This newsletter is devoted to issues that interest our clients in the world of ERISA litigation.

Our ERISA litigation lawyers not only have years of courtroom experience litigating ERISA welfare and retirement plan cases, but they also counsel on day-to-day substantive ERISA issues outside of litigation. This one-two punch is unusual, efficient and effective. Our newsletter, meanwhile, is devoted to issues from the courts that affect the defense and prosecution of ERISA cases and that affect plan administration. For these reasons, this issue presents articles about a recent Supreme Court ruling on use of SPDs as well as litigation remedies; a plan provision that can save you money in litigation; and a revenue-sharing payment lesson that can be learned from a case out of the U.S. District Court for the Central District of California.

We have represented clients in a wide variety of ERISA-based actions involving all types of retirement plans and welfare benefit plans. These actions include defending against government and individual and class participant claims of breaches of fiduciary duty and prohibited transactions (such as valuation and investments in company stock, selection of real estate investments and oversight of investment managers, investment advisors, third-party administrators and actuaries); routine and complex benefits denial claims; disputes over executive compensation; claims of interference with protected rights under ERISA; claims arising from plan terminations and post-termination audits; claims for withdrawal liability by multiemployer plans; and plan claims for subrogation or reimbursement and recovery of overpayments of benefits. We also have considerable litigation experience with benefit plan issues arising in bankruptcy.

Our litigation team also defends clients in connection with investigations by the Department of Labor, the Internal Revenue Service, and the Pension Benefit Guaranty Corporation.
ERISA § 502(a)(1)(B) generally allows a participant or beneficiary to sue for plan benefits. In *Cigna Corp. v. Amara*, the Supreme Court ruled that ERISA § 502(a)(1)(B) provides a cause of action to enforce a plan’s terms, but not to enforce the terms of a summary plan description (SPD), and not to rewrite a plan to conform to what may be more participant-favorable terms in an SPD.

The Supreme Court appears to have overruled the many court decisions which have held that where there are conflicts between the SPD and the plan, the SPD could be enforced if it was more beneficial to the participant. This participant-friendly rule, established under ERISA § 502(a)(1)(B), is contrary to the Supreme Court’s ruling in the *Amara* case.

The implications of the *Amara* case are broader than the Supreme Court’s holding, because the Supreme Court majority and concurrence stuffed their opinions with so much more than the holding in the case.

Although the majority opinion tries to open wide the door for “make whole” relief as a form of equitable relief under ERISA § 502(a)(3) — something that no holding of the Supreme Court has ever done — the concurring opinion penned by Justice Antonin Scalia provides an outline for defeating or minimizing any such claims.

**Practical Implications of Amara**

1. **Who provides the plan; who provides the SPD?**

As a matter of law, the SPD is provided by the administrator, not the plan sponsor. In the *Amara* case, CIGNA was both the plan sponsor who wrote the plan and the administrator who wrote and provided the SPD to participants. CIGNA acted in different capacities: as plan sponsor when writing the plan, and as administrator “when preparing the SPD.” ERISA carefully distinguishes between the roles of plan sponsor and administrator. An ERISA administrator’s duty to provide employees with an SPD arises under ERISA § 104(b)(1), and not by reason of its relationship to the sponsor. Justice Scalia explained in the *Amara* ruling that the plan administrator does not act as an agent of the plan sponsor, when the administrator provides the SPD to participants. The administrator is a legally distinct entity. In his concurrence, Justice Scalia wrote that “it is incoherent to think of the administrator as agent and the sponsor as principal.”

Therefore, it is all the more important (a) for the plan sponsor to follow the plan procedure for adopting amendments to the Plan and (b) for the plan administrator to review and approve the SPD for dissemination to participants and beneficiaries. Without regard to who drafts the SPD, the plan administrator must adopt it, because it is the plan administrator who is providing it to participants as a summary of plan terms.

2. **Can an SPD be one of the “documents and instruments governing the plan,” under ERISA § 404(a)(1)(D), even if the SPD cannot be the plan document and even if the SPD cannot be enforced under ERISA § 502(a)(1)(B)?**

It appears that the answer is “yes,” if the plan document so provides. The government filed an *amicus* brief in the *Amara* case and argued that the SPD was enforceable under ERISA § 502(a)(1)(B). The Supreme Court rejected this argument and ruled “that the summary documents, important as they are, provide communication with beneficiaries about the plan, but
that their statements do not themselves constitute the terms of the plan for purposes of §502(a)(1)(B).”

The government’s starting point in making its argument was that the SPD is a governing document and instrument under ERISA § 404(a)(1)(D). On this issue, the Supreme Court majority did not opine. On the other hand, in his concurrence, Justice Scalia opined that an SPD can be used to amend a plan, if the plan provides this as an amendment procedure. While this may appear to be inconsistent with another of Justice Scalia’s statements — that the SPD “would not fulfill its purpose of providing an easily accessible summary of the plan if it were an authoritative part of the plan itself” — nothing in ERISA limits a plan document having multiple amendment procedures.

3. What does the Amara ruling portend for those plans that use a wrap plan document, which incorporates the terms of SPDs, insurance contracts, administrative service documents, and even employee handbooks, as part of the terms of the plan?

The use of wrap plans does not appear to be undermined by the Amara rulings, and the use of wrap plans appears to be supported by the 404(a)(1)(D) position espoused in the government’s amicus brief, discussed above.

One critical element continues to be compliance with the delegations of authority to amend the plan terms and to amend any of the wrapped documents. This critical element has long been stressed in Supreme Court cases and was again stressed in the Amara case. “The answer will depend on a fact-intensive inquiry … into what persons or committees … possessed plan amendment authority, either by express delegation or impliedly, and whether those persons or committees actually approved the new plan provision contained in the revised SPD … If the new plan provision is found not to have been properly authorized when issued, the question would then arise whether any subsequent actions, such as the executive vice president’s letters informing respondents of the termination, served to ratify the provision ex post.” Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 85 (1995).

Thus, a plan sponsor may provide in the plan document that it reserves the discretionary right to modify or amend the plan in any respect, at any time and from time to time, retroactively or otherwise, by a duly executed written instrument adopted by the plan sponsor’s board of directors or the board’s designee. The plan sponsor may also provide that the administrator has the limited right but not the duty to amend any provision of the plan that is administrative, procedural, or ministerial in nature.

4. What does the Amara ruling portend for the not uncommon practice of uninsured welfare plans that use the same written instrument as both the plan document and the SPD?

Although this practice may have been consistent with the government’s position (as reflected in its amicus brief), in light of the unanimous rulings in Amara, this practice is questionable. Nonetheless, in Amara the Supreme Court was not presented with a case where the only governing document and instrument was the SPD.

The Amara ruling does not necessarily overrule cases like Sengpiel v. BF Goodrich Co., 156 F.3d 660, 668 n.6 (6th Cir. 1998), where the appellate court stated: “At the time the relevant SPDs were issued, there were no actual ‘plans’ separate and apart from the SPDs themselves. Accordingly, the only relevant plan documents are the SPDs.” The appellate court relied on the ruling in Sengpiel this past month in Shaffer v. Rawlings Co., No. 10-3083., (6th Cir. May 18, 2011), slip opinion at 8.

Yet another appellate court took the same position in Admin. Committee of Wal-Mart Stores v. Gamboa, 479 F.3d 538, 544-45 (8th Cir. 2007): “Where no other source of benefits exists, the summary plan description is the formal plan document, regardless of its label … and it fulfilled ERISA’s disclosure requirements.”

After Amara, plan sponsors will have to weigh the costs and benefits of the use of only an SPD.
You may not be able to prevent litigation, but you can pick the court that will hear the case.

Our ERISA litigation team has had considerable success enforcing plan forum selection provisions. These plan provisions require that any claim relating to the plan must be brought in a particular court designated in the plan.

In four recent cases, we have defeated efforts to litigate in California, Virginia, Kentucky, and Florida — because they were not the venue designated under the plans’ forum selection provisions. The cases were transferred to the plans’ selected forum and dismissed.

The plans had provisions entitled “RESTRICTION ON VENUE” which stated that any action in connection with the plan could only be filed in the federal district court in the jurisdiction in which the plans’ sponsor was headquartered. That location was also where the plans were administered. The plan provision identified the particular district court. Each applicable summary plan description included the forum selection provision.

As the courts have explained: Enforcement of a forum selection provision “allows one federal court to oversee the administration of the ... Plan and gain special familiarity with the ... Plan Document, thereby advancing ERISA’s goal of establishing a uniform administrative scheme.” This translates into cost savings for the plan participants and the plan sponsor.

Participants have the “heavy burden” of proving that the forum selection provision is somehow “unreasonable” and not enforceable.

When a defendant raises a timely objection to venue, the plaintiff has the burden of showing that venue is proper. Outside the ERISA context, the Supreme Court has long ruled that forum selection provisions are presumptively valid unless enforcement is unreasonable under the circumstances. Under ERISA § 404(a)(1)(D), the terms of the “documents and instruments governing the plan” control. The Supreme Court stressed the controlling nature of the “plan document rule” under ERISA § 404(a)(1)(D) in Kennedy v. Plan Administrator for DuPont Savings and Investment Plan, 129 S.Ct. 865, 868 (2009).

Even if the forum selection provision is enforceable, courts must still determine whether the provision is reasonable under the particular circumstances. The courts have developed a three-prong test to determine whether to uphold a forum selection provision as reasonable: (1) whether the provision was obtained by fraud, duress, or other unconscionable means; (2) whether the designated forum would ineffectively or unfairly handle the suit; and (3) whether the designated forum would be so seriously inconvenient that requiring the plaintiff to bring suit there would be unjust.

Participant arguments are many, but they do not convince the courts to ignore the three-pronged test for testing the reasonableness of a forum selection provision.

With respect to the first prong, in our cases participants have no argument. Instead, without benefit of citation, they have argued that the forum selection provision should not be applicable to them, because they did not negotiate the terms of the plans. The Supreme Court in Carnival Cruise Lines, Inc. v. Shute, 499 U.S. 585 (1991), enforced a forum-selection provision printed on the back of a cruise ticket, brushing aside arguments that many consumers do not read the fine print in their contracts, may not appreciate the significance or perhaps even the meaning of a forum-selection provision, and have not negotiated the terms of the contract. In the ERISA context, the courts enforce forum selection provisions, because the participant’s consent to any modification of the plan is not necessary. See Curtis-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995) (“Employers or other plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans.”).

As to the second prong — whether the designated forum would ineffectively or unfairly handle the suit
— we have yet to see a participant even try to meet the burden. Understandably, no participant has argued to a federal district court that another federal district court, which happens to be located in another state, cannot effectively or fairly handle an ERISA benefit case.

As to the third prong — whether the designated forum would be so seriously inconvenient that requiring a plaintiff to bring suit there would be unjust — participants argued that their witnesses or medical providers who diagnosed and treated them are located in the state where they have sued, not in the plan’s selected forum. These arguments ignore the controlling case law that there are no witness appearances or testimony in benefit claims cases; benefit claims cases are generally decided on a closed administrative record. Therefore, the courts found that the location of witnesses is a non-issue which does not help participants carry the burden of showing that the forum selection provisions are unenforceable. As one court said when it rejected such an argument and enforced a plan’s forum selection provision: “In bringing this suit, [plaintiffs] claim rights under the Plan … They must take the bad with the good.”

Although plan forum selection provisions satisfy the three-prong test, we submit that the three-prong test is not necessary to enforce them. Given the overarching concern that ERISA requires compliance with the plan terms and the federal concern for uniformity, the plain language of the plans should be enforced.

More participant arguments that fail to stop enforcement of plan forum selection clauses.

In our cases, participants have also argued that the plan forum selection provision is unenforceable because it is superseded by ERISA’s venue provision, which provides that actions under ERISA “may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found.” The courts have rejected that argument. If Congress had wanted to prevent plans from avoiding the statutory venue provision through the use of a forum selection provision, Congress could have done so. There are provisions that ERISA expressly prohibits, but forum selection provisions are not among them.

We have encountered participants who argued that the forum selection provision is unreasonable, because they allegedly had no prior notice of the provision. This argument arises in cases where the forum selection clauses were added by plan amendments adopted after the plaintiffs became plan participants. Whether notice is required is questionable. However we were able to rebut the argument with evidence of the Summaries of Material Modifications (SMMs) provided to all participants in the plans when they were amended to include the forum selection provision. This was sufficient to reasonably communicate the provision to the participants without regard to whether the participants read the SMMs.

Closing Note: Civil Procedure — The appellate courts are not in agreement.

Although the courts are willing to enforce plan forum selection provisions, the proper procedural vehicle for dismissing a case on the basis of a forum selection provision has been the source of considerable debate and some confusion. See Heinz v. Grand Circle Travel, 329 F. Supp. 2d 896, 899 n.6 (W.D. Ky. 2004) (collecting cases evidencing a split among the appellate courts of appeals as to whether Rule 12(b)(1), 12(b)(3), 12(b)(6), or 28 U.S.C. § 1404(a) is the answer to the “vexing” question of which is the proper manner to dispose of a case where a party seeks to enforce a forum selection provision).

In addition, the court may choose to enforce the forum selection provision by transferring, rather than dismissing the case. In our experience, participants generally do not argue for transfer, but the decision of whether to dismiss or transfer is within the district court’s sound discretion.
Thinking About, Planning for and Dealing with Revenue Sharing Payments

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There are a number of lessons to be learned from *Tibble v. Edison International*, a case focused largely on the investment fees incurred by Southern California Edison’s 401(k) Savings Plan (the Plan). One of those lessons involves issues that fiduciaries should think about, plan for and deal with in connection with revenue-sharing payments.

Revenue Sharing

The term “revenue sharing” in the retirement plan industry refers generally to payments made by investment providers, such as mutual fund companies and insurance companies, to other service providers, such as recordkeepers and third-party administrators. These payments include so-called 12b-1 fees and sub-transfer agent fees. At least in some instances, these payments are made in exchange for services that the party making the payment (e.g., the mutual fund company) would otherwise have to provide itself, such as administrative services.

There is nothing inherently contrary to law about revenue sharing payments. The recognition that these payments are not inherently contrary to law is that the Department of Labor has issued a proposed regulation that, upon its effective date, will require service providers to disclose indirect compensation (such as revenue sharing payments) to service providers. The reason for the regulation is not the inherent illegality of revenue sharing, but rather a recognition that the law currently may not require disclosure of that information. What ERISA does require is that plan fiduciaries be aware of the services being provided in return for the compensation that the fiduciaries are paying. Regardless of whether revenue sharing has been affirmatively disclosed, fiduciaries need to know who is performing what service in order to evaluate the reasonableness of the compensation.

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The Facts in *Tibble* Relating To Revenue Sharing

In *Tibble*, the Plan document in effect for much of the relevant time period provided that Southern California Edison (SCE) — and not the Plan itself — would be responsible for the cost of Plan administration. Eventually, the Plan was amended to state that: “The cost of the administration of the Plan, net of any adjustments by service providers, will be paid by SCE.”

SCE’s Board of Directors had delegated to its Trust Investment Committee and/or its Benefits Committee the fiduciary obligation to select and monitor the Plan’s investment options. Members of these committees were not simultaneously members of SCE’s Board of Directors — a fact which turned out to be critical to the court’s decision.

The Plan’s recordkeeper, Hewitt Associates, LLC (Hewitt), received certain revenue sharing payments from some of the mutual funds offered by the Plan. To the extent Hewitt received revenue sharing payments, Hewitt reduced its administrative fees to SCE. Therefore, SCE received a benefit — in the form of reduced administrative expenses — as a result of the revenue sharing payments that Hewitt received from mutual funds offered as Plan investments.

Plaintiff’s Claim Related to Revenue Sharing, the Court’s Holding, and The Current Status of *Tibble*:

ERISA §406(b)(3) prohibits a fiduciary from receiving consideration “for his own personal account from any party dealing with such plan in connection with a transaction involving the assets of the plan.” Plaintiffs claimed that SCE engaged in just such a prohibited transaction because the fees it owed to Hewitt were reduced as a result of these revenue sharing payments.
In other words, according to the plaintiffs, SCE “received consideration” from Hewitt in connection with a transaction involving the Plan assets.

The court disagreed. It held that the party that received the benefit of the transaction (SCE) was not the party that selected the mutual funds that generated the revenue sharing payments. Rather, SCE had delegated to certain committees the fiduciary obligation to select specific investment options, and none of the members of those committees were simultaneously members of SCE’s board of directors. Also, there was no evidence that SCE itself influenced whether to enter into the contracts with the mutual funds. Therefore, SCE could not violate §406(b)(3).

As indicated above, the decision in Tibble is currently on appeal to the U.S. Court of Appeals for the Ninth Circuit. On May 25, 2011, the Secretary of Labor filed an amicus curiae (“friend of the court”) brief. Not surprisingly, the Secretary’s brief disagreed with the district court’s holding on the revenue sharing issues. The Secretary argued that the district court erred in relying on certain Department of Labor advisory opinions when the district court ruled that SCE did not engage in a prohibited transaction. According to the Secretary, those advisory opinions do stand for the proposition that a fiduciary does not engage in prohibited transactions by receiving fees for its services, provided that the fiduciary does not set its own compensation. However, the Secretary argued that those advisory opinions do not support a conclusion that the committees that made the investment decisions in Tibble were sufficiently independent of the company to apply the rule discussed in the advisory opinions.

On August 1, 2011, the California Employment Law Council and the Investment Company Institute both filed amicus briefs supporting the district court’s decision. These briefs focused largely on separate aspects of the Tibble case — namely, whether defendants breached their fiduciary duties by offering certain “retail” mutual funds as plan investment options, when, according to the plaintiffs, lower-cost “institutional” share classes were available, and whether the district court erred in holding that plaintiffs’ challenges to funds added to the Edison plan more than six years before the lawsuit was filed were barred by the applicable statute of limitations. Neither directly addressed the substance of the revenue sharing issue.

In their own brief, the defendants focused on the district court’s factual finding that the plaintiffs failed to “demonstrate that the Plan fiduciaries were motivated by revenue sharing when selecting mutual funds for the Plan.” In part, the district court based its finding on the fact that in the vast majority of changes to the investments, the changes resulted either in a reduction in revenue sharing, or no net change in the amount of revenue sharing received by SCE: “The Plan fiduciaries did not make fund selections with an eye toward increasing revenue sharing and did not put the interests of [SCE] above those of the Plan participants.”

Lessons to be Learned, Regardless of the Outcome of the Appeal:

According to the terms of the Plan, the plan sponsor (SCE) was responsible for payment of the Plan’s administrative expenses. If the Plan had provided that the administrative expenses would be paid from plan assets, then the plan would have received the benefit of the cost reductions brought about by the revenue sharing. The willingness of the plan sponsor to state in the plan that it was responsible for paying plan expenses emphasizes the old adage that no good deed goes unpunished. Tibble should be required reading for those who draft retirement plans. The apparently generous decision of SCE to shoulder the burden of paying the administrative expenses of the Plan did not lead to ERISA liability, because the members of the plan committees that selected the investments were not also on the plan sponsor’s board of directors. Plan sponsors would be well to consider the decision to pay plan expenses given the kinds of arguments plaintiff and DOL made in Tibble.
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