ERISA 101

The Employee Retirement Income Security Act (ERISA, 29 U.S.C. §§ 1001 et. seq.) was enacted in the 1970s with the stated goal of protecting workers covered by employer-provided Pension, Health and Disability benefit plans. In a rather cruel irony, the Act rendered virtually toothless an insured's common law and State law conferred rights and remedies to address perceived violations of benefit plan provisions.

At this point in time, it is assumed that most practitioners are aware that employee welfare benefit plans covered by ERISA are vastly different than first party private insurance contracts. As a result of statutory mandate, and subsequent judicial interpretations of ERISA's Federal preemptive scope, virtually all common law procedural rights (right to jury trial, most discovery, even a normal bench trial) are either swept away or radically different than those we have come to expect in a garden variety insurance case. Likewise, remedial rights are restricted by the ERISA statutes and most definitely narrowed by continued judicial tweaking. At this point, it appears virtually any claim for life, pension, health or disability arising under ERISA will almost surely be limited to a contest over: (1.) benefits and: (2.) attorney's fees (in the Court's discretion). Note that exhaustion of administrative remedies is jurisdictional, and invoking thatremedy may be under a short time frame (regs. allow minimum of 180 days for disability, 60 days for mosh other types of benefit claims, if the plan does not specify a longer time frame).

STANDARD OF REVIEW/CONFLICT AFFECTS STANDARD

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S. Ct. 948, 103 L. Ed. 2d 80 (1989) held, "a denial of benefits challenged under 29 U.S.C. §

1132(a)(1)(B) is to be reviewed under a *de novo* standard unless the benefit plan gives the administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan," in which case an arbitrary and capricious standard applies. *Firestone*, 489 U.S. at 115.

An ERISA fiduciary that is responsible for claims decision-making and payment of claims operates under an inherent conflict of interest, characterized as a "dual role conflict", and the Court must engage in a review of a number of factors to determine to what extent the conflict may have affected the decision to deny Plaintiff's claim for benefits. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 117, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008).

The 10th Circuit follows a "sliding scale approach" for review of a conflicted ERISA fiduciary's benefit decisions. *Weber v. GE Group Life Assurance Co.*, 541 F.3d. 1002, 1010 (10th Cir. 2008). In *Weber*, the court explained:

> [W]e dial back our deference if "a benefit plan gives discretion to an administrator or fiduciary who *is operating under a conflict of interest."*

Weber, at 541 F.3d 1011, quoting *Metro Life Ins. Co. v. Glenn*, 554 U.S. 105, 128 S.Ct. 2343, 2348, 171 L.ED.2d 299 (2008). Other citations omitted. *Weber's* analysis of conflict-based ERISA decisions continues, holding that the conflict is a "factor" to be weighed in determining whether the ERISA decision-maker abused its discretion, stating:

> To incorporate this factor we have "crafted a 'sliding scale approach' where the 'reviewing court will

> always apply an arbitrary and capricious standard but [will] decrease the level of deference given… in proportion to the seriousness of the conflict.'" *Flinders [v. Workforce Stabilization Plan of Phillips Petroleum Co.]* 491 F.3d [1180, 1190 10th Cir. 2007] (quoting Chambers v. Family Health Plan Corp., 100 F.3d 818, 825-26 (10th Cir. 1996).

Weber, 541 F.3d 1011 (bracketed material supplied). *See also, Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F.3d 1151 (10th Cir. 2010)(decreased deference because of conflict).

Where a plan administrator is "operating under a conflict of interest, that conflict may be weighed as a factor in determining whether the plan administrator's actions were arbitrary and capricious." *Foster v. PPF indus., Inc.,* 693 F.3d 1226, 1232 (10th Cir. 2012)(alteration and quotation omitted).

The weight given to the plan administrator's conflict is necessarily case-specific and is informed by the severity of the conflict and the clarity of the other factors contributing to the decision. *Glenn,* 554 U.S. at 117-119; *see Nelson v. Aetna Life Ins. Co., 568 Fed. App'x 615, 620-21* (10th Cir. 2014)(unpublished).

A conflict warrants more weight "where circumstances suggest a higher likelihood that it affected the benefits decision" and less weight "where the administrator has taken active steps to reduce potential bias and to promote accuracy". *Glenn*, 544 U.S. at 117.

See, *Chambers v. Family Health Care Plan* 100 F. 3d 818, 825 (10th Cir. 1996 (reviewing court "must decrease the level of deference given to the conflicted administrator's in proportion to the seriousness of the conflict").

Rules of construction

Pitman v. Blue Cross & Blue Shield, 217 F.3d 1291, 1298, quoting Tenth Circuit rules of interpretation:

> "We are mindful that the objective in construing a healthcare agreement, as with general contract terms, is to ascertain and carry out the true intention of the parties. However, we do so giving the language its common and ordinary meaning *as a reasonable person in the position of the [plan] participant*, not the actual participant, would have understood the words to mean." *Blair v. Metropolitan Life Ins. Co.,* 974 F.2d 1219, 1221 (10th Cir. 1992) (quoting *McGee v. Equicor-Equitable HCA Corp*., 953 F.2d 1192, 1202 (10th Cir. 1992)).

Denial must clearly state basis or bases for decision.

ERISA requires clear communication of the bases for an appeal's denial. 29 CFR § 2560.503-1 (h); *Sandoval v. Aetna Life & Casualty Ins. Co*., 967 F.2d 377, 381-382(10th Cir. 1992).

FIDUCIARY STATUS AND DUTIES

ERISA fiduciaries are defined at 29 U.S.C. § 1002 (2) and (21). "Congress intended ERISA's definition of fiduciary 'to be broadly construed.'" *LoPresti v. Terwilliger*, 126 F.3d 34 (2d Cir. 1997), citing *Blatt v. Marshall & Lassman*, 812 F.2d 810, 812 (2d. Cir. 1987).

Mertens v. Hewitt Assocs., 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161(1993) describes the expansive breadth of ERISA fiduciary status:

> Under traditional trust law, although a beneficiary could obtain damages from third persons for knowing participation in a trustee's breach of fiduciary duties, only the trustee had fiduciary duties. See 1 Scott & Fratcher § 2.5, p. 43. ERISA, however, defines "fiduciary" not in terms of formal trusteeship, but in *functional* terms of control and authority over the plan, see 29 U.S.C. § 1002 (21)(A), thus expanding the universe of persons subject to fiduciary duties -- and to damages -- under § 409(a) [29 U.S.C. § 1109(a)]. Professional service providers such as actuaries become liable for damages when they cross the line from adviser to fiduciary; must disgorge assets and profits obtained through participation as parties-in-interest in transactions prohibited by § 406 [29 U.S.C. § 1106], and pay related civil penalties, see § 502(i), 29 U.S.C. § 29 U.S.C. § 1132(i), or excise taxes, see 26 U.S.C. § 4975; and (assuming nonfiduciaries can be sued under § 502(a)(3) [29 U.S.C. § 1332(a)(3)) may be enjoined from participating in a fiduciary's breaches, compelled to make restitution, and subjected to other equitable decrees.

508 U.S. 248 at 262 (Parallel citations supplied in brackets).

ERISA fiduciary duties are codified at 29 U.S.C. § 1104(a).[1]

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[1] (a) Prudent man standard of care.

(1) Subject to sections 403(c) and (d), 4042, and 4044 [29 USCS §§ 1103(c), (d), 1342, 1344], a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and--

(A) for the exclusive purpose of:

An ERISA fiduciary must discharge his responsibility "with the care, skill, prudence, and diligence" that a prudent person "acting in a like capacity and familiar with such matters" would use. 29 U.S.C. §1104(a)(1).

ESTOPPEL/SURCHARGE CLAIM

CIGNA Corp. v. Amara, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (U.S. 2011) held § 1332 (a)(3) provides equitable rights and remedies for estoppel claims:

> [W]hen a court exercises its authority under § 502(a)(3) [§ 1332(a)(3)] to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.
>
> But this showing is not always necessary for other equitable remedies. Equity courts, for example, would reform contracts to reflect the mutual understanding of the contracting parties where "fraudulent suppression[s], omission[s], or insertion[s]," 1 Story § 154, at 149, "material[ly] . . . affect[ed]" the "substance" of the contract, even if the "complaining part[y]" was negligent in not

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> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims…

> realizing its mistake, as long as its negligence did not fall below a standard of "reasonable prudence" and violate a legal duty, 3 Pomeroy §§ 856, 856b, at 334, 340-341. See *Baltzer*, 115 U.S., at 645, 6 S. Ct. 216, 29 L. Ed. 505; Eaton § 307(b).
>
> Nor did equity courts insist upon a showing of detrimental reliance in cases where they ordered "surcharge." Rather, they simply ordered a trust or beneficiary made whole following a trustee's breach of trust. In such instances equity courts would "mold the relief to protect the rights of the beneficiary according to the situation involved." Bogert § 861, at 4. This flexible approach belies a strict requirement of "detrimental reliance."
> To be sure, just as a court of equity would not surcharge a trustee for a nonexistent harm, 4 Scott & Ascher § 24.9, a fiduciary can be surcharged under § 502(a)(3)
> [§ 1332(a)(3)]only upon a showing of actual harm--proved (under the default rule for civil cases) by a preponderance of the evidence. That actual harm may sometimes consist of detrimental reliance, but it might also come from the loss of a right protected by ERISA or its trust-law antecedents.

Id., 564 U.S. at 443-444; 131 S.Ct. at 1881. (bracketed material supplied).

Amara further states:

> Equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." And, as Justice Story long ago pointed out, equitable estoppel "forms a very essential element in... fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote."

Amara at 563 U.S. at 441 (internal citations omitted).

The 10th Circuit has acknowledged § 1132(a)(3) allows the courts to fashion equitable remedies for aggrieved ERISA beneficiaries:

> [T]hanks to the Supreme Court's decision in *Cigna Corp. v. Amara*, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (2011), we know that § 502(a)(3)'s authorization of "appropriate equitable relief" incorporates "those categories of relief that, traditionally speaking (i.e., prior to the merger of law and equity) were typically available in equity." Id. at 1878 (emphasis omitted) (internal quotation marks omitted). We know, too, that the statute incorporates whatever requirements "come from the law of equity" when "the specific remedy being contemplated imposes" them. *Id*. at 1881. And we know that plaintiffs who seek "the remedy of estoppel" must demonstrate that "the defendant's statement 'in truth, influenced the conduct of' the plaintiff, causing 'prejudice.'" *Id.*

Jensen v. Solvay Chems., Inc., 721 F.3d 1180, 1185, (10th Cir. 2013). See also, *O'Dowd v. Anthem Health Plans*, Inc., 2015 U.S. Dist. LEXIS 132923 (D.C. Colo. Sept. 30, 2015); *Gearlds v. Entergy Services, Incorporated*, 709 F.3d 448, 450 (5th Cir. 2013); *Silva v. Metropolitan Life Insurance Company*, 762 F. 3d 711 (8th Cir. 2014); *Moyle v. Liberty Mut. Ret. Ben. Plan*, 2016 U.S. App. LEXIS 9251 (9th Cir. Cal. May 20, 2016).

McCravy v. Metropolitan Life Insurance Co., 690 F.3d 176 (4th Cir. 2012) observed:

> Central to the resolution of this case is the Supreme Court's decision in *Amara*. Before *Amara*,

> various lower courts, including this one, had (mis)construed Supreme Court precedent to limit severely the remedies available to plaintiffs suing fiduciaries under Section 1132(a)(3). See, e.g., *LaRue v. De Wolff, Boberg & Assocs., Inc.*, 450 F.3d 570, 575 (4th Cir.2006) (holding that *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S.Ct. 2063, 124 L.Ed.2d 161 (1993), "and its progeny compel the conclusion that" "monetary relief" for losses "sustained as a result of the alleged breach of fiduciary duties" "falls outside the scope of § 1132(a)(3)"), vacated on other grounds, 552 U.S. 248, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008)… .
>
> But with *Amara*, "[a] striking development," the Supreme Court "expanded the relief and remedies available to plaintiffs asserting breach of fiduciary duty under [Section 1132(a)(3)] and therefore seeking make-whole relief such as equitable relief in the form of `surcharge.'" Lee T. Polk, *Statutory Provisions — Civil Remedies*, 1 ERISA Practice and Litigation § 5:4 (West 2012).

Id., at 180.

Silva v. Metropolitan Life Insurance Company, 762 F. 3d 711 (8th Cir. 2014)

under the argument heading "Simultaneous Claims Under §1132(a)(1)(B)

and § 1132(a)(3)"also discussed and applied *Amara*:

> In *Amara*, the plaintiffs sought relief under § 1132(a)(1)(B). After discussing § 1132(a)(1)(B) and determining that plaintiffs could not obtain relief under that section of ERISA, the Court turned to § 1132(a)(3) and stated that plaintiffs may be able to obtain equitable relief under that section. 131 *S.Ct. at 1878-79*. The Court addressed the issue in terms of available relief and did not say that plaintiffs would be barred from initially bringing a claim under the § 1132(a)(3) catchall provision simply because they had already brought a claim under the more specific portion of the statute, § 1132(a)(1)(B).

Id at 726-727.

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Id., at 180.

See also, Gearlds v. Entergy Services, Incorporated, 709 F.3d 448, 450 (5th Cir. 2013)(Amara is an "expansion of the kind of relief available under" § 1332(a)).

Moyle v. Liberty Mut. Ret. Ben. Plan, 2016 U.S. App. LEXIS 9251 (9th Cir. Cal. May 20, 2016) agrees that *Amara, id.* indeed allows an ERISA claimant pursue both to §1332(a)(1)(B) and (a)(3) claims. Further,

> Applying Amara's conclusion that a plaintiff may seek relief under both § 1132(a)(1)(B) and § 1132(a)(3) does not contravene the ruling in Varity. In Varity, plaintiffs sought relief under ERISA § 409(a), 29 U.S.C. § 1109(a), which

> authorizes recovery to benefit plans for breaches of fiduciary duty. <u>Varity</u>, 516 U.S. at 508-09. The <u>Varity</u> court found that § 1109(a) provided relief only for benefit plans and not individuals, but held that § 1132(a)(3) could provide individualized relief. Id. at 509-12, 515. Thus, a key holding in <u>Varity</u> was that § 1132(a)(3) extends to other sections of the statute, even when § 1132 does not expressly provide a remedy for those sections. <u>Varity</u> did not explicitly prohibit a plaintiff from pursuing simultaneous claims under § 1132(a)(1)(B) and § 1132(a)(3).
>
> *Id.* at *27.

ONE MAY PLEAD ALTERNATIVE THEORIES—BUT EXPECT PUSHBACK

If the circumstances warrant, I plead Plaintiff alternative theories of recovery. Defendants routinely assert Plaintiff's "exclusive remedy" lies in 29 U.S.C § 1332(a)(1)(B), which provides a vehicle for an ERISA claimant:

> [T]o recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan.

Thus, defendants invariably argue, Plaintiff has no claim under 29 U.S.C § 1332(a)(3) despite its express provision that an ERISA action can be pursued:

> by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan...

In making their “exclusive remedy” argument, Defendants must ignore the impact of *CIGNA Corp. v. Amara*, 563 U.S. 421, 131 S. Ct. 1866, 179 L. Ed. 2d 843 (U.S. 2011) upon ERISA cases. The Court observed that (a)(1) b claims involve rights and remedies available at law and (a)(3) claims involve rights and remedies available in courts of equity. *Amara* held, in no uncertain terms, that 29 U.S.C § 1332(a)(3) provides equitable rights and remedies for estoppel-type claims:

> [W]hen a court exercises its authority under § 502(a)(3) [§ 1332(a)(3)] to impose a remedy equivalent to estoppel, a showing of detrimental reliance must be made.
>
> But this showing is not always necessary for other equitable remedies. Equity courts, for example, would reform contracts to reflect the mutual understanding of the contracting parties where “fraudulent suppression[s], omission[s], or insertion[s],” 1 Story § 154, at 149, “material[ly] . . . affect[ed]” the “substance” of the contract, even if the “complaining part[y]” was negligent in not realizing its mistake, as long as its negligence did not fall below a standard of “reasonable prudence” and violate a legal duty, 3 Pomeroy §§ 856, 856b, at 334, 340-341. See *Baltzer*, 115 U.S., at 645, 6 S. Ct. 216, 29 L. Ed. 505; Eaton § 307(b).
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Id, 564 U.S. at 443-444; 131 S.Ct. at 1881. (bracketed material supplied).

Barring recovery under (a)(1)(B), Plaintiff is entitled to be made whole under 29 U.S.C.A §1332(a)(3).

In cases where redress may need to come outside the blain claim for benefits scenario relief is available in form of a "surcharge", which is only available under § 1332(a)(3). *Id.* at 563 U.S. 442-445; 131 S.Ct. at 1880-1882. *Amara* states:

> … the District Court's remedy essentially held CIGNA to what it had promised, namely, that the new plan would not take from its employees benefits they had already accrued. This aspect of the remedy resembles estoppel, a traditional equitable remedy…. Equitable estoppel "operates to place the person entitled to its benefit in the same position he would have been in had the representations been true." And, as Justice Story long ago pointed out, equitable estoppel "forms a very essential element in... fair dealing, and rebuke of all fraudulent misrepresentation, which it is the boast of courts of equity constantly to promote."

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DISCOVERY

An ERISA fiduciary that is responsible for claims decision-making and payment of claims operates under an inherent conflict of interest, characterized as a "dual role conflict" and as a result if this conflict, the Court must engage in a review of a number of factors to determine to what extent the conflict may have affected the decision to deny Plaintiff's claim for benefits. *Metropolitan Life Ins. Co. v. Glenn*, 554 U.S. 105, 117, 128 S. Ct. 2343, 171 L. Ed. 2d 299 (2008).

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> *Petroleum Co.]* 491 F.3d [1180, 1190 10th Cir. 2007] (quoting Chambers v. Family Health Plan Corp., 100 F.3d 818, 825-26 (10th Cir. 1996).

Weber, 541 F.3d 1011 (bracketed material supplied).

The "seriousness" of defendant's conflict in this case is the focus of the discovery at issue. Discovery to determine the extent and nature of Defendant's conflict is permissible in this Circuit. *Murphy v. Deloitte & Touche Group Ins. Plan*, 619 F.3d 1151, 1157-1158 (10th Cir. 2010). See also, *Schoenhals v. UNUM Life Ins. Co. of Am*., 2011 U.S. Dist. LEXIS 66025, 2011 WL 2457308. There, Judge Cauthron, following *Murphy*, *supra*. sustained plaintiff's motion for discovery on the issue of conflict of interest. Recently, in *Derryberry v. PharMerica Corp*., 2016 U.S. Dist. LEXIS 139773, 2016 WL 5876128 (W.D. Okla. Oct. 7, 2016) Judge West allowed ERISA discovery to take place in Bruce v. Aetna Life Insurance Company, Civ. 13-749 W.

Interestingly, in *Murphy, supra.* on remand, Plaintiff was allowed to serve written discovery upon defendants as well as to conduct a deposition pursuant to Fed. R. Civ. P. 30 (b)(6). *Murphy v. Deloitte & Touche Group Ins. Plan,* 2010 U.S. Dist. Lexis 144434 (D.C.N.M.2010).

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