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The 15th Annual National Institute on

# ERISA Litigation

November 10-11, 2005

Sofitel Chicago Water Tower  
Chicago, IL

*Early Bird Registration October 12th*

*Hotel Registration October 12th*

[www.abanet.org/jceb/](http://www.abanet.org/jceb/)

# ERISA LITIGATION AGENDA

## THURSDAY • NOVEMBER 10, 2005

7:30 Registration and Networking Continental Breakfast

### 8:30 Welcoming Remarks and Overview

Program Co-Chairs

Elizabeth R. Lishner, *Law Offices of Elizabeth R. Lishner*

Joyce A. Mader, *O'Donoghue & O'Donoghue LLP*

Martha Jo Wagner, *Venable LLP*

### 8:45 ERISA Civil Procedure and Remedies

The panelists will review the procedural aspects of litigating ERISA claims, including the elements of a claim, the proper parties, jurisdiction, venue, and statutes of limitations. Both plaintiffs' and defendants' counsel will focus on new developments, regarding when a cause of action arises, who can sue, who can be sued, the remedies that can be sought and attorneys' fees awards.

#### For the Plaintiff

Thomas G. Moukawsher

*Moukawsher & Walsh, LLC*

#### For the Defendant

Myron D. Rumeld

*Proskauer Rose LLP*

### 9:35 Subrogation and Reimbursement

This session will focus on plans' efforts to collect money owed to plans by participants who seek money from third-party tortfeasors. The discussion will include whether a participant must honor a plan's subrogation provision, how much of the award the plan can collect, how the participant's lawyer gets paid, and the current state of the law in light of *Great West Life & Annuity Ins. Co. v. Knudson*.

#### For the Plaintiff

Mark D. DeBofsky

*Daley, DeBofsky & Bryant*

#### For the Defendant

Lisa M. Gomez

*Cohen, Weiss and Simon LLP*

10:05 Questions and Answers

10:15 Morning Break

### 10:30 ERISA Preemption and Removal

ERISA preemption—procedurally and substantively—is a dominant issue in employee benefits litigation, particularly in connection with the regulation of health benefits. 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, in particular, the latest Supreme Court preemption case of *Aetna Health Inc. v. Davila*.

#### For the Plaintiff

Mary Ellen Signorille

*AARP Foundation Litigation*

#### For the Defendant

Howard Shapiro

*Proskauer Rose LLP*

11:45 Questions and Answers

11:55 Lunch (on your own)

# ERISA LITIGATION AGENDA

- 1:15 **Benefit Claims Litigation: Claim 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.
- |   |  |
|---|--|
| <b>For the Plaintiff</b><br>Mark D. DeBofsky<br><i>Daley, DeBofsky &amp; Bryant</i> | <b>For the Defendant</b><br>Lisa M. Gomez<br><i>Cohen, Weiss and Simon LLP</i> |
|---|--|
- 2:05 **Benefit Claims Litigation: Claim Standard of Review and Evidence**  
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.
- |  |  |
|--|--|
| <b>For the Plaintiff</b><br>Elizabeth R. Lishner<br><i>Law Offices of Elizabeth R. Lishner</i> | <b>For the Defendant</b><br>Martha Jo Wagner<br><i>Venable LLP</i> |
|--|--|
- 2:55 **Questions and Answers**
- 3:15 **Afternoon Break**
- 3:30 **Fiduciary Litigation Including Employer Securities**  
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. This panel 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, ignoring participant directions, duties of disclosure, and investment education/investment advice. All of the panelists are litigating these types of cases, including Enron, WorldCom and Rite-Aid, and will discuss the litigation strategies in these lawsuits.
- |   |  |
|---|--|
| <b>For the Plaintiff</b><br>Jeffrey Lewis<br><i>Lewis, Feinberg, Renaker &amp; Jackson, PC</i><br>Lynn L. Sarko<br><i>Keller Rohrback LLP</i> | <b>For the Defendant</b><br>Nancy G. Ross<br><i>McDermott Will &amp; Emery</i><br>Myron D. Rumeld<br><i>Proskauer Rose LLP</i> |
|---|--|
- 4:45 **Questions and Answers**
- 5 - 6:15 **Cocktail Reception**

## FRIDAY • NOVEMBER 11, 2005

- 7:30 **Registration and Networking Continental Breakfast**
- 8:30 **Discrimination in Employment and Employee Benefits**  
Although ERISA generally provides employers with substantial flexibility in the design of employee benefit plans to meet their needs and those of their employees, other federal laws particularly the Americans with Disabilities Act (ADA) and the Age Discrimination in Employment Act (ADEA), may restrict employer plan design choices. In addition, the 1996 Health Insurance Portability and Accountability Act (HIPAA), added a new prohibition under

# ERISA LITIGATION AGENDA

ERISA against discrimination in group health plans on the basis of health status factors. The panelists will focus on the newest regulations and jurisprudence involving claims under the ADA, ADEA, and ERISA, including cash balance litigation, and the recent controversy over whether providing certain employee benefits violates age discrimination laws.

**For the Plaintiff**

Phyllis C. Borzi  
O'Donoghue & O'Donoghue LLP

**For the Defendant**

Lissa J. Paris  
Murtha Cullina LLP

9:20 **LTD Benefit Claims**

The panelists will address litigation arising from long-term disability plans. The focus on long-term disability claims will include a discussion of the standards of review where the insurer is conflicted by its dual roles as fiduciary and payor, "own occupation" disability plans, and burdens of proof, including life after the U.S. Supreme Court's decision in *Black & Decker Disability Plan v. Nord*.

**For the Plaintiff**

Elizabeth R. Lishner  
Law Offices of Elizabeth R. Lishner

**For the Defendant**

Martha Jo Wagner  
Venable LLP

10:10 **Questions and Answers**

10:15 **Morning Break**

10:30 **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 panelist 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**

Jeffrey Lewis  
Lewis, Feinberg, Renaker & Jackson, PC

**For the Defendant**

Lissa J. Paris  
Murtha Cullina LLP

11:20 **Cash Balance Litigation**

Since the decision in *Cooper v. IBM Personal Pension Plan*, 2003 U.S. Dist. LEXIS 13223, West Law 2003 WO 21767853 (S.D. Ill. July 31, 2003), at least a dozen suits have been brought challenging the conversion of standard defined benefit plans into cash balance plans. The panel will discuss the various theories being brought in these cases, including age discrimination claims under ADEA, and cut-back claims under ERISA section 204(b)(1)(H) and 204(g), as well as legal claims involving the so-called "whipsaw" effect and backloading (ERISA section 204(b)(1)(B)). The various defenses that have been raised to these claims also will be discussed, as well as the various legislative proposals in connection with cash balance plans, including Rep. Boehner's recent bill and the Bush Administration's proposals.

**For the Plaintiff**

Thomas G. Moukawsher  
Moukawsher & Walsh, LLC

**For the Defendant**

Howard Shapiro  
Proskauer Rose LLP

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

Audiotapes will be available approximately 3 weeks after the program. To order complete tape sets, see the Registration and Order Form panel of this brochure. Order forms for individual tapes will be available on site.

For more information, see [www.abanet.org/jceb/](http://www.abanet.org/jceb/) or call 202.662.8641.

# ERISA LITIGATION AGENDA

## 12:10 **Cutback Litigation**

The panel will explore recent case law and regulatory developments when companies endeavor to eliminate or cut back on benefits, or reduce benefit costs in a manner perceived to be a cutback. Topics will include recent litigation developments, accrued benefit litigation including the Supreme Court's recent decision in *Central Laborers' Pension Fund v. Heinz*, and retiree health litigation.

### **For the Plaintiff**

Mary Ellen Signorille  
*AARP Foundation Litigation*

### **For the Defendant**

Joyce A. Mader  
*O'Donoghue & O'Donoghue LLP*

## 12:45 **Questions and Answers**

## 12:50 **Lunch (on your own)**

## 2:05 **Plan Termination Litigation**

The recent and significant bear market, combined with bankruptcies in the steel, airline, and textile industries, have created a surge in single employer plan terminations and litigation involving the PBGC. The panelists will discuss the current key PBGC cases, including pending litigation and recent regulatory developments involving setting the plan termination dates, the scope of the PBGC guarantee, and creditors' rights and provide perspective from the PBGC and plan sponsors, creditors, and purchasers of plan sponsor assets.

### **For the Plaintiff**

Jeffrey B. Cohen, Chief Counsel  
*Pension Benefit Guaranty Corporation (PBGC)*

### **For the Defendant**

David R. Levin  
*Gardner Carton & Douglas LLP*

## 2:55 **Spousal Litigation Topics**

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.

Joyce A. Mader  
*O'Donoghue & O'Donoghue LLP*

## 3:45 **Afternoon Break**

## 4:00 **Ethical Considerations in ERISA Litigation**

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:** David R. Levin, *Gardner Carton & Douglas LLP*

**Panelists:** Denise Clark, *H.E.R.E.I.U. Welfare – Pension Funds*  
Gabriel J. Minc, *Law Office of Gabriel J. Minc*  
Charles B. Wolf, *Vedder Price Kaufman & Kamholz, PC*

## 5:00 **Adjourn**

# HIGHLIGHTS OF ERISA LITIGATION

## Who Should Attend?

- *Litigators* who handle ERISA cases and want to enhance their substantive ERISA knowledge
- *Benefits practitioners* who wish to further their knowledge of the substantive law and most recent case law
- *Litigators* who find themselves confronting ERISA preemption issues on an increasing basis
- *ERISA specialists* who draft plan language and render advice about plan administration, trying to minimize the risk of litigation
- *Litigators* seeking to develop expertise in this growing field of practice

## What Past Participants Have Said...

"Excellent up-to-date materials and program. A good coverage of issues from the simple to very complex by an excellent group of well prepared faculty."

**Christopher Morris, Ryan, Jamison, Morris, Ryan & Smith**

"Definitely the best conference I have been to yet! The topics covered were cutting-edge issues that litigators are faced with on a daily basis."

**Kristi B. Gauthier, Miller, Shpiece & Tischler, PC**

"Having one plaintiff-side and one defendant-side speaker during every session has at least two benefits missing from most seminars: First, it gives the audience the perspective of two experienced lawyers at once. But, second and more importantly, it brings the advantages of the adversarial system to the seminar, especially because these speakers are not shy about calling each other out."

**David Tetrick, King & Spalding LLP**

"The seminar was extremely well-organized and provided thorough discussion of all of the hottest areas in the field. This a must for any ERISA litigator."

**Gardiner B. Davis, Spencer Fane Britt & Browne LLP**

## National Institute Faculty

**Phyllis C. Borzi**  
O'Donoghue &  
O'Donoghue LLP  
Washington, DC

**Denise M. Clark**  
H.E.R.E.I.U. Welfare—  
Pension Funds  
Aurora, IL

**Jeffrey B. Cohen**  
Chief Counsel  
Office of Chief Counsel  
Insurance Program Department  
Pension Benefit Guaranty  
Corporation (PBGC)  
Washington, DC

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

**Lisa M. Gomez**  
Cohen, Weiss and Simon LLP  
New York, NY

**David R. Levin**  
Gardner Carton & Douglas LLP  
Washington, DC

**Jeffrey Lewis**  
Lewis, Feinberg, Renaker &  
Jackson, PC  
Oakland, CA

**Elizabeth R. Lishner**  
Program Co-Chair  
Law Office of  
Elizabeth R. Lishner  
Santa Monica, CA

**Joyce A. Mader**  
Program Co-Chair  
O'Donoghue &  
O'Donoghue LLP  
Washington, DC

**Gabriel J. Minc**  
Law Office of Gabriel J. Minc  
Chicago, IL

**Thomas G. Moukawsher**  
Moukawsher & Walsh, LLC  
Groton, CT

**Lissa J. Paris**  
Murtha Cullina LLP  
Hartford, CT

**Myron D. Rumeld**  
Proskauer Rose LLP  
New York, NY

**Nancy G. Ross**  
McDermott Will & Emery  
Chicago, IL

**Lynn L. Sarko**  
Keller Rohrbach LLP  
Seattle, WA

**Howard Shapiro**  
Proskauer Rose LLP  
New Orleans, LA

**Mary Ellen Signorille**  
AARP Foundation Litigation  
Washington, DC

**Martha Jo Wagner**  
Program Co-Chair  
Venable LLP  
Washington, DC

**Charles B. Wolf**  
Vedder Price Kaufman &  
Kammholz, PC  
Chicago, IL

# ERISA LITIGATION INFORMATION

## TUITION

Attend the entire two-day program, each breakfast, and the reception, and network with other registrants and faculty. Registrations must be postmarked, e-mailed or faxed by **Wednesday, October 12** to receive the discount.

### Early Bird Registration - Before October 12

\$945 General Public

\$845 ABA Member (\$100 Savings - *join a Section, and save even more!*)

\$745 Sponsoring Section Member (\$200 Savings)

### Full Tuition - After October 12

\$995 General Public

\$895 ABA Member (\$100 Savings - *join a Section, and save even more!*)

\$795 Sponsoring Section Member (\$200 Savings)

### On-Site Tuition

\$1045 General Public

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\$845 Sponsoring Section Member (\$200 Savings)

## ADDITIONAL SAVINGS

If three or more register from the same firm, one registrant will receive a \$50 reduction in program tuition! Every registrant will receive a copy of the informative course materials book that can be used as a comprehensive resource long after the program is held. Each registrant will also be eligible for MCLE accreditation within those states that require continuing legal education.

## SCHOLARSHIPS

A limited number of scholarships to defray tuition expenses are available for this program. To request an application or receive additional information, contact Karen Case at 202.662.8641. Scholarship applications must be received in the ABA offices no later than thirty days prior to the program presentation. Preference will be given to full-time LL.B. candidates.

## MCLE

Required sponsor documentation has been forwarded to and credit requested from MCLE states with general requirements for lawyers. 11.5 hours of credit, including 1 hour of ethics credit, have been requested from states that recognize a 60-minute credit hour. 13.8 hours of credit, including 1 hour of ethics credit, have been requested from those states granting credit hours on a 50-minute basis (13.5 hours from NY State). Lawyers seeking credit in Pennsylvania must pay a fee of \$1.50 per credit hour directly to the PA CLE Board. The ABA pays applicable fees in other states where the sponsor is required to do so. In states where a late fee may become applicable, the ABA pays this fee as well. Please be aware that each state has its own rules and regulations including its definition of CLE as well as "Ethics." Therefore, certain programs may not receive credit in some states. Please check with your state agency for confirmation of general as well as ethics approval for any program. You may contact the ABA Service Center at 800.285.2221 or Karen Case at 202.662.8641 for confirmation of the number of credits approved by any particular state. This transitional CLE program has been approved for all New York licensed attorneys in accordance with the requirements of the New York CLE Board for NY MCLE.

## QUESTIONS?

If you have a specific question that you want answered, you can fax it up to the day before the program to Karen Case (FAX 202.662.8682), or ask the speakers directly during the program presentation.

# ERISA LITIGATION INFORMATION

## SERVICES FOR PERSONS WITH DISABILITIES

If special arrangements are required, please contact Karen Case at 202.662.8641. Reasonable advance notice is requested.

## CANCELLATIONS

Refunds will be made only if requests are received by **Wednesday, October 12**, and a \$50 administrative fee will be charged. **No refunds will be made for requests received after Wednesday, October 12.** Substitute registrants for the National Institute are welcome.

## PROGRAM CONFIRMATION

Written confirmation of your registration will be e-mailed to you upon receipt. Please bring it with you to the National Institute as proof of registration. If you do not receive the confirmation notice prior to the program, call the ABA (202.662.8641) to confirm that your registration was received and the program is being held as scheduled.

## HOTEL INFORMATION

### DEADLINE FOR HOTEL RESERVATIONS:

**Wednesday, October 12**

You may make hotel reservations at the Sofitel Chicago Water Tower, 20 East Chestnut Street, Chicago, IL 60611. A limited number of rooms have been set aside for National Institute registrants at \$205 for a king size room. All room rates are subject to city occupancy and sales tax, and unclaimed rooms will be released **Wednesday, October 12**, after which the hotel will accept reservations on a space-available basis only. All reservations must be guaranteed with a major credit card. **To register at the hotel, call the hotel directly at 312.324.4000 or 877.813.7700, and be sure to mention the ABA National Institute - ERISA Litigation - to receive the special discounted rate.**

## AIRLINE INFORMATION

The American Bar Association has secured discounted rates with American, Delta, and US Air for all National Institute participants. To make reservations, or for more information call:

**American Airlines** 800.433.1790

ABA Account 17715

**Delta Airlines** 800.241.6760

ABA Account 207843A

**US Air** 877.874.7687

ABA Account 65163236

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**November 3-4, 2005**

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# REGISTRATION AND ORDER FORM

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### ON-SITE TUITION

- \$1045 General Public
- \$945 ABA Member  
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ABA # \_\_\_\_\_
- \$845 Sponsoring Section Member (\$200 Savings)  
ABA # \_\_\_\_\_
- Two or more people have registered with me; please apply the \$50 tuition reduction to the tuition rate indicated above.

- Send me the **ERISA Litigation Audiotope Package, PC5470638**, (tapes and course materials) available three weeks following the presentation, at the special price of \$649.95 including postage and handling\*.
- Send me the **ERISA Litigation Course Materials, PC5470637B** at the special prepublication price of \$267.95 including postage and handling\*.
- Send me the JCEB calendar for upcoming Employee Benefits Membership Events

### TO REGISTER

**Mail:** American Bar Association  
JCEB Registrar  
740 15th Street, NW, 10th Floor  
Washington, DC 20005-1022  
**Fax:** 202.662.8682 (credit card only)

### PAYMENT (must include one of the following)

- Check made payable to  
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\*District of Columbia residents add 5.75% use tax, Illinois residents add 9% sales tax, and Maryland residents add 5% sales tax, before including domestic postage and handling charges. Price is subject to change after 11/14/05.

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Join one of these dynamic Sections, and become active in one of their employee benefits committees. Join one or more when registering for this program, and save up to \$200 on this program tuition.

- I am interested in becoming a member of the American Bar Association. Please send me information and membership forms.
- I am an ABA member but want a further reduction on my tuition for this program. Please enroll me into the Section listed below; I've enclosed a separate check.
  - Section of Business Law, \$55
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  - Section of Taxation, \$50
  - Section of Health Law, \$50
  - Section of Real Property, Probate and Trust Law, \$50
  - Section of Tort Trial and Insurance Practice, \$50

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