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FOREWORD: THE PAST, PRESENT, AND FUTURE OF SUPREME COURT JURISPRUDENCE ON ERISA

COLLEEN E. MEDILL*

The Tenth Annual Employee Benefits Symposium was held on April 16, 2012. In keeping with the theme of the conference, *The Past, Present, and Future of Supreme Court Jurisprudence on ERISA*, the papers presented addressed a wide range of current issues. The speakers included distinguished employee benefits practitioners as well as leading academics in the employee benefits field. The topics generated a lively discussion among the panelists and the members of the large audience, which included students, professors, practicing attorneys, and employee benefits consultants. Befitting a tenth anniversary, three of the symposium participants were alumni of prior symposia.¹

José Martin Jara began with a discussion of *ERISA Prudence and Employer Stock: What Is the Correct Standard of Prudence?* Mr. Jara is the ERISA project manager in the New York City office of SNR Denton and routinely represents clients before the Department of Labor's Employee Benefits Security Administration, where he was formerly a senior pension law specialist and investigator. In his article, Mr. Jara addresses the ERISA fiduciary duties of corporate officers and directors in the context of retirement plans that hold company stock as a plan asset. His focus is the judicial presumption of fiduciary prudence that originated in the Third Circuit's decision in *Moench v.*

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1. See David Pratt, *Pension Simplification*, 35 J. MARSHALL L. REV. 565 (2002) (First Annual Symposium); Albert Feuer, *When Are Releases of Claims for ERISA Plan Benefits Effective?*, 38 J. MARSHALL L. REV. 773 (2005) (Third Annual Symposium); Colleen E. Medill, *Resolving the Judicial Paradox of "Equitable" Relief Under ERISA Section 502(a)(3)*, 39 J. MARSHALL L. REV. 827 (2006) (Fourth Annual Symposium); David Pratt, *Standards of Practice for Pension Practitioners*, 39 J. MARSHALL L. REV. 667 (2006) (Fourth Annual Symposium); Albert Feuer, *Who Is Entitled to Survivor Benefits From ERISA Plans?* 40 J. MARSHALL L. REV. 919 (2007) (Fifth Annual Symposium); David Pratt, *The Past, Present and Future of Health Care Reform: Can It Happen?*, 40 J. MARSHALL L. REV. 767 (2007) (Sixth Annual Symposium); David Pratt, *Retirement in a Defined Contribution Era: Making the Money Last*, 41 J. MARSHALL L. REV. 1091 (2008) (Seventh Annual Symposium).

Robertson.² Under the *Moench* presumption, a fiduciary is entitled to a presumption that his decision to invest in the employer's securities was prudent. Mr. Jara argues that a more uniform standard for application and rebuttal of the *Moench* presumption is necessary in the context of stock-drop litigation claims under ERISA. He also argues that the federal courts should apply the *Moench* presumption at the motion to dismiss stage of litigation.

John D. Blum followed with *Medicaid Governance in the Wake of National Federation of Independent Business v. Sebelius: Finding Federalism's Middle Pathway, from Administrative Law to State Compacts*. Professor Blum is the John J. Waldron Research Professor at Loyola University Chicago School of Law and an adjunct professor of medical humanities at Loyola's Stritch School of Medicine. Professor Blum's essay addresses a less well-publicized aspect of the Supreme Court's pending decision regarding the constitutionality of the Patient Protection and Affordable Care Act (ACA),³ namely the legal challenge by various states⁴ to the dramatic expansion of Medicaid coverage by the ACA. After reviewing the goals of the ACA and the argument that the ACA's expansion of the eligibility requirements for Medicaid exceeds congressional authority, Professor Blum argues that cooperative federalism is needed to rebuild the federal-state Medicaid relationship. Professor Blum concludes by suggesting two possible solutions: greater state input into the administrative rulemaking process and the development of federal-state compacts to oversee the Medicaid program.

The third speaker, Albert Feuer, presented *How the Supreme Court and the Department of Labor May Dispel Myths About ERISA's Family Law Provisions and Protect the Benefit Entitlements that Arise Thereunder*. Mr. Feuer's private legal practice focuses on employee benefits, executive compensation, estate planning, and administration and taxation matters. Mr. Feuer's article presents a detailed and comprehensive analysis of the Supreme Court's jurisprudence regarding the interaction between state family law and ERISA. His primary focus is on ERISA preemption, domestic relations orders, and entitlement to plan distributions. Mr. Feuer concludes that, after the Court's trilogy of *Boggs*,⁵ *Egelhoff*,⁶ and *Kennedy*,⁷ numerous practical

2. *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

3. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, 124 Stat. 119 (2010), as amended by the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152, 124 Stat. 1029 (2010).

4. See *Florida v. U.S. Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2010), *cert. granted*, 132 S. Ct. 604 (2011).

5. *Boggs v. Boggs*, 520 U.S. 833 (1997).

6. *Egelhoff v. Egelhoff*, 532 U.S. 141 (2001).

7. *Kennedy v. Plan Adm'r of the DuPont Sav. and Inv. Plan*, 555 U.S. 285 (2009).

issues remain unresolved.

The next two speakers addressed various aspects of the Supreme Court's 2011 decision in *CIGNA Corp. v. Amara*.⁸ Susan Harthill began with *The Supreme Court Fills a Gaping Hole: CIGNA Corp. v. Amara Clarifies the Scope of Equitable Relief Under ERISA*. Professor Harthill teaches at the Florida Coastal School of Law and writes on employment law and ERISA remedies. Her piece is self-described as “unashamedly a guide for plaintiffs’ counsel, a practitioner’s piece, and should therefore please the current Chief Justice who has recently criticized legal scholarship on this score.”⁹ Professor Harthill’s analysis of *Amara* is forward-looking, with an emphasis on how the lower courts are reacting to *Amara* and applying the language of the decision in awarding “appropriate equitable relief” under section 502(a)(3) of ERISA. She provides suggestions for how plaintiffs’ counsel may frame their arguments for equitable relief to bolster their chances of success in future cases.

David Pratt followed with *Summary Plan Descriptions After Amara*. Professor Pratt is a Professor of Law at Albany Law School and a Fellow of the American College of Employee Benefits Counsel. Professor Pratt’s article focuses on the future implications of *Amara* for plan sponsors, administrators, participants, and beneficiaries regarding the summary plan description (SPD) required by ERISA and the new eight-page summary of benefits and coverage (SBC) required under the ACA. During the question and answer session following his presentation, Professor Pratt drew two provocative conclusions based on his research and analysis. First, he believes that *Amara* relieves plan sponsors and administrators from the burden of writing a comprehensive SPD. Second, he believes that *Amara* makes the formerly impossible task of writing the eight-page SBC slightly less impossible. For litigation purposes, post-*Amara*, the judicial focus will be on the terms of the plan itself.

Kevin Wiggins concluded the program with *Medicaid Provider Claims: Standing, Assignments, and ERISA Preemption*. Mr. Wiggins is a senior counsel at Thorp Reed & Armstrong, LLP and has served as a member of the Department of Labor’s ERISA Advisory Council. His article describes and explains a paradox that arises due to the combination of ERISA’s broad preemption of state law and the Supreme Court’s narrow interpretation of ERISA remedies. Namely, oral promises regarding plan coverage made to a medical service provider by a plan fiduciary are enforceable via state law claims for breach of contract and

8. *CIGNA Corp. v. Amara*, 131 S. Ct. 1866 (2011).

9. Susan Harthill, *The Supreme Court Fills a Gaping Hole: CIGNA Corp. v. Amara Clarifies the Scope of Equitable Relief Under ERISA*, 45 J. MARSHALL L. REV. 767 (2012).

negligent misrepresentation. Ironically, an identical claim made by a plan participant would likely have no relief under ERISA, and all state law claims would be preempted by ERISA. Mr. Wiggins concludes that this differential treatment of medical service providers discourages effective communication.

Collectively, the articles in this Symposium volume illustrate the significant impact that the Supreme Court has on national retirement and health care policy through its ERISA jurisprudence. When Congress enacted ERISA in 1974, workers expected to have inexpensive health care insurance coverage through their employer and a financially comfortable retirement due to the monthly benefits provided by their employer's traditional defined benefit pension. Today, the expectations of workers and retirees are dramatically different. Due to congressional inaction, we continue to look to future Supreme Court decisions for answers to such fundamental policy points as the fiduciary duties of employers regarding plan investments in company stock, the remedies available to plan participants, the standards for communication with plan participants, and the relationship between federal and state laws that impact employee benefits.

Finally, I would like to congratulate the Center for Tax Law and Employee Benefits and its director, Professor Kathryn J. Kennedy, for founding the Employee Benefits Law Symposium Series and successfully carrying that vision forward for ten years. The Series has become an important sounding board for ideas and research by academics in the employee benefits law community. It also provides a unique and vital link between the academic world and the implementation and practice of employee benefits law by practitioners and consultants. Given that the opportunities for such exchanges between theorists and practitioners are rare, the future of the Employee Benefits Law Symposium Series is bright indeed.