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Twenty years of ERISA " federal common law," the progeny of Pilot Life. Permit me a personal note. *Pilot Life* bumped me from a June, 1987, jury trial docket in West Palm Beach. Next month *Pilot Life* turns 20! *ERISA preemption* that June began an odyssey into *terra incognita*. I could not foresee then that almost 20 years later I'd still be pursuing ERISA benefits claims for my client and that even the fundamentals of ERISA federal common law would still be a work in progress in the federal courts. Below are a few, by now, familiar ERISA issues in recent cases.

Prudential as a "plan administrator"is penalized $33,000. ERISA provides for "personal liability" for "any administrator"who fails to furnish plan documents upon written request by the plan participant. Although some decisions excuse insurers from such sanctions, this was not one of them. *Younkin v. Prudential Ins. Co. of America*, 2007 WL 295221 (D. Mont. Jan. 24, 2007.)

Did I endorse thaaat? Does your firm's benefit brochure have the firm name in big letters on the front cover and the insurance company's name in smaller type on the back cover? Then your firm may have an ERISA plan, even if the employees pay all the costs for a completely optional insurance policy. That's all it took for the court to find *employer endorsement* and *no safe harbor* in *Booth v. Life Ins. Co. of North America*, 2006 WL 3306846 (W.D. Ky. Nov. 9, 2006).

A pebble in the pond. On the other hand, short-term disability benefits paid by the employer for a percentage of the disabled employee's wages may be a "payroll practice" instead of an ERISA plan. *Franklin v. Blue Cross*, 2006 WL 2792893 (M.D. Fla. Sept. 27, 2006), citing *Stern v. IBM Corp.*, 326 F. 3d 1367, 1372 (11th Cir. 2003) (where the DOL and I pitched the "payroll practice" pebble into the pond of ERISA preemption).

A mile in his mocassins! Robert Lyn Baker was an attorney in his 50's specializing in mergers and acquisitions and a partner and senior shareholder at the Nashville office of Baker, Donelson, Bearman & Caldwell, P.C.,, when on January 9, 2001, he was seriously in a rear-end collision. For a year, despite his injuries and worsening pain Baker kept on working, even lying on his office floor to take phone calls. MetLife's plan called for monthly regular-occupation benefits of $9,000 until age 65. Baker was treated at the University of Miami Comprehensive Pain and Rehabilitation Center. His level of pain lessened. So did his benefits, which MetLife cut off. Baker's long trek through the barren desert of treating

and reviewing doctors (including a four-day battery of neuropsychological testing at his own expense) vividly depicts the arid landscape of disability claims after *Pilot Life's* preemption of bad faith and punitive damages. At last, however, a district court recounted Baker's saga, found MetLife's decision arbitrary and capricious and awarded Baker his benefits. *Baker v. Metropolitan Life Ins. Co.*, 2006 WL 3782852 (M.D.Tenn. Dec. 20, 2006).

***Insurer's reimbursement claim denied*.** The court denied this insurer's motion for summary judgment. Although the basis of the insurer's claim for overpayment was equitable in nature, relief would have been of a legal nature – because the insured no longer had any of the Social Security Disability Income back benefits in her possession and resulting in personal liability. *Reichert v. Liberty Life Assur. Co. of Boston*, 2007 WL 433321 (D.N.J. Feb. 5, 2007).[Note! Recommended reading re the "tracing" of *assets: Popowski v. Parrott*, 461 F.3d 1367 (11th Cir. 2006).]

The federal make whole doctrine bars insurer from offsetting disability benefits. To bar the make whole doctrine, an ERISA plan *must include language specifically allowing* the Plan the *right of first reimbursement* out of any recovery the participant was able to obtain *even if* the participant were not made whole. *If the plan does not include language explicitly providing the fund with a right to first recovery even when a participant or beneficiary is not made whole, the fund cannot avoid the application of the make whole doctrine*. Standard subrogation language providing a plan the right to seek repayment of settlement or other funds obtained from a third party is not enough effectively to reject the make whole doctrine. Here, plaintiff's economic losses greatly exceeded his third-party settlement. His future medical expenses alone ($3,872,313) exceeded the entire settlement amount he received ($3,087,194.21). *Also, by the way, the Georgia anti-subrogation statute was "saved" from ERISA preemption* and precluded the insurer from offsetting benefits. *Smith v. Life Ins. Co. of North America*, 466 F. Supp. 2d 1275 (N.D. Ga. Sept. 20, 2006).

Brain-teaser: "Do you have to be married to receive a qualified domestic relations order (a "QDRO")? Answer: No, not necessarily. Philip Owens and Norma Owens, the mother of their two children, lived together for 30 years but were never married. They separated. Under Washington law Norma Owens was awarded a 50% share in the community property acquired during that relationship. The Washington state court's order was held to be a QDRO by the federal district court. *Owens v. Automotive Machinists Pension Trust*, 2007 WL 188884 (W.D. Wash. Jan. 19, 2007).

Alice Through the Looking Glass. A *pre-nup could not* waive the joint and survivor form of benefits; rather, a participant-consent would have had to be signed *post-nup*, *while married*. *Veolia Water Retirement Savings Plan v. Smith*, 2007 WL 496425 (W.D. Va. Feb. 12, 2007).

Do "cash-balance" plans discriminate? Yes, according to *Richards v. FleetBoston Financial Corp.,* 427 F.Supp.2d 150 (D.Conn.2006), which held that cash balance plans discriminate *on the basis of age*. Accord, *In re Citigroup Pension Plan Erisa Litigation,* ---F.Supp.2d ----, 2006

WL 3613691 (S.D.N.Y., December 12, 2006). But, ***no***, according to *Cooper v. IBM Personal Pension Plan,* 457 F.3d 636, 639 (7th Cir.2006). Then again, ***yes*** :"[t]his court continues to adhere to its previous statutory interpretation of the terms Congress used in ERISA § 204(b)(1)(H). *Parsons v. AT&T Pension Ben. Plan*, 2006 WL 3826694 (D.Conn. Dec. 26, 2006). [A work in progress!]

Debtor's breaches of ERISA fiduciary made debt non-dischargeable in bankruptcy. *In re Goodwin*, – B.R.–, 2006 WL 2949107 (M.D. Fla. Oct. 13, 2006). The defendant's fiduciary duties arose under ERISA. "An individual can also be deemed a fiduciary if they have any discretionary authority ... with respect to the administration of the plan." Id., *4.

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