CONTENTS

In Memoriam xxvii
Introduction xxxix
About the Editor xxxv
About the Authors xxxvii

CHAPTER 1
First Circuit 1
J. Christopher Collins
Byrne J. Decker
Joseph M. Hamilton
Kevin Kam
J. Scott Kilpatrick
Kyle N. Kirby
Mason J. Waring

I. What Constitutes an ERISA Plan? 1
   A. Determining the Existence of an Employee Welfare Benefit Plan 1
   B. Definition of “Employee” for ERISA Purposes 3
   C. Interpretation of the Safe Harbor Regulation 3
   D. Amount of Employer Involvement Required to Sustain
      an Employee Welfare Benefit Plan 4
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 4
   F. De Facto Plan Administrators 4
   G. Cases Addressing Government Plans 5
   H. Cases Addressing Church Plans 5

II. Preemption 5
   A. Scope of ERISA Preemption 5
      1. Express Preemption 6
      2. Conflict or Complete Preemption 8
   B. Preemption of State Antisubrogation Laws 8
   C. Preemption of Managed Care Claims 9
   D. Preemption of Malpractice Claims 9
   E. ERISA’s Insurance “Savings Clause” 10
   F. Preemption of State Law Equitable Claims 10

III. Exhaustion of Administrative Remedies 11
   A. Is Exhaustion an Absolute Requirement? 11
CONTENTS

B. Exceptions to the Exhaustion Requirement 11
C. Consequences of Failure to Exhaust 12
D. Minimum Number of Levels of Administrative Review 12
E. Can a Defendant Waive a Failure-to-Exhaust Defense? 12
F. Issue Exhaustion 13

IV. Standard of Review 13
A. Plan Language 13
B. Arbitrary and Capricious 14
C. Effect of Conflict of Interest or Procedural Irregularity 15
D. Cases Interpreting MetLife v. Glenn 15
E. Other Factors Affecting Standard of Review 17
F. Bans on Discretionary Clauses 18
G. Impact of DOL Regulations 19

V. Rules of Plan Interpretation 19
A. Application of Federal Common Law 19
B. Application of Contra Proferentem 20
C. Deference Afforded to an Administrator’s Interpretation of a Plan 20

VI. Discovery 21
A. Limitations on Discovery 21
B. Discovery and Conflict of Interest 23
C. The Fiduciary Exception 24

VII. Evidence 25
A. Scope of Evidence under Standards of Review 25
B. Evidentiary Value of Social Security or Other Determinations 27
C. Value of an Independent Medical Exam versus a Medical Record Review 28
D. Can an Administrator Require Objective Evidence of Disability? 28
E. Other Evidence Issues 30

VIII. Procedural Aspects of ERISA Practice 30
A. Appropriate Defendant 30
B. Methods of Adjudication 31
C. Reported ERISA Trials 31
D. Special Procedures for ERISA Benefit Cases 31

IX. Remedies 32
A. Remedies for Benefits Owed 32
B. Remedies for Breach of Fiduciary Duty 32

X. Fiduciary Liability Claims 34
A. Definition of Fiduciary 34
B. Definition of Fiduciary Duties 35
C. Fiduciary Liability in the Context of Health and Disability Claims 37
D. Contribution and Indemnity Claims among Fiduciaries 37
E. ERISA Claims against Nonfiduciaries 38

XI. Attorneys’ Fees 38
A. Introduction 38
B. Criteria for Awarding Attorneys’ Fees 38
Contents

C. Fees Awarded to Plan Fiduciaries 40
D. Calculation of Attorneys’ Fees 40
E. Catalyst Theory 41

XII. ERISA Regulations 41

XIII. Cases Interpreting ERISA Statutes of Limitation 50
A. Contractual Limitations Periods 50
B. Claim Accrual 51
C. Equitable Tolling 51

XIV. Subrogation Litigation 52

XV. Miscellaneous 53
A. Unique Substantive or Procedural Rules for ERISA Cases 53
B. Unique Approach to Common Policy-Based Defenses 54
C. Delegation of Discretionary Authority 54
D. Supplementing the Administrative Record on Remand 54
E. Appealability of Orders for Remand for Further Review 54
F. Risk of Relapse and Disability Claims 55
G. Other Miscellaneous Issues 55

CHAPTER 2
Second Circuit 57
Michael H. Bernstein
Fallyn B. Cavalieri
Daniel W. Gerber
Matthew P. Mazzola

I. What Constitutes an ERISA Plan? 57
A. Determining the Existence of an Employee Welfare Benefit Plan 57
B. Definition of “Employee” for ERISA Purposes 58
C. Interpretation of the Safe Harbor Regulation 59
D. De Facto Plan Administrators 60
E. Government Plans 61
F. Church Plans 62

II. Preemption 62
A. Scope of ERISA Preemption 62
B. Preemption of State Antisubrogation Laws 64
C. Preemption of Managed Care Claims 64
D. Preemption of Malpractice Claims 65
E. Other Preemption Issues 66

III. Exhaustion of Administrative Remedies 67
A. Is Exhaustion an Absolute Requirement? 67
B. Exceptions to the Exhaustion Requirement 67
C. Consequences of Failure to Exhaust 69

IV. Standard of Review 69
A. Plan Language 69
B. What Standard of Review Applies? 70
CONTENTS

C. Effect of Conflict of Interest or Procedural Irregularity 70
D. Compliance with ERISA Regulations 71
E. Delegation of Discretion 72
F. Discretionary Language Bans 72

V. Rules of Plan Interpretation 73
A. Application of Federal Common Law 73
B. Application of Contra Proferentem 73
C. Deference Afforded to an Administrator’s Interpretation of a Plan 73
D. Effect of Plan Amendments 74
E. Other Rules of Plan or Contract Interpretation 74

VI. Discovery 75
A. Limitations on Discovery 75
B. Discovery and Conflict of Interest 75
C. Fiduciary Exception to Privilege 76

VII. Evidence 76
A. Scope of Evidence under Standards of Review 76
B. Administrator’s Request for Objective Evidence 78
C. Evidentiary Value of Social Security Determinations 79
D. Value of an IME versus Paper Review in Psychiatric Disability Claims 79
E. Attendance at an IME 80

VIII. Procedural Aspects of ERISA Practice 80
A. Proper Defendants in a Claim for Benefits under ERISA 80
B. Methods of Adjudication 81
C. Reported ERISA Trials 85

IX. Remedies 87

X. Fiduciary Liability Claims 91
A. Definition of Fiduciary 91
B. Definition of Fiduciary Duties 92
C. Fiduciary Liability in the Context of Health and Disability Claims 93
D. Contribution and Indemnity Claims among Fiduciaries 93
E. ERISA Claims against Nonfiduciaries 94

XI. Attorneys’ Fees 94
A. Criteria for Awarding Attorneys’ Fees 94
B. Fees Awarded to Plan Fiduciaries 97
C. Calculation of Attorneys’ Fees 97
D. Who May Be Reimbursed for Attorneys’ Fees? 99
E. The Second Circuit Has Adopted the “Catalyst Theory” 99

XII. ERISA Regulations 101
A. ERISA Regulations Related to Summary Plan Descriptions 101
B. ERISA Regulations Related to Claim and Appeal Procedures 101
Contents

XIII. Cases Interpreting ERISA Statutes of Limitation 103
XIV. Subrogation Litigation 105
XV. Miscellaneous 108
   A. Awarding Prejudgment Interest 108
   B. Class Actions 108
   C. Relapsing Conditions 108
   D. A Court-Ordered Remand Is Not an Appealable Final Order 109

CHAPTER 3

Third Circuit 111
Heather J. Austin
Joshua Bachrach
Fotini Karamboulis
Randi F. Knepper

I. What Constitutes an ERISA Plan? 111
   A. Determining the Existence of an Employee Welfare Benefit Plan 111
   B. Definition of “Employee” for ERISA Purposes 112
   C. Interpretation of the Safe Harbor Regulation 114
   D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 116
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 117
   F. De Facto Plan Administrators 118
   G. Government and Church Plans 118

II. Preemption 119
   A. Scope of ERISA Preemption 119
   B. Preemption of State Antisubrogation Laws 121
   C. Preemption of Managed Care and Malpractice Claims 121
   D. State Independent Review Statutes 122
   E. Preemption of Equitable Claims and Defenses, Such as Waiver and Estoppel 122

III. Exhaustion of Administrative Remedies 123
   A. Is Exhaustion an Absolute Requirement? 123
   B. Exceptions to the Exhaustion Requirement 124
   C. Consequences of Failure to Exhaust 125
   D. Is There a Distinction between Issue and Claim Exhaustion? 126
   E. Minimum Number of Levels of Administrative Review 126
   F. Can a Defendant Waive a Failure-to-Exhaust Defense? 127

IV. Standard of Review 127
   A. Plan Language 127
   B. What Standard of Review Applies? 129
   C. Effect of Conflict of Interest or Procedural Irregularity 130
   D. Other Factors Affecting Standard of Review 131

V. Rules of Plan Interpretation 132
   A. Application of Federal Common Law 132
   B. Application of Contra Proferentem 132
CONTENTS

C. Deference Afforded to an Administrator’s Interpretation of a Plan 133
D. Other Rules of Plan or Contract Interpretation 134

VI. Discovery 136
A. Limitations on Discovery 136
B. Discovery and Conflict of Interest 138
C. Recognition of Fiduciary Exception to Claims of Privilege 141

VII. Evidence 142
A. Scope of Evidence under Standards of Review 142
B. Evidentiary Value of Social Security Determinations 143
C. Other Evidence Issues 145
D. Use of an IME instead of a Paper Review 145
E. What Is the Evidentiary Value of Claim Decisions from Other Insurers? 147
F. When May a Plan Require Objective Evidence? 147

VIII. Procedural Aspects of ERISA Practice 147
A. Methods of Adjudication 147
B. Reported ERISA Trials 148

IX. Remedies 149
A. Remedies Available under § 502(a)(1)(B) 149
B. Remedies Available under § 502(a)(3) 150
C. Reformation, Estoppel, and Surcharge 150
D. Disgorgement of Profits and Equitable Accounting 151
E. Permissibility of Simultaneous Claims under ERISA § 502(a)(1)(B) and § 502(a)(3) 152

X. Fiduciary Liability Claims 153
A. Definition of Fiduciary 153
B. Definition of Fiduciary Duties 154
C. Fiduciary Liability in the Context of Health and Disability Claims 156
D. Remedies for Breach of Fiduciary Duty 156
E. Contribution and Indemnity Claims among Fiduciaries 158
F. ERISA Claims against Nonfiduciaries 158

XI. Attorneys’ Fees 159
A. Criteria for Awarding Attorneys’ Fees 159
B. Fees Awarded to Plan Fiduciaries 161
C. Calculation of Attorneys’ Fees 161

XII. ERISA Regulations 162

XIII. Cases Interpreting ERISA Statutes of Limitation 164
XIV. Subrogation Litigation 167
XV. Miscellaneous 169
CHAPTER 4

Fourth Circuit

Bryan D. Bolton
James A. Dean
George K. Evans, Jr.
Marianna M. Jasiukaitis
E. Ford Stephens
William F. Womble, Jr.

I. What Constitutes an ERISA Plan? 171
   A. Determining the Existence of an Employee Welfare Benefit Plan 171
   B. Definition of “Employee” for ERISA Purposes 172
   C. Interpretation of the Safe Harbor Regulation 173
   D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 174
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 174
   F. Treatment of Individual Business Owners 176
   G. De Facto Plan Administrators 177
   H. Government Plans 177
   I. Church Plans 178

II. Preemption 178
   A. Scope of ERISA Preemption 178
   B. ERISA Savings Clause 181
   C. Conflict Preemption 182
   D. Preemption of State Antisubrogation Laws 183
   E. Preemption of Managed Care Claims 183
   F. Preemption of Malpractice Claims 184
   G. Preemption of Independent Review Statutes 184
   H. Other Preemption Issues 185

III. Exhaustion of Administrative Remedies 186
   A. Is Exhaustion an Absolute Requirement? 186
   B. Exceptions to the Exhaustion Requirement 186
   C. Consequences of Failure to Exhaust 188
   D. Issue versus Claim Exhaustion 189
   E. Can a Defendant Waive a Failure-to-Exhaust Defense? 189

IV. Standard of Review 189
   A. Plan Language 189
   B. What Standard of Review Applies? 190
   C. Effect of Conflict of Interest or Procedural Irregularity 191
   D. Standard of Review for Self-Funded Plans 192
   E. Other Factors Affecting Standard of Review 192

V. Rules of Plan Interpretation 193
   A. Application of Federal Common Law 193
   B. Application of Contra Proferentem 194
   C. Deference Afforded to an Administrator’s Interpretation of a Plan 194
CONTENTS

D. Other Rules of Plan or Contract Interpretation 195
E. Plan Documents Rule 196

VI. Discovery 196
A. Limitations on Discovery 196
B. Discovery and Conflict of Interest 198
C. Prima Facie Showing Required to Warrant Discovery 198
D. Types of Discovery Permitted 199
E. Fiduciary Exception to Claims of Privilege 200

VII. Evidence 201
A. Scope of Evidence under Standards of Review 201
   1. Abuse of Discretion Standard 201
   2. De Novo Standard 203
B. Particular Types of Evidence 204
C. Disputes Concerning the Administrative Record 205
D. Evidentiary Value of Social Security Determinations 205
E. IME versus Paper Review 207
F. Failure to Attend an IME 208
G. Objective versus Subjective Evidence 208

VIII. Procedural Aspects of ERISA Practice 209
A. Correct Defendant in an Action for ERISA Benefits 209
B. Methods of Adjudication 210
C. Reported ERISA Trials 210
D. Jury Trials 211
E. Special Procedures for ERISA Benefit Cases 212

IX. Remedies 212
A. Award of Benefits and Interest 212
B. Equitable Relief for Plan Beneficiaries 212

X. Fiduciary Liability Claims 214
A. Definition of Fiduciary 214
B. Definition of Fiduciary Duties 216
C. Fiduciary Liability in the Context of Health and Disability Claims 219
D. Remedies for Breach of Fiduciary Duty 220
E. Contribution and Indemnity Claims among Fiduciaries 221
F. ERISA Claims against Nonfiduciaries 221

XI. Attorneys’ Fees 222
A. Criteria for Awarding Attorneys’ Fees 222
B. Fees Awarded to Plan Fiduciaries 224
C. Calculation of Attorneys’ Fees 224
D. Catalyst Theory 226

XII. ERISA Regulations 227

XIII. Cases Interpreting ERISA Statutes of Limitation 229
A. Limitation Periods 229
B. Contractual Limitation Periods 231
C. When the Limitation Period Accrues 232
D. Must Denial/Uphold Letters Address the Limitations Period? 232
E. Application of Equitable Tolling 232
Contents

XIV. Subrogation Litigation 233
XV. Miscellaneous 234
  A. Unique Substantive or Procedural Rules for ERISA Cases 234
  B. Unique Approach to Common Policy-Based Defenses 235
  C. ERISA Class Actions 236
  D. Jurisdictional Removal 238
  E. Remand for Further Review 239

CHAPTER 5
Fifth Circuit 241
Virginia N. Roddy
Kevin A. Rogers
Kelly D. Simpkins
Hon. Stephen W. Smith

I. What Constitutes an ERISA Plan? 241
  A. Determining the Existence of an Employee Welfare Benefit Plan 241
  B. Definition of “Employee” for ERISA Purposes 242
  C. Individual Business Owners 243
  D. Interpretation of the Safe Harbor Regulation 243
  E. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 244
  F. Treatment of Multiple Employer Trusts and Welfare Agreements 245
  G. De Facto Plan Administrators 246
  H. Government Plans 246
  I. Church Plans 247

II. Preemption 248
  A. Scope of ERISA Preemption 248
  B. Complete versus Ordinary Preemption 249
  C. Preemption of Health Care Benefit Claims 250

III. Exhaustion of Administrative Remedies 252
  A. Is Exhaustion an Absolute Requirement? 252
  B. Exceptions to the Exhaustion Requirement 253
  C. Consequences of Failure to Exhaust 253
  D. Minimum Number of Levels of Administrative Review 254
  E. Can a Defendant Waive a Failure-to-Exhaust Defense? 254

IV. Standard of Review 254
  A. Plan Language 254
  B. What Standard of Review Applies? 254
  C. Effect of Conflict of Interest or Procedural Irregularity 256
  D. Other Factors Affecting Standard of Review 258

V. Rules of Plan Interpretation 259
  A. Application of Federal Common Law 259
  B. Application of Contra Proferentem 261
  C. Other Rules of Plan or Contract Interpretation 261
  D. Effect of Plan Amendments on Pending Claims 262
VI. Discovery 262
   A. Limitations on Discovery 262
   B. Discovery and Conflict of Interest 265
VII. Evidence 267
   A. Scope of Evidence under Standards of Review 267
   B. Evidentiary Value of Social Security Determinations 268
   C. Other Evidence Issues 269
VIII. Procedural Aspects of ERISA Practice 270
    A. Methods of Adjudication 270
    B. Reported ERISA Trials 271
IX. Remedies 272
X. Fiduciary Liability Claims 273
    A. Definition of Fiduciary 273
    B. Definition of Fiduciary Duties 274
    C. Fiduciary Liability in the Context of Health and Disability Claims 275
    D. Remedies for Breach of Fiduciary Duty 275
    E. Contribution and Indemnity Claims among Fiduciaries 276
    F. ERISA Claims against Non fiduciaries 276
XI. Attorneys’ Fees 276
    A. Criteria for Awarding Attorneys’ Fees 276
    B. Fees Awarded to Plan Fiduciaries 277
    C. Calculation of Attorneys’ Fees 278
XII. ERISA Regulations 278
XIII. Cases Interpreting ERISA Statutes of Limitation 279
XIV. Subrogation Litigation 283
XV. Miscellaneous 285
    A. Procedural Rules 285
    B. Common Policy-Based Defenses 286
    C. ERISA Class Actions 287
    D. Risk of Relapse Cases 288
    E. Jurisdiction and Removal 288

CHAPTER 6 289
Sixth Circuit
Robert D. Anderle
Martha Boyd
Michelle Thurber Czapski
Bridget Hathaway
John M. Scannapieco
Michael Serra
I. What Constitutes an ERISA Plan? 289
    A. Determining the Existence of an Employee Welfare Benefit Plan 289
    B. Definition of “Employee” for ERISA Purposes 290
    C. Interpretation of the Safe Harbor Regulation 291
    D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 293
**CONTENTS**

<table>
<thead>
<tr>
<th>Section</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>VIII. Procedural Aspects of ERISA Practice</td>
<td>317</td>
</tr>
<tr>
<td>A. Who Is the Correct Defendant in an Action for ERISA Benefits?</td>
<td>317</td>
</tr>
<tr>
<td>B. Methods of Adjudication</td>
<td>318</td>
</tr>
<tr>
<td>C. Reported ERISA Trials/Jury Trials</td>
<td>319</td>
</tr>
<tr>
<td>D. Special Procedures for ERISA Benefit Cases</td>
<td>319</td>
</tr>
<tr>
<td>IX. Remedies</td>
<td>320</td>
</tr>
<tr>
<td>C. Cases Addressing Reformation, Estoppel, and Surcharge</td>
<td>321</td>
</tr>
<tr>
<td>D. Cases Addressing Disgorgement of Profits and Equitable Accounting</td>
<td>322</td>
</tr>
<tr>
<td>E. Cases Addressing Whether a Claimant Seeking Benefits Can Prosecute Both § 1132(a)(1)(B) and § 1132(a)(3) Claims</td>
<td>323</td>
</tr>
<tr>
<td>X. Fiduciary Liability Claims</td>
<td>323</td>
</tr>
<tr>
<td>A. Definition of Fiduciary</td>
<td>323</td>
</tr>
<tr>
<td>B. Definition of Fiduciary Duties</td>
<td>325</td>
</tr>
<tr>
<td>C. Contribution and Indemnity Claims among Fiduciaries</td>
<td>326</td>
</tr>
<tr>
<td>D. ERISA Claims against Nonfiduciaries</td>
<td>326</td>
</tr>
<tr>
<td>XI. Attorneys’ Fees</td>
<td>327</td>
</tr>
<tr>
<td>A. Criteria for Awarding Attorneys’ Fees</td>
<td>327</td>
</tr>
<tr>
<td>B. Fees Awarded to Plan Fiduciaries</td>
<td>328</td>
</tr>
<tr>
<td>C. Fees Awarded When Plaintiffs Lack Standing</td>
<td>328</td>
</tr>
<tr>
<td>D. Calculation of Attorneys’ Fees</td>
<td>329</td>
</tr>
<tr>
<td>E. Catalyst Theory</td>
<td>329</td>
</tr>
<tr>
<td>XII. ERISA Regulations</td>
<td>329</td>
</tr>
<tr>
<td>XIII. Cases Interpreting ERISA Statutes of Limitation</td>
<td>332</td>
</tr>
<tr>
<td>XIV. Subrogation Litigation</td>
<td>334</td>
</tr>
<tr>
<td>XV. Miscellaneous</td>
<td>336</td>
</tr>
<tr>
<td>A. Class Actions</td>
<td>336</td>
</tr>
<tr>
<td>B. Stress/Relapse</td>
<td>336</td>
</tr>
<tr>
<td>C. Remand Not Final Order</td>
<td>336</td>
</tr>
</tbody>
</table>

**CHAPTER 7**

**Seventh Circuit** 337

*Mark D. Debofsky*

*Mark E. Schmidtke*

I. What Constitutes an ERISA Plan? 337
   A. Determining the Existence of an Employee Welfare Benefit Plan 337
   B. Definition of “Employee” for ERISA Purposes 338
   C. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 339
   D. Treatment of Multiple Employer Trusts and Welfare Agreements 339
   E. Government Plans and Church Plans 339

II. Preemption 340
   A. Scope of ERISA Preemption 340
   B. Preemption of Managed Care Claims 341
C. Calculation of Attorneys’ Fees 363

XII. ERISA Regulations 364

XIII. Cases Interpreting ERISA Statutes of Limitation 365

XIV. Subrogation Litigation 365

XV. Miscellaneous 366
   A. Unique Approach to Common Policy-Based Defenses 366
   B. Other Miscellaneous Issues 367

CHAPTER 8
Eighth Circuit 369

Molly R. Hamilton Cawley
Clark H. Cole
Wilbur L. Tomlinson
Terrance J. Wagener

I. What Constitutes an ERISA Plan? 369
   A. Determining the Existence of an Employee Welfare Benefit Plan 369
   B. Definition of “Employee” for ERISA Purposes 370
   C. Interpretation of the Safe Harbor Regulation 370
   D. Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 370
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 370
   F. Treatment of Individual Business Owners 371
   G. De Facto Plan Administrators 371
   H. Government Plans 371
   I. Church Plans 371

II. Preemption 372
   A. Scope of ERISA Preemption 372
      1. State Law Claims 372
      2. Savings Clause 373
   B. Conflict Preemption 373
   C. Preemption of Antisubrogation Laws 373
   D. Preemption of Managed Care Claims 374
   E. Preemption of Malpractice Claims 374
   F. State Independent Review Statutes 374
   G. Preemption of Equitable Claims and Defenses, Such as Waiver and Estoppel 374

III. Exhaustion of Administrative Remedies 374
   A. Is Exhaustion an Absolute Requirement? 374
   B. Exceptions to the Exhaustion Requirement 375
      1. Futility Exception 375
      2. Denial of Meaningful Access to Procedures 375
      3. Rapid and Life-Threatening Illness 375
   C. Consequences of Failure to Exhaust 375
   D. Issue versus Claim Exhaustion 375
   E. Minimum Number of Levels of Administrative Review 376
   F. Can a Defendant Waive a Failure-to-Exhaust Defense? 376
Contents

IV. Standard of Review 376
   A. Plan Language 376
   B. What Standard of Review Applies? 377
      1. Abuse of Discretion 377
      2. De Novo 377
      3. Sliding Scale 378
   C. Effect of Conflict of Interest or Procedural Irregularity 378
      1. Conflict of Interest 378
      2. Procedural Irregularity 379
   D. Other Factors Affecting Standard of Review 379
   E. State Insurance Laws Banning Discretionary Clauses 380
V. Rules of Plan Interpretation 380
   A. Application of Federal Common Law 380
   B. Application of Contra Proferentem 380
   C. Deference Afforded to an Administrator’s Interpretation of a Plan 380
   D. Other Rules of Plan or Contract Interpretation 381
      1. Ordinary Meaning 381
      2. Vesting of Benefits 381
      3. Proper Beneficiary Designation 382
VI. Discovery 382
   A. Limitations on Discovery 382
      1. Abuse of Discretion Standard of Review 382
      2. De Novo Standard of Review 383
      3. Fiduciary Exception 383
   B. Discovery and Conflict of Interest 383
VII. Evidence 384
   A. Scope of Evidence under Standards of Review 384
   B. Dispute over the Administrative Record 385
   C. Evidentiary Value of Social Security Determinations 385
   D. Evidentiary Value of an IME versus Paper Review 385
   E. Objective Evidence 386
   F. Failure to Attend an IME 386
VIII. Procedural Aspects of ERISA Practice 386
   A. Proper Defendants in an ERISA Case 386
   B. Methods of Adjudication 387
   C. Reported ERISA Trials 387
   D. Special Procedures for ERISA Benefit Cases 387
IX. Remedies 387
X. Fiduciary Liability Claims 388
   A. Definition of Fiduciary 388
   B. Definition of Fiduciary Duties 389
   C. Fiduciary Liability in the Context of Health and Disability Claims 390
   D. Contribution and Indemnity Claims among Fiduciaries 390
   E. ERISA Claims against Nonfiduciaries 390
XI. Attorneys’ Fees 390
   A. Criteria for Awarding Attorneys’ Fees 390
CONTENTS

B. Fees When Remedy Is Remand for Further Review 391
C. Fees Awarded to Plan Fiduciaries 391
D. Calculation of Attorneys’ Fees 391
E. Catalyst Theory of Attorneys’ Fees 392

XII. ERISA Regulations 392

XIII. Cases Interpreting ERISA Statutes of Limitation 393
A. General Rules 393
B. Contractual Limitations Periods 394
C. Limitations Period Accrual 394
D. Equitable Tolling 394

XIV. Subrogation Litigation 394

XV. Miscellaneous 395
A. Unique Substantive or Procedural Rules for ERISA Benefit Cases 395
B. Unique Approach to Common Policy-Based Defenses 395
  1. Mental/Nervous Limitation 395
  2. Total Disability versus Residual Disability 395
  3. Preexisting-Condition Exclusion 396
  4. Burden of Proof 396
  5. Prejudgment Interest 396
C. Other Miscellaneous Issues 396
  1. ERISA Class Actions 396
  2. Appealability of Remand for Further Review 397

CHAPTER 9

Ninth Circuit 399

Sevana Babooian
Russell S. Buhite
Horace W. Green
Linda M. Lawson

I. What Constitutes an ERISA Plan? 399
A. Determining the Existence of an Employee Welfare Benefit Plan 399
B. Definition of “Employee” for ERISA Purposes 400
C. Interpretation of the Safe Harbor Regulation 400
D. “List Bill” Exceptions for Individual Policies 400
E. Treatment of Multiple Employer Trusts and Welfare Agreements 401
F. Treatment of Individual Business Owners 401
G. Recognition of De Facto Plan Administrators 401
H. Government Plan Exception 402
I. Church Plan Exception 403

II. Preemption 404
A. Scope of ERISA Preemption 404
  1. Express Preemption 405
  2. Interpretation of the “Savings Clause” Pursuant to Miller 409
B. Conflict or Complete Preemption 411
C. Preemption of State Antisubrogation Laws 414
Contents

D. Preemption of Managed Care Claims 416
E. Preemption of Malpractice Claims 417
F. State Independent Review Statutes 418
G. Equitable Claims and Defenses 420

III. Exhaustion of Administrative Remedies 422
    A. Is Exhaustion an Absolute Requirement? 422
    B. Exceptions to the Exhaustion Requirement 422
    C. Consequences of Failure to Exhaust 422
    D. Issue Exhaustion versus Claim Exhaustion 423
    E. How Many Levels of Review Are Required? 423
    F. Can a Defendant Waive a Failure-to-Exhaust Defense? 423

IV. Standard of Review 423
    A. Plan Language 423
    B. What Standard of Review Applies? 424
    C. Effect of Conflict of Interest or Procedural Irregularity 425
    D. Application of Glenn to Self-Funded Plans and TPAs 427
    E. Evidence Required to Establish a Conflict of Interest 427
    F. Other Factors Affecting the Standard of Review 428
       1. Timeliness 428
       2. Discretionary Clause Bans 428
       3. Impact of Compliance with ERISA Regulations on the Standard of Review 429

V. Rules of Plan Interpretation 430
    A. Application of Federal Common Law 430
    B. Application of Contra Proferentem 430
    C. Deference Afforded to an Administrator’s Interpretation of a Plan 430
    D. Other Rules of Plan or Contract Interpretation 430
    E. Effect of Plan Amendment on Pending Claims 431

VI. Discovery 431
    A. Limitations on Discovery Based on the Standard of Review 431
    B. Discovery and Conflict of Interest 431
    C. Must the Plaintiff Make a Prima Facie Showing in Order to Get Discovery? 432
    D. What Type of Discovery Is Permitted? 432
    E. Fiduciary Exception to Claims of Privilege 433

VII. Evidence 433
    A. Scope of Evidence under Standards of Review 433
    B. Evidence Permitted under De Novo Review 433
    C. Dispute over Administrative Record 434
    D. Evidentiary Value of Social Security Determinations 434
    E. Who Bears the Burden of Obtaining Social Security Information? 435
    F. Independent Medical Examination versus Paper Review 435
    G. Objective Evidence Requirement 435

VIII. Procedural Aspects of ERISA Practice 436
    A. Who Is the Correct Defendant in an ERISA Benefits Case? 436
B. Methods of Adjudication 436
   1. Are ERISA Cases Typically Resolved on Summary Judgment? 436
   2. Does the Circuit Recognize Motions for Judgment on a Stipulated Record? 436
C. Are ERISA Trials Appropriate? Under What Circumstances? 437
D. Are Jury Trials Permitted under Any Circumstances? 437
E. Has the Ninth Circuit Developed Any Special Procedures for ERISA Benefits Cases? 437
IX. Remedies 437
   A. Remedies under ERISA § 502(a)(1)(B) 437
   B. Remedies under ERISA § 502(a)(3) 438
   C. Cases Addressing Reformation, Estoppel, and Surcharge 438
   D. Cases Addressing Disgorgement of Profits and Equitable Accounting 440
      1. Disgorgement of Profits 440
      2. Equitable Accounting 442
   E. Cases Addressing Seeking Benefits under Both § 1132(a)(1)(B) and § 1132(a)(3) 443
X. Fiduciary Liability Claims 446
   A. Definition of Fiduciary 446
   B. Definition of Fiduciary Duties 446
   C. Fiduciary Liability in the Context of Health and Disability Claims 446
   D. Can a Claimant Prosecute Both § 1132(a)(1)(B) and § 1132(a)(3) Claims? 446
   E. Contribution and Indemnity Claims among Fiduciaries 446
   F. ERISA Claims against Nonfiduciaries 447
XI. Attorneys’ Fees 447
   A. Criteria for Awarding Attorneys’ Fees 447
   B. Fees Awarded Where Remedy Is a Remand 451
   C. Fees Awarded to Plan Fiduciaries 453
   D. Calculation of Attorneys’ Fees 456
   E. The “Catalyst Theory” 460
XII. ERISA Regulations 461
XIII. Cases Interpreting ERISA Statutes of Limitation 465
   A. Contractual Limitations Provisions 466
   B. Cases Addressing Heimeshoff 467
   C. Accrual of Statute of Limitations 469
   D. Administrator’s Letters Addressing Limitation Periods 472
   E. Equitable Tolling of the Statute of Limitations 473
XIV. Subrogation Litigation 477
XV. Miscellaneous 479
CHAPTER 10

**Tenth Circuit**

Matthew J. Hegarty
David N. Kelley
Cristin J. Mack
Scott M. Petersen

I. What Constitutes an ERISA Plan? 481
   A. Determining the Existence of an Employee Welfare Benefit Plan 481
   B. Definition of “Employee” for ERISA Purposes 482
   C. Interpretation of the Safe Harbor Regulation 483
   D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 483
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 483
   F. Treatment of Individual Business Owners 483
   G. Recognition of De Facto Plan Administrators 484
   H. Treatment of Government and Church Plans 485

II. Preemption 486
   A. Scope of ERISA Preemption 486
   B. Preemption of Managed Care Claims 487
   C. Preemption of Malpractice Claims 488
   D. Other Preemption Issues 488
      1. Bad-Faith Breach of Insurance Contract 488
      2. State Claims Handling Statutes 488
      3. State Laws Construing Insurance Contracts 488
      4. Other State Law Claims by Participants 489
      5. Claims by Health Care Providers Based upon Precertification 490
      6. Claims by Employers against Insurers and Service Providers 490

III. Exhaustion of Administrative Remedies 490
   A. Is Exhaustion an Absolute Requirement? 490
   B. Exceptions to the Exhaustion Requirement 491
   C. Consequences of a Plaintiff’s Failure to Make a Timely Request for an Administrative Review 492
   D. Issue and Claim Exhaustion 492
   E. Minimum Number of Levels of Administrative Review 493
   F. Can a Defendant Waive a Failure-to-Exhaust Defense? 493

IV. Standard of Review 493
   A. Plan Language 493
   B. What Standard of Review Applies? 495
      1. “Abuse of Discretion” or “Arbitrary and Capricious” Standard 495
      2. De Novo Standard 496
   C. Effect of Conflict of Interest or Procedural Irregularity 496
   D. Other Factors Affecting the Standard of Review 497

V. Rules of Plan Interpretation 499
   A. Application of Federal Common Law 499
   B. Application of Contra Proferentem 499
CONTENTS

C. Deference Afforded to an Administrator’s Interpretation of a Plan 500
D. Other Rules of Plan or Contract Interpretation 501
E. Effect of Substantive and Procedural Plan Amendments on Pending Claims 502

VI. Discovery 502
A. Limitations on Discovery 502
B. Discovery and Conflict of Interest 503

VII. Evidence 503
A. Scope of Evidence under Arbitrary and Capricious Standard of Review 503
B. Scope of Evidence under De Novo Standard of Review 505
C. Looking beyond the Administrative Record 506
D. Disputes over Composition of Administrative Record 506
E. Evidentiary Value of Social Security Determinations 506
F. Burden of Obtaining Social Security Information 508
G. Value of an Independent Medical Examination versus Paper Review 508
H. Value of Other Insurer’s or Administrator’s Determination 508
I. Objective Evidence Requirement 509
J. Claimant’s Refusal to Appear for an Independent Medical Examination 510

VIII. Procedural Aspects of ERISA Practice 511
A. Correct Defendant in an Action for ERISA Benefits 511
B. Methods of Adjudication 512
C. Reported ERISA Trials 512
D. Special Procedures for ERISA Benefit Cases 513

IX. Remedies 513
A. Remedies under § 502(a)(1)(B) 513
B. Remedies under § 502(a)(3) 514
C. Availability of Prejudgment Interest 514
D. Cases Addressing Reformation, Estoppel, and Surcharge 515
E. Cases Addressing Disgorgement of Profits and Equitable Accounting 515
F. May Claimant Prosecute Both § 1132(a)(1)(b) and § 1132(a)(2) Claims for Benefits? 516

X. Fiduciary Liability Claims 516
A. Definition of Fiduciary 516
B. Definition of Fiduciary Duties 517
C. Fiduciary Liability in the Context of Health and Disability Claims 517
D. Contribution and Indemnity Claims among Fiduciaries 518
E. ERISA Claims against Nonfiduciaries 518

XI. Attorneys’ Fees 518
A. Criteria for Awarding Attorneys’ Fees 518
B. Awarding Fees for Remand 519
C. Fees Awarded to Plan Fiduciaries 519
D. Calculation of Attorneys’ Fees 520
E. Adoption of the “Catalyst Theory” 520
XII. ERISA Regulations 521
   A. Interpretation of ERISA Regulations on Claims Procedure 521
   B. Impact of Procedural Violations on Substantive Determinations 522

XIII. Cases Interpreting ERISA Statutes of Limitation 524
   A. Contractual Limitations Provisions 525
   B. Cases Addressing Heimeshoff v. Hartford Life 525
   C. When the Limitations Period Accrues 525
   D. Must Denial/Uphold Letters Address the Limitations Period? 526
   E. Equitable Tolling of the Limitations Period 526

XIV. Subrogation Litigation 527

XV. Miscellaneous 528
   A. Burden of Proof on Insurer for Exclusionary Clauses 528
   B. Risk of Relapse as Basis for Disability Claim 528
   C. Whether Remand for Further Review Is a Final Appealable Order 529

CHAPTER 11
Eleventh Circuit 531
J.S. Christie, Jr.
Kenton J. Coppage
Leonor M. Lagomasino
Aaron E. Pohlmann

I. What Constitutes an ERISA Plan? 531
   A. Determining the Existence of an Employee Welfare Benefit Plan 531
   B. Definition of “Employee” for ERISA Purposes 532
   C. Interpretation of the Safe Harbor Regulation 533
   D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 533
   E. Treatment of Multiple Employer Trusts and Welfare Agreements 535
   F. De Facto Plan Administrators 535
   G. Government Plans 536
   H. Church Plans 536

II. Preemption 537
   A. Scope of ERISA Preemption 537
   B. Preemption of Managed Care Claims 538
   C. Preemption of Malpractice Claims 539
   D. Preemption of Equitable Claims and Defenses 539
      1. Promissory Estoppel Claims 539
      2. Equitable Estoppel Claims 540
      3. Waiver Claims 540
   E. Other Preemption Issues 541

III. Exhaustion of Administrative Remedies 542
   A. Is Exhaustion an Absolute Requirement? 542
   B. Exceptions to the Exhaustion Requirement 543
   C. Consequences of Failure to Timely Seek an Administrative Review 544
   D. Application to Claims for Breach of Fiduciary Duty 545
   E. Issue versus Claim Exhaustion 546
CONTENTS

F. Levels of Administrative Review Required 546
G. Waiver 547

IV. Standard of Review 548

V. Rules of Plan Interpretation 550
A. Application of Federal Common Law 550
B. Application of Contra Proferentem 551
C. Other Rules of Plan or Contract Interpretation 551

VI. Discovery 552
A. Limitations on Discovery 552
B. Discovery and Conflict of Interest 553
C. Discovery Regarding Other Issues 555
D. Fiduciary Exception to Privilege 556

VII. Evidence 557
A. Scope of Evidence under Standards of Review 557
   1. De Novo Standard of Review 557
   2. Arbitrary and Capricious Standard of Review 557

VIII. Procedural Aspects of ERISA Practice 561
A. Methods of Adjudication 561
B. No Right to a Jury Trial 562
C. Admissibility of Evidence 562
D. Ambiguous Plan Language and Extrinsic Evidence 564
E. Social Security Determinations 565
F. Reported Trials 565
G. ERISA Class Actions 566
H. Proper Party Defendant 567

IX. Remedies 567

X. Fiduciary Liability Claims 569
A. Definition of Fiduciary 569
   1. Employers 569
   2. Corporate Officers 571
   3. Insurers 571
   4. Third-Party Plan Administrators 572
   5. Banks 573
   6. Legal Counsel 573
   7. Investment Advisors 574
   8. Plan Participants 574
B. Fiduciary Duties Defined 574
C. Fiduciary Liability in the Health and Disability Context 578
D. Contribution and Indemnity 580
E. Liability of Nonfiduciaries 580

XI. Attorneys’ Fees 580
A. Criteria for Awarding Attorneys’ Fees 580
B. Post-Remand Fee Petitions 584
C. Fees Awarded to Plan Fiduciaries 584
D. Settling Parties and Fees 585
E. Pre-Litigation Fees 585
F. Calculation of Attorneys’ Fees 585
G. Class Action Fees 586
XII. ERISA Regulations 586
XIII. Cases Interpreting ERISA Statutes of Limitation 588
XIV. Subrogation Litigation 591
XV. Miscellaneous 596
A. How Does the Eleventh Circuit Award and Calculate Prejudgment Interest? 596
B. ERISA Class Actions 598
C. Removal of ERISA Cases 599

CHAPTER 12
D.C. Circuit 601
Adanwimo B. Esedebe
W. Glenn Merten
I. What Constitutes an ERISA Plan? 601
A. Determining the Existence of an Employee Welfare Benefit Plan 601
B. Definition of “Employee” for ERISA Purposes 602
C. Interpretation of the Safe Harbor Regulation 603
D. Amount of Employer Involvement Required to Sustain an Employee Welfare Benefit Plan 603
E. Treatment of Multiple Employer Trusts and Welfare Agreements 604
F. Treatment of Individual Business Owners 604
G. De Facto Plan Administrators 604
H. Government Plans 604
I. Church Plans 605
II. Preemption 606
A. Scope of ERISA Preemption 606
B. Preemption of Managed Care and Malpractice Claims 609
C. Other Preemption Issues 609
III. Exhaustion of Administrative Remedies 611
A. Is Exhaustion an Absolute Requirement? 611
B. Exceptions to the Exhaustion Requirement 612
C. Consequences of Failure to Make a Timely Request for an Administrative Review 613
D. Issue versus Claim Exhaustion 614
E. Minimum Number of Levels of Administrative Review 614
F. Can a Defendant Waive a Failure-to-Exhaust Defense? 614
IV. Standard of Review 614
A. Plan Language 614
B. What Standard of Review Applies? 616
C. Effect of Conflict of Interest or Procedural Irregularity 617
D. Other Factors Affecting Standard of Review 619
E. Ban on Discretionary Clauses 620
V. Rules of Plan Interpretation 620
A. Application of Federal Common Law 620
CONTENTS

B. Application of Contra Proferentem 622
C. Deference Afforded to an Administrator’s Interpretation of a Plan 622
D. Other Rules of Plan or Contract Interpretation 624

VI. Discovery 625
A. Limitations on Discovery 625
B. Discovery and Conflict of Interest 627

VII. Evidence 628
A. Scope of Evidence under Standards of Review 628
B. Evidentiary Value of Social Security Determinations 629
C. Other Evidentiary Issues 629
   1. Denial Notices 629
   2. Federal Common Law: Remedies 630
   3. Objective Medical Evidence 630
   4. Independent Medical Examination versus Paper Review 630
D. Claimants’ Refusal to Appear for an Independent Medical Examination 631

VIII. Procedural Aspects of ERISA Practice 631
A. Methods of Adjudication 631
B. Reported ERISA Trials 632
C. Special Procedures for ERISA Benefit Cases 633

IX. Remedies 633
A. Claims for Benefits 633
B. Breach of Fiduciary Duty 633
C. Prosecution of Both Benefit and Breach of Fiduciary Duty Claims 634

X. Fiduciary Liability Claims 635
A. Definition of Fiduciary 635
B. Definition of Fiduciary Duties 636
C. Fiduciary Liability in the Context of Health and Disability Claims 637
D. Contribution and Indemnity Claims among Fiduciaries 637
E. ERISA Claims against Nonfiduciaries 637

XI. Attorneys’ Fees 638
A. Criteria for Awarding Attorneys’ Fees 638
B. Fees Awarded to Plan Fiduciaries 639
C. Calculation of Attorneys’ Fees 639
D. The Catalyst Theory 640

XII. ERISA Regulations 640

XIII. Cases Interpreting ERISA Statutes of Limitation 643

XIV. Subrogation Litigation 646
A. Post-Knudsen and Sereboff 646
B. Cases Addressing Montanile v. Board of Trustees 647

XV. Miscellaneous 647

Table of Cases 649
Index 747