

Employee Benefits Law

Briana M. Montminy

Given the downturn in the economy and increasing unemployment rates, employee benefits and health care reform have once again become elevated topics on the nation's agenda. The feature articles for this themed issue were contributed by the Employee Benefits Committee. Sacha Steinberger thoroughly summarizes COBRA subsidies under the American Recovery and Reinvestment Act of 2009 and employers' obligations under the Act, including notifying eligible employees. Following the Supreme Court's ruling in *Met Life v. Glenn*, Nancy Pridgen advises of the split that has developed among the circuit courts concerning employee benefit plans funded by trusts. Kenton Coppage provides an excellent summary of two recent rulings by the U.S. Supreme Court that highlight differing interpretations of benefit plans subject to ERISA.

Jeffrey Kroll offers a few suggestions on keeping employees happy during these tough economic times, and Robert Ferm's Legislative Update sums up the status of the health care reform bills as of the August congressional recess. Michael Neuren's Tech Tip is a great reminder of the importance of choosing a secure password for our computers and online accounts. The good times shared in the Windy City at the Annual Meeting are recapped by Janine Smith, and Tom Wert entices us to come to sunny Florida in February for the Midyear Meeting in Orlando. Last but definitely not least, Janet Davis shares her story and inspiring advice in "When I Was a New Lawyer." We hope you enjoy this issue of *TortSource* and look forward to seeing you at the Fall Leadership Meeting in San Diego in October. ♦

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Illustration by Andrew O. Alcalá

COBRA Subsidies under the Recovery Act: Bridging the Gap

Sacha Steinberger

As the nation's unemployment rate nears 10 percent, terminated and unemployed persons' access to health care is increasingly precarious. On February 17, 2009, President Barack Obama signed the American Recovery and Reinvestment Act of 2009 (Recovery Act), Pub. L. No. 111-5, which contains a host of potential economic stimulus measures. Among those is a temporary COBRA premium subsidy for eligible terminated employees that provides critical monetary assistance for people who are out of work. An overview of the basic provisions of the subsidy as set forth by the Recovery Act, IRS Notice 2009-27 (April 1, 2009), and the Department of Labor is offered here.

Under the Recovery Act, employees involuntarily terminated between September 1, 2008, and December 31, 2009, and their qualified family member beneficiaries are eligible for a subsidy of 65 percent of their COBRA premiums for a period of up

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Employee Benefits Funded Through Trusts: A New Circuit Split

Nancy Pridgen

The Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001–1462, the statute governing employee benefit plans, requires employers to fund pension plans through a trust. Employers can choose, but are not required, to set up a trust to fund any health and welfare benefits they provide. Many employers recognized the potential for a conflict of interest when the same entity responsible for the direct funding of a plan also decides claims for benefits to be paid from the plan and attempted to sidestep the problem by using trusts. As the law developed before 2008, many circuits around the country likewise had come to acknowledge that using a trust provided an additional layer between those responsible for determining benefit claims and those responsible for funding the benefits, at least partially ameliorating concerns about a structural conflict. But then the U.S. Supreme Court issued its decision in *MetLife v. Glenn*, 128 S. Ct. 2343 (2008), which now requires

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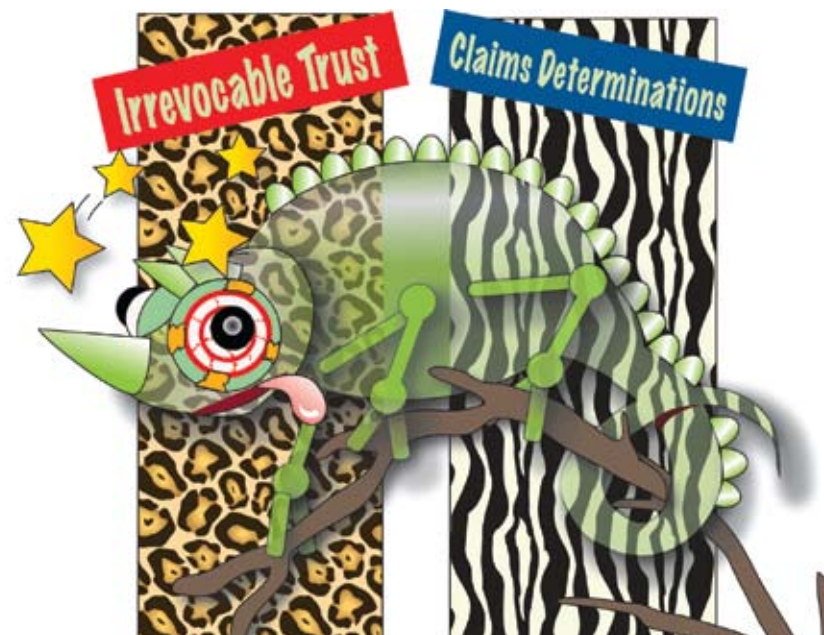


Illustration by Andrew O. Alcalá

Meeting Round-Up

Annual Meeting in Chicago

Janine Smith

The Windy City of Chicago hosted the 2009 ABA Annual Meeting, July 30–August 3. TIPS was headquartered at the Chicago Marriott Downtown on North Michigan Avenue’s “Magnificent Mile,” which showcases exclusive restaurants, trendy shops, and upscale hotels.

To kick-off the summer gathering, past Section chairs dined on Thursday in the heart of the Chicago Loop’s financial district at the historic Union League Club, established in 1879.

On Friday, members had an array of CLE programs to choose from, including “How to ‘Try’ Your Case in ADR,” “Litigating the Workplace Harassment Case,” and “The Psychology of Negotiation.” The third class of the TIPS Leadership Academy received comments from Section Chair Tim Bouch and Dean of the Leadership Academy, Peter Neeson, followed by reflections and candid discussions on the themes of pro bono, public service, diversity, and leadership. Former ABA President Dennis Archer addressed the Academy on “The Challenges of Diversity.”

That evening, TIPS members and guests enjoyed a spectacular sunset high above the city at the Welcome, Diversity, and Pursuit of Justice Reception in the Metropolitan Club on the 99th floor of the Willis Tower (formerly known as the Sears Tower). During the reception, the Honorable Shelvin Louise Marie Hall of Chicago, who serves on the Illinois First District Appellate Court, First Division, was honored with the Liberty Achievement Award.



Former TIPS Section Chair Jim Carroll presented the Robert B. McKay Law Professor Award to Charles M. Silver of the University of Texas Law School. (See the upcoming Fall issue of *The Brief* for a memorial to Jim, who passed away unexpectedly a few days after the Annual Meeting.) Photo by John Pavlou.

A variety of committee and task force meetings kept members busy on Saturday, along with excellent TIPS CLE programs. The Section also sponsored a service project at Legacy Elementary Charter School, where members spruced up the interior corridors and exterior façade, just ahead of the students’ arrival for a new school year.

The Tennessee Bar Association sponsored a reception on Saturday evening honoring Chair-Elect John R. Tarpley. Fellow Tennessean and TIPS leader Gail V. Ashworth offered a heartfelt introduction highlighting John’s service to TIPS, the Tennessee Bar Association, and the ABA. Addressing his many colleagues, family, and friends in attendance, John said he was extremely “honored and humbled” to serve as chair for the 2009-2010 bar year.

During the Leadership Academy graduation dinner on Saturday night at the Union League Club, the Academy made generous contributions to the Denise St. Fort Trust Fund in memory of Denise St. Fort and to the South Suburban Humane Society in memory of Sonia Schroeder. Denise and Sonia were veteran TIPS staff members who each lost a courageous battle to cancer during the past year.

The Annual Meeting culminated with Sunday’s gala Leadership and Awards Dinner at the John G. Shedd Aquarium, preceded by a reception on the Aquarium’s terrace overlooking Lake Michigan and the incomparable Chicago skyline. Linda A. Klein of Atlanta, Georgia, a former TIPS chair, was honored with the Edmund S. Muskie Pro Bono Award, and Professor Charles M. Silver of the University of Texas Law School received the Robert B. McKay Law Professor Award.

Special thanks to TIPS Chair Tim Bouch, Program Chair Marlo Orlin Leach, and Arrangements Chair John Buckley for planning such an informative, fascinating, and culturally diverse Annual Meeting. Make your plans now for the TIPS Fall Meeting, October 6-11, on Coronado Island, across the bay from San Diego, California. Travel safely and take care until we meet again! ❖

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Practice Management

Jeffrey J. Kroll

Keeping Law Firm Staff Happy in Tough Economic Times

With the economy struggling, some workers are spending longer hours at the office while others are concerned with being terminated. Because workers may have to focus more on their jobs in these tough economic times, it is important for employers to maintain a productive *and* happy staff. Keeping a staff happy is not only an investment in your relationship with your employees, it is also a reflection of the success of your overall business. Staff members are instrumental in growing and maintaining a prosperous law practice, even during a recession. Here are a few tips on keeping your staff’s morale up during tough times:

- Allow staff members to balance their work and personal lives. Starting and finishing times should be flexible, especially to accommodate child care issues. Consider granting employee requests to work from home when personal issues arise. As long as a staff member’s work is getting done, this should not be a concern. By taking advantage of flexible hours, my employees do not miss school plays, sporting events, or other family-related activities.
- At times when clients will not be in the office, allow staff to wear casual attire, especially during the summer months.

- Make the office a pleasant place to work. Flowers, coffee/tea facilities, soft drinks, and complimentary snacks are much appreciated.
- Keep your staff “in the loop.” Involve them, whenever possible, in decisions that could impact their job assignments and the overall direction of the firm.
- Reward hard work, even the smallest accomplishment of goals. Why wait until the end of the year for a bonus?
- When your staff is feeling overwhelmed, offer to help them. Even if you cannot help, your acknowledgment of their workload or problems can still go a long way.
- Constructive criticism should be given *and* received.
- Schedule weekly meetings with the staff. Allow for open dialogue to encourage each employee to speak freely about problems or concerns.
- For team building and to show your appreciation for your staff, engage in activities outside of the office. On a weekly basis, we head out for at least one lunch together away from the office. We also invite spouses for dinner throughout the year. Inviting the spouses to dinners and other activities assists in creating a family atmosphere. Plus, it is always nice to place a name with a face.

I am very fortunate to have a loyal group of employees working with me. Only a few years ago, several members of my staff left a successful law firm to join me at my new office. My staff is like family to me. Keeping them happy helps keep our office productive, and our clients notice and appreciate the positive culture we have created. ❖

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The Supreme Court Weighs In

Kenton J. Coppage

The U.S. Supreme Court has handed down two important decisions this year in the employee benefits arena, both authored by departing Justice David Souter and both premised, at least in part, on notions of reliance and predictability.

Adhering to ERISA Plan Documents

In *Kennedy v. Plan Administrator for DuPont Savings & Investment Plan*, 129 S. Ct. 865 (2009), the Court initially agreed to resolve a split among the circuits and among state courts over a divorced spouse's ability to waive pension plan benefits through a divorce decree that is not a qualified domestic relations order (QDRO). The Court concluded that the case implicated a "further split over whether a beneficiary's federal common law waiver of plan benefits is effective where that waiver is inconsistent with plan documents" *Id.* at 870.

Liv Kennedy was designated as the beneficiary of her husband's benefits under DuPont's savings and investment plan (SIP). It provided specific forms for designating or changing beneficiaries, and required that all such designations be made "in the manner prescribed by" the administrator.

The plan complied with the Employee Retirement Income Security Act's (ERISA) antialienation provision, which requires that "benefits . . . under the plan may not be assigned or alienated." *Id.* at 868 (citing 29 U.S.C. § 1056(d)(1)).

Liv and her husband William divorced, with the divorce decree purporting to divest Liv of any rights under any retirement or pension plans related to William's employment. However, William never removed Liv as beneficiary of the SIP.

William died and his estate requested payment of the SIP proceeds. DuPont instead paid the funds to Liv, relying on the designation form. The estate sued.

The district court concluded that Liv had waived her rights to the SIP funds and found for the estate. The Fifth Circuit reversed, concluding that the waiver constituted an impermissible assignment or alienation of benefits because the divorce decree did not qualify as a QDRO.

Unanimously, the Court first concluded that "Liv did not assign or alienate anything to William or to the Estate . . ." Noting that ERISA's antialienation provision is "much like a spendthrift trust provision barring assignment or alienation of a benefit," the Court turned to the law of trusts for guidance. "Although the beneficiary of a spendthrift trust traditionally lacked the means to transfer his beneficial interest to anyone else," the Court continued, "he did have the power to disclaim prior to accepting it, so long as the disclaimer made no attempt to direct the interest to a beneficiary in his stead." *Id.* at 870-72.

The U.S. Treasury Department's interpretation was that "no party 'acquires from' a beneficiary a 'right or interest enforceable against the plan' pursuant to a beneficiary's waiver of rights where the beneficiary does not attempt to direct her interest in pension benefits to another person." The Court deemed this interpretation controlling since it was neither "plainly erroneous nor inconsistent with the regulation." *Id.* at 872.

Nor did the QDRO provisions support a contrary conclusion. "Not being a mechanism for simply renouncing a claim to benefits," the Court wrote, "the QDRO provisions shed no light on whether a beneficiary may waive by a non-QDRO." In short, "Liv did not attempt to direct her interest in the SIP benefits to the Estate or any other potential beneficiary, and accordingly we think that the better view is that her waiver did not constitute an assignment or alienation rendered void under" ERISA's antialienation provision. *Id.* at 873.

The question remaining was whether the plan administrator correctly declined to honor the waiver, thereby resulting in payment of the benefits to Liv. The Court

concluded that the administrator "did its statutory ERISA duty by paying the benefits to Liv in conformity with the plan documents." *Id.* at 875.

Invoking the "plan documents" rule, the Court cited a provision of ERISA that requires that a plan "fiduciary shall discharge his duties . . . in accordance with the documents and instruments governing the plan insofar as such documents and instruments are consistent with the provisions of [ERISA]." ERISA "provides no exemption from this duty when it comes time to pay benefits," the Court wrote. Requiring strict compliance with plan terms allows employers to "establish a uniform administrative scheme, [with] a set of standard procedures to guide processing of claims and disbursement of benefits." *Id.* (quoting *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 9 (1987)).

The plan, the Court noted, provided an "easy way" for William to change the beneficiary designation and "for whatever reason he did not." As a result, by paying Liv the administrator did exactly what ERISA requires: "the documents control, and those name [the ex-wife]." *Id.* at 877.

Limiting Retroactive Application of the PDA

As plan administrators are entitled to rely—and indeed must rely—upon the terms of an ERISA plan, so too are employers entitled to rely upon existing law in creating pension benefit calculation rules, the Court suggested in its 7-2 decision in *AT&T Corp. v. Hulteen*, 129 S. Ct. 1962 (2009).

Addressing the Pregnancy Discrimination Act (PDA), the majority opinion upheld a pension calculation rule that gave less retirement credit for pregnancy leave than for other medical leave, where the rule had not resulted from any intention to discriminate.

The PDA was passed to make "clear that it is discriminatory to treat pregnancy-related conditions less favorably than other medical conditions." *Id.* at 1967. On the PDA's effective date, AT&T adopted a plan that provided service credit for pregnancy leave on the same basis as that taken for other disabilities. However, AT&T did not retroactively adjust the service credit calculations made *before* passage of the PDA. The plaintiffs in *Hulteen* were women who received less service credit as the result of pregnancy leave and thus received a lesser pension benefit than they otherwise would have been entitled to receive.

The district court held that AT&T's post-PDA pension benefit calculations—incorporating the pre-PDA accrual rules—constituted a violation of Title VII. The Ninth Circuit affirmed. The Supreme Court granted certiorari since that circuit's decision conflicted with those of two other circuits.

The Court first concluded that the differential treatment was lawful when adopted, as confirmed by *General Electric Co. v. Gilbert*, 429 U.S. 125 (1976), in which the Court held that a disability plan excluding pregnancy-related disabilities did not constitute sex-based discrimination under Title VII as it then existed. Although AT&T's former service credit rule would violate Title VII today, the Court held, "a seniority system does not necessarily violate the statute when it gives current effect to such rules that operated before the PDA." 129 S. Ct. at 1967-68.

As a result of "Congress's understanding that their stability is valuable in its own right," seniority systems are given "special treatment" and "[b]enefit differentials produced by a bona fide seniority-based pension plan are permitted unless they are 'the result of an intention to discriminate.'" Here, AT&T's system was bona fide because it was not intentionally discriminatory under the existing law. The Court further rejected the notion that the PDA retroactively recharacterized the accrual rules as discriminatory, finding no clear intent on the part of Congress that the PDA be applied retroactively. *Id.* at 1968-71. ♦

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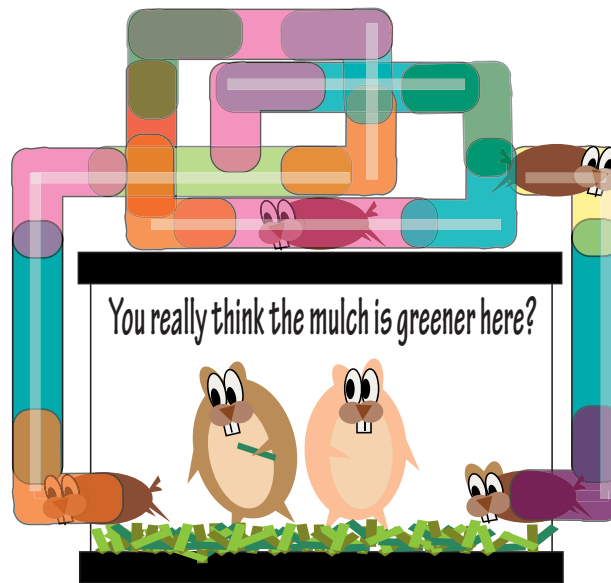


Illustration by Andrew O. Alcalá

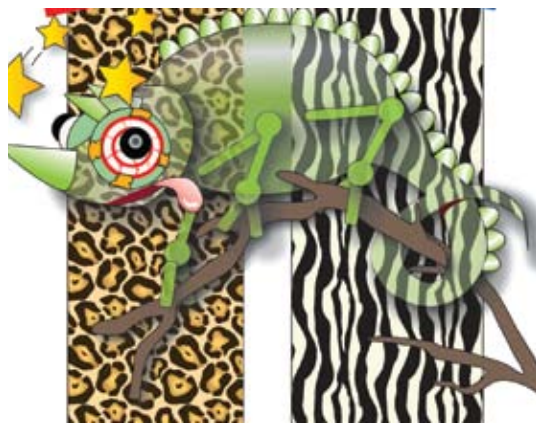
Employee Benefits Funded Through Trusts: A New Circuit Split

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federal courts to reconcile *Glenn's* holding—that a structural conflict of interest exists when an employer “both funds the [employee benefit] plan and evaluates the claims,” *id.* at 2348—with prior circuit court precedent holding that no conflict of interest exists when employee benefits are funded from a trust. Thus far, five circuits have weighed in on this issue: the Third, Fourth, Fifth, Ninth, and Eleventh.

With the Fifth Circuit's recent decision in *Holland v. International Paper Co. Retirement Plan*, No. 08-30967, 2009 WL 2050688 (5th Cir. July 16, 2009), a circuit split now exists that may soon percolate back up to the Court. As is fitting for what could have been the tiebreaker, the Fifth Circuit essentially decided to “split the baby.” Noting that the employer both determined eligibility for benefits and funded the trust (which, in turn, funded the disability benefits), that court held that *Glenn* dictated that a structural conflict exists because International Paper's contribution to the trust would necessarily increase if the amounts paid out in benefits claims exceeded the actuarially anticipated amounts. However, the circuit court found that the conflict was not a significant factor because the trust contributions are irrevocable and nonreversionary, so the company's assets were not directly affected by any claims decisions. “In effect, the creation of the trust diminishes, but does not entirely negate, the impact of that conflict.” *Id.* at *5. The Fifth Circuit's decision in *Holland* is also somewhat of a chameleon and is likely to be touted as a victory by both participants and employers alike since it both acknowledges a conflict and minimizes it all in the same breath.

Similarly, the Third and Ninth Circuits have found that *Glenn* dictates that a structural conflict does in fact exist, regardless of whether the employer has set up a trust to fund the benefits or funds them directly out of corporate assets/operating funds. In *Burke v. Pitney Bowes Inc. Long Term Disability Plan*, 544 F.3d 1016 (9th Cir. 2008), the Ninth Circuit held that even when a plan's benefits are paid out of a trust, a structural conflict of interest exists because, even though benefits are not paid directly by the employer, the employer has a financial incentive to keep claims payments as low as possible to reduce the amount the employer needs to contribute to the trust. *Id.* at 1026. While acknowledging that the impact may be less direct, and thus any conflict would be less significant compared



to plans where the benefits are paid directly by the employer, that circuit found that the conflict nonetheless exists and must be considered as a factor in evaluating claims decisions made by a company committee. *Id.* Likewise, the Third Circuit in *Michaels v. The Equitable Life Assurance Society*, 305 Fed. Appx. 896 (3d Cir. 2009), while acknowledging that the benefits were funded from a trust established by the employer for which Aetna (*not* the employer) made the eligibility determinations, nonetheless found that a conflict exists. *Id.* at 902–03.

In contrast, the Fourth and Eleventh Circuits have found that *Glenn* does not upset prior precedent holding that no structural conflict exists when employee benefits are funded from a trust. For example, in *Lance v. Retirement Plan of International Paper Co.*, No. 08-1295, 2009 WL 1497493 (4th Cir. May 29, 2009), the Fourth Circuit found that no conflict of interest existed under *Glenn* because the plan's benefits are funded by a trust to which the employer did not have direct access, and no significant incentives exist for denying benefits claims. *Id.* at *4. Alternatively, the court found that to the extent any conflict of interest existed, that conflict “may be deemed of such little importance as to recede ‘to the vanishing point’.” *Id.* In *White v. Coca-Cola Co.*, 542 F.3d 848 (11th Cir. 2008) (*certiorari* denied April 6, 2009), the Eleventh Circuit found that a company committee making claim determinations does not operate under a conflict of interest when benefits are paid from a trust funded by periodic, nonreversionary contributions because the employer does not incur any direct or immediate expense as a result of paying a benefits claim. *Id.* at 858.

While post-*Glenn* decisions have not yet indicated a wholesale conviction at the circuit court level that structural conflicts are inescapable in the administration of employee benefit plans, the possibility certainly exists for other circuits to attribute more import to *Glenn's* structural conflict holding than it calls for. Further, as this issue continues to percolate upward, the possibility exists that the Supreme Court will need to resolve the circuit split and either distinguish *Glenn* from the situation where trusts are directly funding the benefits or explain why this structural separation between the employer and the claims fiduciary does not alleviate its conflict concerns. In the meantime, until the Court holds differently, plan sponsors should continue to consider funding benefits through a trust as one effective way to distance benefits determinations from a conflict of interest analysis and any potential impact such an analysis might have on the ultimate outcome of the dispute. ❖

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TortSource

A Publication of the Tort Trial
& Insurance Practice Section

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ISSN # 1521-9445.

TortSource is published quarterly by the Tort Trial & Insurance Practice Section of the American Bar Association and

is generously funded by Thomson West.

American Bar Association
321 N. Clark St., Chicago, IL 60654-7598

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InMotion

Frank J. Ceglar Jr. has been promoted to executive vice president and general counsel of Farmers Group, Inc., insurers in Los Angeles, California. He began his career with Farmers in 1977 and was most recently senior vice president and acting general counsel.

Barbara O'Donnell joined the insurance practice of Zelle McDonough & Cohen in Boston, Massachusetts, where she represents commercial and specialty lines insurers in complex liability coverage disputes in multiple jurisdictions.

Francine L. Semaya joined Nelson Levine de Luca & Horst and chairs the Insurance Transactional and Regulatory Group in the firm's New York, New York, office. She concentrates her practice in transactional reinsurance and insolvency along with national and global insurance regulatory matters. ❖



Legislative Update

Robert M. Ferm

The Health Care Reform Debate Heats Up

The debate over health care reform overshadowed every other political issue throughout the spring and summer of 2009. It is fair to state that by mid-summer the political rhetoric for and against health care reform took on an ugly tone representative of politics at its worst. We were bombarded by media reports of fiery confrontations between supporters, opponents, and elected officials who were riding the fence. Interest groups on all sides had spent more than \$57 million on television advertising as of August 16, according to the *New York Times*. The political rhetoric over who pays for health care is crowding the more meaningful discussion of why the system costs so much and covers so few. Civil and informative debate has given way to identifying public enemy number one. Depending on your point of view, it is easy to demonize the health care insurance industry or those “tax-and-spend liberals” supporting an uncontrolled federal government. Proponents of change argue that scare mongering by opponents of change is nothing but a tactical strategy to bring down the Obama administration.

Reaching Across the Aisle

The *NBC Nightly News* reported on August 19 that on health care the president’s job rating had a 41 percent approval rating, with 47 percent disapproving. In an effort to address diminishing support for reform, the White House had seemed to indicate it was willing to jettison the so-called “public option” when Health and Human Services Secretary Kathleen Sebelius said it was not “the essential element” of the reform package, according to the Associated Press on August 16. Her suggestion that the White House could settle on insurance cooperatives as an acceptable alternative to a government-sponsored option was seen as an effort to reach across the aisle and address concerns of the fiscally conservative Blue Dog Democrats and moderate Republican lawmakers. We have yet to see detail on how cooperatives would be constructed or operate. In an effort to address progressive Democrats, the White House stated on August 19 that the administration had not changed its stance on the public option. *U.S. News Political Bulletin*, Aug. 21, 2009; see also www.usnews.com/usnews/politics/bulletin/.

Setting the rhetoric aside, the good news is that there appears to be a real effort from both political parties in an effort to find compromises on proposals left behind during the August recess. In the Senate, a group of senators are developing a bipartisan health reform bill. In the House, leaders are working through three separate versions of H.R. 3200, the “America’s Affordable Health Choices Act,” as approved by the House Energy and Commerce Committee, the House Ways and Means Committee, and the House Education and Labor Committee. Plans were for the collaborative version to be merged into a proposal that would be presented for floor vote when the Congress reconvened after Labor Day. Key points for continuing dialogue include the construct of overall insurance market reforms, coverage requirements, the nature and extent of subsidies, Medicaid reform, Medicare reform, legal malpractice reform, and equitable cost containment measures. See www.insurancejournal.com/news/national/2009/08/10/102872.htm.

Emerging Consensus on Fundamental Principles

In spite of the rhetoric for or against the current proposals, there does appear to be an emerging consensus on fundamental principles, although there is no guarantee they will be obtained before the end of the year.

On June 1, in a letter to President Obama, disparate constituencies, including the Advanced Medical Technology Association, America’s Health Insurance Plans, the American Hospital Association, the American Medical Association, the Pharmaceutical Research and Manufactures of America, and the Service Employees

International Union, identified core principles for meaningful reform. The principles include the following key areas: approaching appropriate utilization of care in order to lower costs; addressing innovative approaches to the cost of doing business; administrative simplification and consequential cost savings, and better management of chronic care, which accounts for 75 percent of overall health care spending. See ama-assn.org/ama1/pub/upload/mm/31/stakeholders-to-obama.org.

Issues with Potential for Compromise

TIPS members are encouraged to review a paper released on July 6 titled “An Emerging Middle Ground? An Analysis of Health Reform Positions” by Michelle Herman and Cynthia Vasquez. The paper was funded by the Robert Wood Johnson Foundation and Avalere Health. The authors comment on the diversity of constituencies that appear willing to compromise to some extent to achieve health care reform. The potential for compromise exists on the following issues, according to the authors: providing premium assistance to low-income individuals and families to purchase health insurance; expanding access to, and coverage of, high-quality preventive services; promoting wellness and healthy patient behaviors; increasing primary care physician payments to address workforce shortages; restructuring provider payments to reward for high-quality care, not for volume of services provided; encouraging chronic care coordination among providers and across various points of care to treat patients holistically; accelerating health information technology adoption and use; and encouraging transparent dissemination of information about health care quality and costs. See www.rwjf.org/files/research/7609middlegrouddavalere.pdf.

By the time this article is published, we will have a better idea as to whether or not health care reform will be a reality in 2009. Hopefully, the finger pointing, demonizing, and political rhetoric will have given way to an honest effort to address the core challenges in creating a health care system that is less expensive and less dysfunctional than the current system. The TIPS Governmental Affairs Committee will continue to monitor and report on developments. ❖

Robert M. Ferm is a member of Hall & Evans LLC in Denver, Colorado, and is chair of the TIPS Governmental Affairs Committee. He can be reached at fermr@hallevans.com.



Mark Your Calendar

TIPS Section Fall Meeting

October 6–11, 2009, San Diego, CA
(312-988-5672)

Preventing and Defending Insurance Bad Faith Claims

October 15, 2009
Teleconference 1:00PM–2:30PM EDT
(312-988-5597)

Aviation and Space Law Litigation Program

October 22–23, 2009, Washington, DC
(312-988-5708)

Fidelity and Surety Law Committee Fall CLE Program

October 28–30, 2009, Philadelphia, PA
(312-988-5708)

Premises Liability National Program

November 5–6, 2009, St. Pete Beach, FL
(312-988-5597)

The Psychology of Impasse in Negotiation and Mediation

November 18, 2009
Teleconference 1:00PM–2:30PM EST
(312-988-5597)

Midwinter Symposium on Insurance, Employment, and Benefits

January 14–17, 2010, Bonita Springs, FL
(312-988-5708)

Fidelity & Surety Law Committee Midwinter Meeting

January 26–30, 2010, San Francisco, CA
(312-988-5672)

ABA Midyear Meeting

February 3–9, 2010, Orlando, FL
(312-988-5672)

ABA 2010 Workers’ Compensation Midwinter Seminar and Conference

March 4–6, 2010, Phoenix, AZ
(312-988-5708)

COBRA Subsidies under the Recovery Act: Bridging the Gap

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to nine months. This subsidy applies to periods of health coverage beginning on or after February 17, 2009.

The subsidy applies to COBRA continuation coverage under any group health plan—medical, dental, or vision—but does not apply to a flexible spending arrangement offered under a cafeteria plan. It covers plans offered by private sector employers or unions, plans sponsored by state or local governments subject to the continuation provisions under the Public Health Service Act, plans in the Federal Employee Health Benefits Program, and group health insurance that is required by state law to provide comparable continuation coverage.

Subsidy Eligibility

The definition of an “involuntary termination” is broad. According to the Internal Revenue Service (IRS), it “means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” IRS Notice 2009-27. This includes terminations “elected by the employee in return for a severance package.” *Id.*

Both the involuntary termination and the loss of coverage resulting in eligibility for COBRA continuation must occur between September 1, 2008, and December 31, 2009. If an employee does not lose coverage until after December 31, 2009, he or she is only eligible for the premium subsidy if the employer treats its provision of health coverage prior to that time as part of its obligation to provide COBRA continuation coverage. Therefore, if an employee is involuntarily terminated during the relevant period, but the employer, under a severance agreement, offers to continue to pay the employee’s health premiums until a date after December 31, 2009, the employee will not be eligible for the premium subsidy unless the employer treats its provision of health coverage as part of its obligation to provide COBRA continuation coverage.

In addition to qualifying as an involuntarily terminated employee, there are two other primary prerequisites to coverage. First, qualifying persons are ineligible, or will become so, if they are otherwise eligible for other coverage, such as from another employer, through a family member, or through Medicare or Medicaid. Second, employees are not eligible if their gross income exceeds \$145,000 (or \$290,000 for joint filers). Taxpayers with gross incomes between \$125,000 and \$145,000 (or \$250,000 to \$290,000 for joint filers) are eligible but with a reduced premium. The income qualifications are determined according to the person’s modified adjusted gross income in the taxable year the subsidy is received (either 2009 or 2010). If these “high-income” employees receive the subsidy, they will have to repay the premium. Repayment is effectuated through an increase in the person’s income tax liability.

Payment and Reimbursement

If eligible for the COBRA premium subsidy, terminated employees pay 35 percent of the premium cost. If the employer receives a 35 percent payment from an assistance-eligible person as a full payment, that employer must treat that person as having paid the full premium. An insurer that collects the premiums directly from the employee must do the same. Therefore, even if an assistance-eligible employee’s income is higher than the income thresholds, COBRA continuation coverage must be provided if the employee pays 35 percent of the premium unless the employee has notified the plan that he or she has elected to waive the subsidy, as noted below.

Employers will receive a credit against their payroll taxes to offset the subsidy. Employers should use the updated IRS Form 941, Employer’s Quarterly Federal Tax Return, to report their COBRA premium assistance payments.

Appeals, Notice, and Waivers

If a terminated employee’s request for premium assistance is denied, he or she may apply to the U.S. Department of Labor for review if the plan is an ERISA plan or to the Department of Health and Human Services if the plan is not an ERISA plan. Due to the time-sensitive nature of health coverage, the departments must rule within 15 days.

Employers are required to notify employees laid off since September 1, 2008, that they have the right to opt for subsidized COBRA coverage. Those laid off between September 1, 2008, and February 17, 2009, must have been notified of their premium subsidy rights by April 18, 2009. Others must be notified within 14 days of a qualifying event. There are specific provisions regarding the type and content of the notice provided to terminated employees, and the Department of Labor has model notices posted on its Web site.

The Recovery Act and IRS guidance provide that an employee can make a “permanent waiver” of his or her rights to the premium subsidy by providing, to the person who is reimbursed for the premium reduction, a signed and dated notification that requests such a waiver. This waiver provision allows employees who are over the income threshold to make sure that they do not receive the subsidy and are

not later subject to repayment. However, this election lasts beyond the tax year in which it is submitted and it is binding on the person, even if he or she later determines that he or she was, or later became, income eligible.

If a person is offered a severance agreement that contains a general waiver, it may affect the employee’s capacity to bring an action to enforce his or her rights under COBRA and the Recovery Act. As with all waiver issues, the analysis depends on the language of the severance agreement, whether it includes a waiver of future claims, and whether the health plan is an ERISA

plan (private sector employers or unions) or not (all others). The analysis, though often complicated and fact-intensive, is not subject to any additional Recovery Act-specific waiver provisions besides the one discussed above. ♦

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For more information, see:

Department of Health and Human Services: www.cms.hhs.gov/COBRAContinuationofCov/

Department of Labor review: www.dol.gov/ebsa/COBRA.html

IRS Notice 2009-27: www.irs.gov/pub/irs-drop/n-09-27.pdf

TIPS Launches Health Care Reform Task Force

To keep members informed about the health care reform proposals under development in both houses of Congress, TIPS has established a Health Care Reform Task Force. In addition to offering information about ABA policies addressing the evolving issues, the task force is working to provide balanced factual comment and access to information about myriad areas of potential legislation including malpractice reform, physician safe harbors, rescission of an insurance contract, ERISA, health courts, preexisting condition limitations, insurance portability, COBRA coverage, employer benefits, HIPAA, and other subjects that may be covered in health care reform bills.

Access the Health Care Reform Task Force Web site at www.abanet.org/tips/taskforce/healthcare/home.html. Consistent with the Section’s mission of bringing together lawyers representing all sides of the issues and industries involved, the task force welcomes all comments and encourages TIPS members to contribute potential content and participate in the dialogue. Send comments or contributions to gbusby@burr.com or hughesj@staff.abanet.org. ♦



“When I Was a New Lawyer”

Janet R. Davis
Partner, Meckler Bulger Tilson Marick & Pearson, LLP
Chicago, Illinois

What is your background, and what inspired you to become a lawyer?

I was raised in the Northeast and later Michigan, the third of four children of relocated Texans. My father is a fundamentalist minister, which provided strong parameters for our upbringing. I think the basic fairness and sense of right and wrong I learned as a child was my inspiration for choosing law as a way to help others.

Where did you go to law school, and what did you do right after that?

I attended law school at the University of Michigan and moved to Chicago to work for a small but up-and-coming insurance defense firm.

Do you have any young lawyer experiences that particularly stand out in your memory? If so, what have you learned from them and how have they helped you to become so successful?

My first firm allowed me to defend different types of cases including various professionals. As a new lawyer, I quickly learned that lawyers did not want a new lawyer representing them, doctors didn't like any lawyers including their own, and design professionals were welcoming and appreciative of assistance from any source. At my first review, I boldly requested to be assigned to every architect or engineer case that came into the firm. This early recognition of a practice area I enjoyed and in which I could really help clients has shaped my career. The representation of design professionals continues to be a primary practice area, along with insurance coverage litigation. Seizing an opportunity at an early stage of one's career can definitely make a huge difference in being successful.

I received valuable advice from the first partner with whom I worked, who said being a woman in our profession, particularly a female construction litigator, might often be a disadvantage. But he said there also would be times when it could be an advantage, and he encouraged me to use each of those opportunities in pursuit of our clients' best interests. I've employed this advice in conjunction with my conviction that I am a lawyer who happens to be a woman, rather than a “woman lawyer.”

Whom do you most admire?

My parents. My father, because in spite of prejudices learned as a youth in West Texas, he taught us that everyone is equal and should be judged not by position but by their actions. My mother, because in spite of her circumstances, she was fiercely independent and taught me to be the same. My parents expected high achievement of all of us and instilled in me the confidence that I could accomplish whatever I set out to do.

What is your greatest source of professional pride?

While I am grateful to be a recognized leader in my practice areas, my greatest source of pride is the long-term relationships I have with many of my clients based on the confidence they have placed in me as their lawyer.

What got you started with ABA involvement?

My partner at the time, Mitch Orpett, asked Dianne Dailey to give me a speaking opportunity at the 1993 TIPS Insurance Coverage Litigation Committee (ICLC) Midyear Meeting. I began my involvement with diversity issues in TIPS later that year when I passed on a comment from a young female lawyer from Tulsa about a program at the Annual Meeting to Jill Berkeley, then chair of the Minority Women and General Membership Involvement Committee. I was appointed to fill in for one of her absent committee members at the Fall Planning Meeting, and my active TIPS involvement has continued ever since on various committees, including ICLC, which has been extremely

helpful professionally. TIPS's efforts to support its general committees and to diversify are very important, and I am honored to serve currently as the Section's secretary and chief diversity officer.

What was the worst professional advice you ever received?

I can't recall—which probably means that, whatever it was, I ignored it.

What was the best professional advice you ever received?

An admonition on the University of Michigan Law School application read “brevity is the soul of wit.” Obviously not original to my alma mater and now frequently replaced by “less is more,” this is advice that I live by and repeat to my associates frequently.

What personality trait has served you best over the years?

My ability to be a good listener and a confidential sounding board has served me well with clients and colleagues, as well as friends.

What challenges you the most?

I enjoy what I do, but business administration is not nearly as satisfying as lawyering. Practicing law in Utopia would involve no timesheets and no billing.

What is the one thing you cannot stand (regarding the law/lawyers)?

Lawyers who are not resolution-oriented. Too many lawyers lack the professionalism and integrity to always put their clients first. Contentiousness for its own sake costs clients thousands of dollars for no reasons beyond ego and greed. I tell people who make lawyer jokes not to apologize because I deal with lawyers on a daily basis and understand the source of their disdain. It is frustrating that a small percentage of our profession leaves people with such a negative impression about the rest of us.

What is your favorite type of legal work?

I appreciate situations where I add value by counseling clients through difficulties and find a resolution that someone with a different approach might not see. I also enjoy the puzzle presented by analyzing insurance coverage and creating the road map in a coverage opinion for the future handling of a claim.

What are your future ambitions?

Because I have a 10 year-old son, early retirement is not an option. I hope to continue firm practice with partners supportive of me and my ABA/TIPS involvement and to represent clients that I enjoy in work that challenges me. When I do retire, I look forward to traveling to many places I've never seen and reading lots of books.

What can the ABA do to be a good home to young lawyers?

While the ABA offers many benefits, the association could be even better at showing young lawyers how to access the opportunities and support it provides. TIPS is a fantastic Section in which new lawyers can gain confidence and grow substantively in their practice areas as well as take advantage of numerous writing and speaking opportunities. Most importantly, TIPS offers members a nationwide network of colleagues and friends to call upon for advice and counsel in their areas of expertise. ♦



Janet R. Davis then and now.



Janet R. Davis's Advice for New Lawyers:

- Nothing is more important than your written product. It is the first impression of you that others will form, lasts forever, and may reappear in places you can't imagine.
- Never compromise your integrity and credibility. Deliver on your word. In negotiations, don't say your offer or demand is the bottom line unless it really is.
- Don't worry about things you can't control. (This is probably the hardest to achieve but also among the most worthwhile.)
- Always try to find the humor.
- Life is too short to pursue clients that you don't like.
- Always be professional and give your best effort. Rewarding engagements will come from unexpected places. ♦



Tech Tips

Michael Neuren

Replacing PostIt Passwords

It's a safe bet that some of you have a PostIt note on your monitor or under your keyboard with your password written on it. How many of you actually use the word "password" or think your alternate password, "password1," is markedly more secure? How about your dog's name, kid's birthday, or just the default password that was supplied with your software?

Many computer users do not use strong passwords. A hacker can quickly guess his targets' passwords if they are variations on any of the above.

Dictionary hacking software compares lists of words or character combinations against a password until it finds a match. Don't think you can fool this software by using a foreign word or an obscure language. It has all of them—even Klingon.

The first step in protecting your privacy—whether online, on your laptop, or your home wireless router—is creating a password that a computer program or persistent person will not easily be able to guess in a short period of time. Follow the instructions below.

A secure password

- includes punctuation marks and/or numbers;
- mixes capital and lowercase letters;
- includes similar-looking substitutions, such as the number zero for the letter O, \$ for S, or 3 for E;
- creates a unique acronym; or
- includes phonetic replacements, such as "Luv2Laf" for "Love to Laugh."

Don't use passwords that

- are listed as an example of how to pick a good password, such as "Luv2Laf";
- contain personal information (name, birth date, etc.);
- are words or acronyms that can be found in a dictionary;
- use keyboard patterns (say, qwerty or asdf) or sequential numbers;
- are all numbers, uppercase letters, or lowercase letters; or
- use repeating characters (aa11).

Keep your password secure. Be sure that you

- never tell your password to anyone—including significant others, family members, roommates, etc.—and never write your password down or send it by e-mail; and
- periodically "test" your current password and change it to a new one. (Microsoft provides a checker to see if your password meets its level of complexity at www.microsoft.com/protect/yourself/password/checker.aspx. You can also score your password when you sign up for newsletters on the Web pages for many federal agencies.)

Passwords should meet some minimal guidelines. They should not contain all or part of the account name of the user. They need to be at least eight characters long. Finally, passwords need to contain characters from three of the following four categories:

- Latin uppercase letters (A through Z);
- Latin lowercase letters (a through z);
- base 10 digits (0 through 9); and
- nonalphanumeric characters, such as the exclamation point, dollar sign, number sign, or percent.

A good password is one that's easy enough to remember so that you don't need to write it down but sufficiently complicated to be difficult to guess. That may sound like a paradox, but it really isn't. ♦

Michael Neuren is a senior programs analyst for the Administrative Office of the Courts in Atlanta, Georgia. He can be reached at mneuren@msn.com.

lando's award-winning Walt Disney World Swan Resort will be TIPS's headquarters at the ABA Midyear Meeting. Get ready to immerse yourself in the magic of Walt Disney World, the most visited and largest recreational resort in the world. The Swan Resort in Lake Buena Vista, Florida, is literally located in the center of it all, just a stone's throw from Disney's Animal Kingdom and Magic Kingdom theme parks, between Epcot and Disney's Hollywood Studios. Walt Disney World Resort also contains five champion-ship golf courses (tee times can be booked through the Swan), two water parks, and more shopping, dining, entertainment, and recreational venues than you can imagine. In addition to the attractions, the Swan offers the Mandara Spa, a Balinese-inspired retreat; a groto pool with waterfalls, a waterslide, two lap pools and a kiddie pool; beach activities; jogging trails; two state-of-the-art fitness centers; shopping; entertainment; and dining. For reservations at the Swan call 888-828-8850 or fax: 407-934-4710.

From the Swan, you can stroll along Disney's BoardWalk entertainment district or embark on a leisurely cruise along the waterways that connect the hotels to both Epcot and Disney's Hollywood Studios. In fact, you'll be so close to the magic that you will be able to see the nightly fireworks over the theme parks from the hotel. A short distance away, Downtown Disney's venues include the House of Blues restaurant and nightclub, Planet Hollywood restaurant, the DisneyQuest indoor arcade, and Cirque du Soleil with its original production, La Nouba.

Great restaurants on Disney property include the Flying Fish Cafe on the Disney BoardWalk, Jiko—The Cooking Place at the Animal Kingdom Lodge, Victoria & Albert's at Disney's Grand Floridian Resort, and the California Grill at the Contemporary Resort.

Thomas P. Wert

TIPS Midyear Meeting
February 3-9, 2010



"My Orlando"

If you venture off Disney property, try Del Frisco's on Lee Road in Orlando (a half-hour drive north, but well worth the trip) for literally the best steak ever; Christin's Ristorante Italiano, 7600 Dr. Phillips Blvd., for splendid Italian cuisine; or Moonfish, 7525 West Sand Lake Road, for fantastic seafood.

Outside Disney, Orlando is home to a wide variety of other attractions, including Universal Orlando Resort (Universal Studios Orlando, CityWalk, and the Islands of Adventure), SeaWorld, and the Holy Land Experience themed exhibit and museum. You will also be a short drive away from world famous beaches, such as Daytona and Cocoa Beach, as well as the Kennedy Space Center. Orlando also is known for its wide array of golf courses, with numerous courses available for any level of player.

I could go on, but I will let you figure out the rest on your own—or, better yet, go to www.orlandoinfo.com for the latest information from the Orlando/Orange County Convention & Visitors Bureau. We look forward to seeing you in The City Beautiful in February! ♦

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A Publication of the Tort Trial & Insurance Practice Section



American Bar Association
321 N. Clark Street, Chicago, IL 60654-7598

Vol. 12 No. 1 Fall 2009

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American Bar
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