

Employee Benefits and Developments
Avoid Lawyer Mistakes

ROBERT A. PEREZ SR., M.S., J.D.
THE PEREZ LAW FIRM CO., L.P.A.

Purpose of Presentation ---

- Jurisdictional Issues
 - What law controls?
 - Why?
- Distinguish among various employer sponsored plans
- Benefit claims - the basics
- What to do?
 - Administrative appeals and exhaustion
 - Litigation basics
- Know how to avoid mistakes

What is an ERISA Plan?

- Employer Sponsored Plans-
 - insured "Policy not a plan."
 - uninsured or self-funded
- Disability benefits
 - Insurance based or Otherwise
- Life insurance
- Health/Medical - surgical, hospital care
- Pensions
 - Qualified plans Not IRA's

WHAT IS NOT AN ERISA PLAN

- Self-Employed Individuals Paying Premiums
- Statutory Exemptions
- Government Plan
- Church Plans
- Worker's Compensation and Unemployment Compensation

What Does the Plan Say?

- The Plan
 - Written document(s)
 - Trust analysis
 - Employer is the Settlor
 - Pension plan
 - Self insured
 - Insurance contract
- Summary Plan Description (SPD)
 - Regulated disclosure to employee
 - Variance issues *Cigna Corp. v. Amara*, 133 S. Ct. 1866 (2011).

Preemption Analysis

- Does the law relate to an employee benefit plan?
- If the answer to this question is "yes," then it may be preempted by ERISA. If the answer is "no," then ERISA has no effect on the application of state law to a particular fact situation and state law is applied.
- However, if the state law does involve an employee benefit plan, the next issue is whether the law regulates insurance. If the law does regulate insurance, then the state law is safe from preemption.
- If the law does not regulate insurance, then ERISA preempts the law.

Savings Clause

- The Supreme Court on the "Savings Clause."
 - "Specifically directed toward entities engaged in insurance."
 - "Substantially affects the risk-pooling arrangement between the insurer and the insured -- does not require that the state law actually spread risk."

Kentucky Ass'n. of Health Plans v. Miller, 538 U.S. 329 (2003)

Ohio State Law

- Ohio R. Code Section 3923, Sickness and Accident Insurance.
- Ohio R. Code Section 1751, Health Insuring Corporation Law.
 - External Review
 - Review of Medical Necessity Experimental Treatment.
- Ohio R. Code Section 1753 Physician Health Plan Partnership Act.

Pre-Litigation

- ERISA's administrative remedies must be exhausted before suit is filed. *Miller v. Metropolitan Life Ins. Co.*, 925 F. 2d. 979, 986 (6th Cir. 1991)
- Statutory 29 U.S.C. § 1133
- Regulatory process 29 C.F.R. § 2560.503-1
- Administrative appeal procedures must be followed

Denied Claims - Basics

- ERISA requires administrative appeal
 - Exhaustion
 - Judicial review of record
 - Deference given to administrative decision
 - Remedies limited – equitable remedies
- Non-ERISA not subject to appeals unless contract language mandates it
 - Exhaustion not mandated
 - Review by court plenary
 - Remedies more extensive

Judicial Review - Differences

- ERISA claim should be filed in federal court
 - Concurrent jurisdiction in state court for benefit claims
 - Likely to be removed
 - Court review is on the claims record
 - Deference to administrator if policy has language to support
- Non ERISA
 - State Court/Diversity
 - Plenary review
 - Deference language not as problematic
 - Jury trial

Judicial Review

- Federal district court 29 USC § 1133
 - Review of the “record” *Wilkins v. Baptist Healthcare Sys., Inc.*, 150 F.3d 609 (6th Cir. 1998)
 - Discovery is very limited - “conflict of interest and procedural issues.”
 - *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).
- Abuse of discretion v. de novo review
 - Language of the plan
- Benefits claims can be brought in state court
 - *Richland Hosp., Inc. v. Raylon*, 33 Ohio St.3d 87 (1987)

Moon v. Unum Provident Corp.,
405 F.3d 373 (6th Cir. 2006)

- Failed to provide a reasoned explanation for terminating the claimant's benefits.
- Selective review of the medical record was obvious.
- Important for the court to review the "quantity and quality" of medical evidence in the record.
- When Insurer employs the reviewing physician, the opinion must be viewed with some skepticism if that opinion contradicts the rest of the opinions.
- Reasoned explanation based on fact, or it is arbitrary and capricious.

Fiduciary Duties

- ERISA imposes higher-than-marketplace quality standards on insurers - - special standard of care "discharge [its] duties" in discretionary claims processing "solely in the interests of [claimant]."

29 USC § 1104(a)(1). Accurate claims processing, "a 'full and fair review' of denials," § 1133(2). *Metropolitan Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008).

Limited Remedies

- Recovery of Benefits
- Equitable Relief –
 - *CIGNA Corp. v. Amara*, 131 S.Ct. 1866 (2011)
 - Reformation
 - Equitable Estoppel
 - Surcharge
- No "Bad Faith," *Pilot Life v. Dedeaux*, 481 U.S. 41 (1987)
- Possibly attorney fees, 29 U.S.C. § 1132(g).
 - Five factors

Designation of Beneficiaries

- ERISA – the form controls
 - State law is preempted
 - Not simply whether it is a qualified plan
 - State pension plans qualified plan but not ERISA
 - Divorce does not affect it
 - *Egelhoff v. Egelhoff*, 532 U.S. 141
 - ERISA uniform administration of claims and disbursement
 - IRA is not an ERISA plan; 29 C.F.R. § 2510.3-2(d)(1)
- Non ERISA plan opposite result
 - O.R.C. section 5815.33. Termination of marriage revokes designation – opposite result.

Conclusion

- What law applies? Federal or State or both?
- Read the documents
- Appeal claim with strategy and exhaust
- Limited discovery
- No bad faith
- Limited remedies
- Attorney fees maybe - do not count on it
- Affects all aspects of benefits estate planning too.
- Remedies developing
