid the money to anyone else in the interim.

*Recovery of pension plan benefits erroneously paid.* Based on unjust enrichment, an ERISA pension plan was permitted to recover the balance of the deceased participant's account which the plan had erroneously paid to the former spouse. Neal v. General Motors Corp., 2003 WL 21356735 (W.D. N.C. June 11, 2003).

Similarly, a plan administrator could pursue any overpayment which resulted from a disability beneficiary's receipt of Social Security Disability Benefits. Cooperative Benefit Administrators, Inc. v. Ogden, 2003 WL 21262855 (M.D. La. April 28, 2003).

*Below are a few examples of recent ERISA cases involving participants' benefit claims.*

*Delay defeats deference.* Because the claims administrator of a long-term disability plan did not substantially comply with ERISA's procedural requirements, deferential review was not due the claim denial. Gilbertson v. Allied Signal, Inc. 328 F.3d 625 (10<sup>th</sup> Cir. 2003). The claimant had submitted significant new information that the plan administrator failed to address as part of its final decision on appeal.

*Anti-assignment health plan provision upheld.* Judge Hurley of the Southern District of Florida upheld against a health care provider a plan provision prohibiting assignment of plan benefit claims. Vardag v. Motorola, Inc., 2003 WL 21221892 (S.D. Fla. May 8, 2003).

*Equitable remedies.* Equitable remedies of front pay and reformation were available under ERISA to former employees who alleged that their former employer fraudulently induced them to participate in a voluntary resignation program by furnishing them misleading information about the pension benefits they could expect. De Pace v. Matsushita Electric Corp. of America, 257 F. Supp. 2d 543 (E.D. N.Y. 2003).

*Private duty nursing.* Health plan administrator's interpretation of "homebound" and "custodial care" was not reasonable. Parents of homebound son were entitled to recover value of lost private duty nursing services. Munsen v. Wellmark, Inc., d/b/a Wellmark Blue Cross Blue Shield of Iowa, 257 F. Supp.2d 1172 (N.D. Iowa 2003).