The John Marshall Law Review

Volume 39 | Issue 3 Article 2

Spring 2006

Foreword, 39 J. Marshall L. Rev. v (2006)

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FOREWORD

The Fourth Annual Employee Benefits Symposium began with a stirring tribute to the late Congressman John Erlenborn delivered by his long-time friend, Judge William J. Bower of the United States Court of Appeals for the Seventh Circuit. Congressman Erlenborn was known to many as the "Father of ERISA" for his faithful shepherding of the legislation for several years leading to its enactment. The Symposium consisted of eight thoughtful papers on matters of current interest to the ERISA bar and policy makers. Four of the papers looked into issues presented by the current spate of litigation under ERISA; two others concentrated on professional standards of practitioners who concentrate on benefit matters and the final papers consider important aspects of health benefits.

Craig Martin and Mark Casciari addressed lawsuits in which plaintiffs alleged that fiduciaries of an employer-sponsored defined contribution plan providing for investments in the employer's stock breached their ERISA fiduciary duties when they did not sell the employer's stock held by the plan before a significant drop in the price of the employer's stock – the so-called "stock-drop cases." Mr. Martin's paper advances the proposition that the *Moench* presumption should be extended to all eligible individual account plans for the same reason it was applied to employee stock ownership plans ("ESOPs"), namely, that the primary purpose of all eligible individual account plans holding employer stock is to encourage employee stock ownership. The *Moench* presumption grew out of *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995), which held that a court's review of a fiduciary's decision to hold employer stock in an ESOP is limited to whether the fiduciary breached his duty in the exercise of his discretion; it is not a de novo review.

Mr. Casciari approached the stock-drop cases from a different angle. His paper argues that plan fiduciaries should not be dragged into what is essentially a quarrel between stockholders and issuers over whether the issuer has failed to disclose material information affecting its financial condition. The ERISA cases generally follow on the heels of cases brought under corporate and securities laws and play on the fact that fiduciaries are often employees or officers of the issuer. He argues that if material information should have been disclosed to the plan participants, then adequate remedies are provided elsewhere; if not, there is no fiduciary liability. In effect, Mr. Casciari maintains that ERISA never intended to give stockholders a second bite at this apple.

Colleen Medill's paper presents a new way of analyzing cases that have interpreted the meaning of "appropriate equitable relief" under ERISA section 502(a)(3) and posits that such relief may not be as open-ended as many fear. Ms. Medill further posits that make-whole relief and consequential damages may be appropriate in certain circumstances.

Justin Cummins paper argues that ERISA is fundamentally flawed and that pending legislation will not solve its procedural and structural deficiencies. Mr. Cummins proposes that there be more complete and accurate disclosure of investment risks and the assumptions that go into the funding calculations for defined benefit plans, that there be additional causes of action available under ERISA, including the recovery of damages.

David Pratt alerts us to the difficulties encountered in applying the new IRS Circular 230 regulations to the practice of employee benefits law and in particular to the problems presented by the exception in section 10.35(b)(2)(ii)(B)(1) for advice concerning the qualified status of a plan. Professor Platt includes a helpful guide to the application of Circular 230 to a number of situations practitioners are likely to encounter.

Paul Secunda takes on the knotty problems a lawyer faces when she represents a company in its capacity as plan sponsor and as plan administrator, pointing out that the model rules of professional conduct discourage lawyers from taking on such dual representations. Professor Secunda proposes a new model rule permitting dual representations only when a lawyer reasonably believes that she can diligently and competently represent both the company and the plan and both give written consent to the dual representation.

Alison Sulentic applies systems analysis to continued group health plan coverage, which is commonly referred to as COBRA coverage, after an acronym for the statute which requires employers to provide continued coverage. Professor Sulentic illustrates the needless complexity and logical inconsistencies of the COBRA coverage requirements, beginning with the fact that employers are obligated to provide insurance coverage for individuals they do not employ.

Laurence Grudzien concluded the Symposium with a discussion of employer-provided retiree health benefits, noting the factors contributing to the disturbing decline in such benefits and suggesting alternative mechanisms that might be more suitable for covering retirees' health care needs. Professor Grudzien points out that, unless something is done, the concerns considered in his paper will only worsen as the baby boomers retire and become eligible for Medicare.

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