

## ERISA LITIGATION AGENDA

### THURSDAY • NOVEMBER 6, 2008

7:30 **Registration and Networking Continental Breakfast**

8:30 **Welcoming Remarks and Overview from Co-Chairs**

Mark D. DeBofsky, *Daley, DeBofsky & Bryant*

Lissa J. Paris, *Murtha Cullina LLP*

Douglas M. Selwyn, *Sessions Lambert Selwyn, LLP*

8:45 **Hot Topics in ERISA Preemption**

ERISA preemption—procedurally and substantively—is a dominant issue in employee benefits litigation, particularly in connection with the regulation of health benefits. States and cities attempt to construct health insurance programs which avoid preemption. Plaintiffs' counsel run from ERISA preemption as they attempt to salvage common law claims, preserve a right to a jury trial and obtain broad remedies for their clients. Defendants embrace ERISA preemption because it provides a choice of forum, eliminates common law and extra-contractual damage claims, and results in a bench trial. This program segment will focus on the latest developments in ERISA preemption, including emphasis on health-related claims and litigation trends.

**For the Plaintiff**

Mary Ellen Signorille

*AARP Foundation Litigation*

**For the Defendant**

Charles B. Wolf

*Vedder Price PC*

9:45 **Fiduciary Insurance Coverage Issues**

Fiduciary insurance provides important coverage to fiduciaries of employee benefit plans. The provisions of these policies vary, and what is covered (and excluded) can be an important consideration in litigation against fiduciaries in a variety of contexts. Also, there are numerous tactical and strategy decisions that have to be made when fiduciary insurance is involved, in litigating and settling a case. This session will examine typical policy provisions and the issues they raise and strategic considerations that arise as a result of these policies, for example, notification of potential and actual claims, retention of counsel, what defense costs are covered, and conflicts of interest.

**Panelists:**

Greg Smith, *Chubb*

Brian Smith, *The Segal Company*

Barry S. Slevin, *Slevin & Hart, PC*

10:45 **Morning Break**

11:00 **Benefit Claims Litigation: Claims Review and Exhaustion**

The meat and potatoes of ERISA litigation are claims for benefits under an ERISA plan. However, before filing a suit for an ERISA benefit, critical strategy considerations should guide both parties, as claimants pursue administrative review of their claims pursuant to the plan's review procedure. This segment of the program focuses upon this important prelude to benefit claims litigation: the claims review procedure. The panelists will address the benefit claims regulation and new case law developments and show how this preliminary phase sets up and controls the subsequent benefit claims litigation.

**For the Plaintiff**

Denise M. Clark

*The Law Office of Denise M. Clark*

**For the Defendant**

Mark E. Schmidtke

*Ogletree, Deakins, Nash, Smoak  
& Stewart, PC*

*(Program Subject to Revisions on Late Breaking Legislative or Regulatory Developments)*

## ERISA LITIGATION AGENDA

12:00 **Lunch (on your own)**

1:30 **Benefit Claims Litigation: Claims Standards of Review and Discovery and Dispositive Motions**

This program segment features a discussion of the most recent jurisprudence dealing with what occurs when suit is filed for benefits under an ERISA plan, including evidence the district court may consider, the judicial standards of review applied in benefit claims litigation, the doctrine of conflict of interest, and emerging theories of benefit claims law.

**For the Plaintiff**

Mark D. DeBofsky  
*Daley, DeBofsky & Bryant*

**For the Defendant**

Lissa Paris  
*Murtha Cullina LLP*

2:30 **Afternoon Break**

2:45 **Other Remedies**

Remedies, especially in fiduciary breach cases, have become a hotly contested battle ground as evidenced by the decisions in *Amschward v. Spherion Corp.* and *LaRue v. DeWolff, Boberg & Assoc., Inc.* This segment will focus on how courts have analyzed plan remedies under 502(a)(2) and the scope of equitable remedies under 502(a)(3).

**For the Plaintiff**

Thomas G. Moukawsher  
*Moukawsher & Walsh, LLC*

**For the Defendant**

Lissa J. Paris  
*Murtha Cullina LLP*

3:45 **Spousal Rights**

One of the key issues facing all plans is how to deal with spousal rights. This session will focus on lessons learned from the cases about pivotal issues such as QDROs, beneficiary designations, and disputes among potential claimants (including multiple spouses) over survivor benefits.

**Speaker:**

Sally Doubet King, *McGuire Woods LLP*

4:45- **Reception**

5:45

### UNABLE TO ATTEND? CAN'T DECIDE WHICH SESSIONS TO ATTEND?

Audiotapes and CDs will be available approximately 4 weeks after the program.

To order complete tape sets or CD sets,  
see the Registration and Order Form panel of this brochure.

Order forms for individual tapes will be available on site.

For more information, visit [www.abanet.org/jceb/](http://www.abanet.org/jceb/) or call 202.662.8640.

## ERISA LITIGATION AGENDA

### FRIDAY • NOVEMBER 7, 2008

#### 7:30 Registration and Networking Continental Breakfast

#### 8:30 Fee Case Litigation

The past two years have seen an explosion of litigation challenging the selection of investments, and the monitoring of fees in individual account (401(k)) plans. This session examines litigation between plans/plan sponsors and service providers, including cases concerning the fiduciary status of providers. This session will also address litigation involving fiduciary duties in selection and monitoring service providers.

**For the Plaintiff**

**Gregory Y. Porter**

*McTigue Porter, LLP*

**For the Defendant**

**Nancy G. Ross**

*McDermott Will & Emery LLP*

#### 9:30 Special Topics in Welfare Litigation

This session will cover a potpourri of topics that frequently arise in welfare benefit litigation; particular problems that arise in relation to mental health claims (health and disability); experimental and investigational treatment; proving disability claims involving so-called subjective impairments such as chronic fatigue syndrome and fibromyalgia; the uses and abuses of functional capacity evaluations and surveillance; and suggestions for practitioners in the wake of the *MetLife v. Glenn* Supreme Court ruling.

**For the Plaintiff**

**Mark D. DeBofsky**

*Daley, DeBofsky & Bryant*

**For the Defendant**

**Douglas M. Selwyn**

*Sessions Lambert Selwyn, LLP*

#### 10:30 Morning Break

#### 10:45 Fiduciary Breach Litigation

Probably the most financially significant and complicated area of ERISA litigation involves claims against fiduciaries for alleged breach of duty. ERISA fiduciary litigation is particularly challenging because the case law is still developing, and little precedent is available to guide courts when they decide the legal questions at the heart of many fiduciary cases. These presenters will discuss recent trends in fiduciary litigation including developing case law on the core question of what constitutes fiduciary activity, the impact of participant direction under ERISA Section 404(c), potential liability of directed trustees and general fiduciary duties of disclosure and remedies for fiduciary misrepresentations.

**For the Plaintiff**

**Thomas G. Moukawsher**

*Moukawsher & Walsh, LLC*

**For the Defendant**

**Ian H. Morrison**

*Seyfarth Shaw LLP*

#### 11:45 Withdrawal Liability and Collections

Fiduciaries of multiemployer plans have an obligation to collect contributions owing to the plans including both delinquent contributions and withdrawal liability payments. In the aftermath of the market downturn, withdrawal liability has again become a significant issue for multiemployer defined benefit pensions plans and withdrawing employers. This session examines current issues in collection litigation and withdrawal liability litigation.

**For the Plan**

**Douglas M. Selwyn**

*Sessions Lambert Selwyn, LLP*

**For the Employer**

**Charles B. Wolf**

*Vedder Price PC*

## ERISA LITIGATION AGENDA

12:45 **Lunch (on your own)**

2:00 **Service Provider Litigation**

One of the most important fiduciary obligations involves the retention, monitoring, and termination of providers of service to employee benefit plans. As a result, there have been numerous litigated cases involving these issues. In addition, unique issues arise in connection with the provision of services to employee benefit plans, which often are the focus of the litigation that arises in connection with these types of contractual relationships. This session will focus on the substantive provisions of ERISA that are implicated by service provider relationships and the legal issues that arise in litigation between plans and service providers

**Panelists:** Gregory Y. Porter, *McTigue Porter, LLP*  
Deborah S. Davidson, *Morgan, Lewis & Bockius LLP*  
Barry S. Slevin, *Slevin & Hart, PC*

2:50 **Severance and Early Retirement Litigation**

Despite the recent improvement in the economy, many for-profit and not-for-profit companies, as well as educational institutions, are considering or undertaking RIFs. The panelists will explore in depth a hypothetical involving a company RIF. The hypothetical will have many elements, including retiree health and a supplemental early retirement pension, as well as special “top hat” benefits. The defense-side panelist will discuss how to avoid litigation in the context of severance and early retirement programs, and both sides will discuss litigation strategies, including how to ensure ERISA status for severance arrangements and class status.

**For the Plaintiff**  
Mary Ellen Signorille  
*AARP Foundation Litigation*

**For the Defendant**  
Thomas G. Hancuch  
*Vedder Price PC*

3:50 **Afternoon Break**

4:00 **Ethical Considerations in ERISA Litigation/Multi-jurisdictional Practice/Scope of Attorney-Client Privilege**

Plan sponsors (employers and boards of trustees) can have multiple roles in connection with the employee benefit plans they have established. Employee benefits attorneys often face many vexing ethical issues that arise from conflicting loyalties when dealing with plan-related issues. This session will focus on key ethical rules and principles that should be considered by ERISA practitioners, including a discussion regarding how multiple representation is possible, how to determine who the client is and what role the client has when advice is sought, whether the advice requested or given in particular situations is privileged, and the impact of the Sarbanes-Oxley Act on employee benefits lawyers.

**Moderator:** Gabriel J. Minc, *Law Office of Gabriel J. Minc*  
**Panelist:** Denise M. Clark, *The Law Office of Denise M. Clark*

5:00 **Adjourn**