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Article 1

Litigation Under ERISA

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INTRODUCTION

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The passage and implementation of the Employee Retirement Income Security Act of 1974 (ERISA)[1] has now led to a significant flow of cases within the federal court system. For the most part, these cases involve the fiduciary and reporting and disclosure portions of ERISA, rather than the detailed regnlation by the Internal Revenue Code of certain "qualified" plans.

The four notes which comprise this student symposium demonstrate that decisions about the numerous issues left unanswered by the general language of ERISA's fiduciary provisions are part of the species of general federal law and not an isolated genus of "pension" law. The notes involve four major questions: (i) whether in light of the availability of arbitral or administrative remedies under a plan litigation may be undertaken before or only after the pursuit of those remedies, (ii) what standard of review courts should apply in considering a fiduciary's denial of a claim for benefits, (iii) whether courts may award extracontractual or punitive damages, especially in light of the Supreme Court's decision in *Massachusetts Mutual Life Insurance Co. v. Russell*,[2] and (iv) under what circumstances courts should award attorney's fees upon the conclusion of such litigation.

Many employee benefit plans are collectively bargained and many are not. Collectively bargained plans are significantly affected by the applicability of a well-developed general federal labor law. One of the central provisions of that labor law is the reliance on binding arbitration to mold and hopefully resolve disputes.[3] Reliance on the arbitral process has led, to a considerable degree, to an ouster of substantive review by the courts of the results of that process, except in the case of allegations concerning the legitimacy or integrity of the process.[4] The courts have demurred in certain cases

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1 Pub. L. No. 93-406, 88 Stat. 829 (codified at 29 U.S.C. §§ 1001-1461 and in scattered sections of the I.R.C. (1982)).

2 105 S. Ct. 3085 (1985).

3 C. SUMMERS, H. WELLINGTON & A. HYDE, LABOR LAW 764-77 (1982). For a recent case on the importance of arbitration, see AT & T Technologies, Inc. v. Communications Workers of Am., 106 S. Ct. 1415, 1418-19 (1986).

4 *See* C. SUMMERS, H. WELLINGTON & A. HYDE, *supra* note 3, at 854-57.

concerning the enforceability of an arbitration clause in the context of claims based on federal statutes like the antitrust and securities laws.[5] As shown in the first note of this symposium, the issue remains vibrant in the context of ERISA in those cases in which the trustees of jointly-sponsored union-employer plans, typically operated pursuant, in part, to a collective bargaining agreement with an arbitration clause, have powers of plan design and amendment held by the employer alone in the non-collectively bargained context.

The issue of what standard should be applied in reviewing a fiduciary's action is as fundamental an issue as courts face in the complex world of modern federal regulatory statutes. The precise resolution of the question may only modestly affect actual litigation because courts frequently tailor the application of their standard of review to accommodate or produce the decision they have made on the merits (as they often do in issues of standing). But erecting a high standard of review, even if it is handled flexibly once a case is in the courts, actively discourages litigation. As the second note in this symposium points out, it is puzzling that the courts looking at the same fiduciary provision of ERISA have applied more than one standard of review based on the factual context of the fiduciary's conduct.

ERISA generally gives an aggrieved participant the right to sue for damages but the statute does not specify what kinds of damages are available. In *Massachusetts Mutual Life Insurance Co. v. Russell*[6] the Supreme Court held that punitive damages may not be recovered under one of ERISA's remedial provisions, section 409. But the various opinions in *Massachusetts Mutual* do not provide a general answer to the question and the lower courts are currently struggling with this issue.[7] The *Massachusetts Mutual* opinions make it clear that there is likely to be disagreement on the Supreme Court on this larger issue which will have to be resolved by reference to the types of inquiries contained in the third note.

ERISA explicitly provides for the awarding of attorney's fees in appropriate situations. Not surprisingly this has generated a significant amount of litigation. The courts have attempted to establish and apply standards to decide which litigants might be entitled to such fees given continued adherence to the general American Rule disfavoring fee awards. The fourth note investigates this complex issue.

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5 *But see* Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 105 S. Ct. 3346 (1985).

6 105 S. Ct. 3085 (1985).

7 *See, e.g.*, Wilson v. Pye, No. 85 C 6341 (N.D. Ill. Jan. 3, 1986) (available on WESTLAW, Federal DCT database).

In the aggregate these four notes demonstrate that in answering questions about a general and sometimes vague statute, like ERISA, the courts and commentators ought first to study the particular context of that statute, in this case employee benefit plans and employment patterns generally. Second, recourse should be made to proximate, general provisions of federal statutory or common law. It would be unwise, for instance, not to think about how the awarding of attorney's fees under ERISA relates to the highly developed case law under the federal civil rights statutes. It would be foolish to fail to consider the issue of awarding punitive damages in the larger context of federal remedial law or whether to defer to the arbitral process in its labor law domain.

Pension cases may, because of their particular context, provide peculiar and nongeneral answers. For instance, although Congress referred to the corpus of state fiduciary law in setting the general fiduciary rules of ERISA, it also noted that such law would have to be tailored to the pension context. Thus, the second note shows that state fiduciary law, which generally defers to fiduciary determinations as to benefit distributions, may not be appropriate in the context of employee benefit plans.

Pension and other employee benefit issues may also generate more or less typically federal answers to subsidiary issues that parallel general legal developments as the nature of employment in American society evolves. Perhaps employment, particularly for skilled, blue-collar workers, is becoming less stable. Some think that as the economy reorients itself to service jobs performed at computer terminals the home may again become a significant situs of paid employment. The role of unions is also at least temporarily waning and this may also impact the development of the law of fiduciary obligations under ERISA. If any or all of these trends prove to be significant, it may justify a more protective approach by courts to employee interests in pensions and other benefit programs.