INTRODUCTION

This book is a project of the Health and Disability Insurance Law Committee of the Tort Trial and Insurance Practice Section of the American Bar Association. The committee consists of practitioners representing plaintiffs and defendants nationwide in life, health, and disability insurance cases. This book is intended to address a wide variety of substantive and procedural issues that arise in litigation under the Employee Retirement Income Security Act of 1974, as amended, 29 U.S.C. § 1001 et seq. (ERISA).

For the original volume published in 2005, committee volunteers from each of the federal circuits agreed to write on several substantive and procedural ERISA issues. These volunteers were organized into teams and asked to write on the law of their respective circuits.

ERISA law can change suddenly and dramatically. For this reason, the committee has published updates every two to three years. For this seventh edition, committee members discussed the law of their respective circuits according to the following outline:

I. What Constitutes an ERISA Plan?

- What rules or tests does your circuit apply to determine whether an employee benefit plan exists?
- How does your circuit define “employees” for ERISA purposes?
- How has your circuit interpreted the “safe harbor” regulation?
- How much employer involvement is required to sustain an employee welfare benefit plan?
- Treatment of multiple employer trusts or welfare agreements
- Treatment of individual business owners
- Does your circuit recognize de facto plan administrators? Under what circumstances?
- Cases addressing government plans
- Cases addressing church plans

II. Preemption

- What is the scope of ERISA preemption as defined by your circuit? Please comment on:
  - Express preemption
  - Interpretation of the insurance savings clause
  - The scope of conflict preemption
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- Preemption of state antisubrogation laws
- Preemption of managed care claims
- Preemption of malpractice claims
- State independent review statutes
- Preemption of equitable claims and defenses, such as waiver and estoppel

III. Exhaustion of Administrative Remedies

- Is exhaustion an absolute requirement?
- Does your circuit recognize a futility exception? Other exceptions?
- What are the consequences of a plaintiff’s failure to make a timely request for an administrative review?
- Does your circuit distinguish between issue and claim exhaustion?
- How many levels of administrative review are required?
- Can a defendant waive a failure-to-exhaust defense?

IV. Standard of Review

- What kind of plan language satisfies Firestone criteria?
- What standards of review does your circuit apply in ERISA cases? Did Glenn alter the test(s) adopted in your circuit?
- How do conflicts of interest or procedural irregularities affect the standard of review?
- Cases interpreting MetLife v. Glenn. Does it apply to self-funded plans or third-party administrators (TPAs)?
- What evidence is required to establish a conflict of interest? Can a conflict be implied?
- What factors, other than plan language or a conflict, can affect the standard of review?
- Effect of state insurance laws on standard of review
- Have states in your circuit banned discretionary clauses?
- Are state bans on discretionary clauses preempted?
- Possible impact of ERISA regulations on standard of review

V. Rules of Plan Interpretation

- Is it subject to federal common law?
- Does your circuit apply contra proferentem? Under what circumstances?
- Is an administrator’s interpretation of a plan entitled to deference?
- Other rules of plan or contract interpretation
- Effect of plan amendments on pending claims, both substantive and procedural

VI. Discovery

- Does your circuit recognize limitations on discovery in ERISA cases?
- Does it depend on the standard of review?
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- Is discovery permitted to prove conflict of interest or degree of conflict of interest?
- Must a plaintiff make a prima facie showing in order to get discovery?
- What types of discovery are permitted (e.g., medical review vendors, employee compensation, claim statistics, etc.)?
- Has your circuit recognized the fiduciary exception to claims of privilege?

VII. Evidence

- Is the scope of evidence under a deferential standard of review limited to the administrative record?
- Evidence permitted under de novo review
- Under what circumstances will a court look beyond the administrative record?
- What if there is a dispute over the composition of the administrative record?
- What is the evidentiary value, if any, of Social Security determinations?
  - Who bears the burden of obtaining Social Security information?
- Value of an independent medical examination (IME) versus paper review, particularly in psychiatric disability claims
- What is the evidentiary value, if any, of another insurer’s or administrator’s claim determination?
- Under what circumstances may an administrator require objective evidence?
- What if a claimant refuses to appear for an IME?

VIII. Procedural Aspects of ERISA Practice

- Who is the correct defendant in an action for ERISA benefits?
- Are ERISA cases typically resolved on summary judgment?
  - Does the circuit recognize motions for judgment on a stipulated record?
- Are ERISA trials appropriate? Under what circumstances?
- Are jury trials permitted under any circumstances?
- Has your circuit developed any special procedures for ERISA benefit cases?

IX. Remedies

- Cases addressing reformation, estoppel, and surcharge
- Cases addressing disgorgement of profits and equitable accounting
- Can a claimant prosecute both § 1132(a)(1)(b) and § 1132(a)(2) claims for benefits?

X. Fiduciary Liability Claims

- Who is a fiduciary?
- How does your circuit define fiduciary duties?
- Does fiduciary liability arise in the context of health and disability claims?
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- Does your circuit allow claims for contribution and indemnity among fiduciaries?
- Does your circuit recognize ERISA claims against nonfiduciaries?

XI. Attorneys’ Fees

- What are your circuit’s stated criteria for awarding attorneys’ fees under 29 U.S.C. § 1132(g)?
- Can fees be awarded where the remedy is a remand?
- Have fees been awarded to plan fiduciaries?
- How are fees calculated?
- Has your circuit adopted the “catalyst theory”?

XII. ERISA Regulations

- Cases interpreting current regulations
- Cases interpreting old regulations that may form a basis for interpreting current regulations
- What is the impact of procedural violations on the court’s review of substantive determinations?

XIII. Cases Interpreting ERISA Statutes of Limitation

- Does the circuit enforce contractual limitations provisions?
- Cases addressing Heimeshoff v. Hartford Life
- When does the limitations period accrue?
- Does the circuit apply equitable tolling?

XIV. Subrogation Litigation

- How has your circuit handled subrogation claims after Knudson and Sereboff?

XV. Miscellaneous

- Has your circuit developed any unique substantive or procedural rules for ERISA benefit cases?
- Has your circuit developed a unique approach to common policy-based defenses such as mental/nervous conditions, residual versus total disability, and so forth?
- Does your circuit favor or disfavor ERISA class actions? Have class actions been certified in ERISA cases?
- Can a risk of relapse form the basis of a disability claim?
- Any unusual or unique rulings concerning jurisdiction or removal?
- Is a remand for further review an appealable order?

The resulting compendium provides a convenient reference of the law of various circuits to the ERISA practitioner. This volume is an update, current to August 2017.
The outline addresses issues that frequently arise in the prosecution and defense of claims for ERISA-regulated benefits. As you will see, circuits can vary significantly in their approach to substantive and procedural ERISA issues.

Many thanks to the contributing authors, who are identified at the beginning of their respective chapters. These individuals devoted significant time and effort to making this compendium a valuable publication.

The committee may produce additional updates as ERISA law continues to evolve. We welcome comments from readers on the content and format of this survey.

Brooks R. Magratten
Pierce Atwood LLP
One Financial Plaza
Providence, RI 02903
(401) 490-3422
bmagratten@pierceatwood.com