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ERISA LITIGATION

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View from the Bench:



Hon. Ruben Castillo
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U.S. Dist. Ct., D. Colo.



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Senior District Judge
U.S. Dist. Ct., W.D. Pa.



Hon. Eric F. Melgren
District Judge
U.S. Dist. Ct., D. Kan.



Hon. Richard S. Schmidt
Bankruptcy Judge
U.S. Bankr. Ct., S.D. Tex.



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Hon. Roslyn O. Silver
Senior District Judge
U.S. Dist. Ct., D. Ariz.

Benefit from key updates and strategies on:

- Employer stock and *Fifth Third v. Dudenhoeffler*
- Equitable remedies under ERISA §502(a)(3), *Cigna v. Amara* and *U.S. Airways v. McCutchen*
- Class action developments with regard to excessive fees, stock drop, defined benefit and welfare plan class claims
- Emerging trends with the Affordable Care Act and Church Plan Litigation
- And the latest issues in
 - ERISA fiduciary litigation
 - ESOP Litigation
 - plan investment litigation
 - 401(k) fee cases
 - withdrawal liability
- Enforcement of plan document limitations period for benefit claims post-*Heimeshoff*

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2014 marks the 40th anniversary of the enactment of the Employee Retirement Income Security Act. In response, ACI is pleased to introduce the Chicago installment of the only ERISA Litigation conference that goes the extra mile and brings you the highest level judicial insights and maximum networking opportunities with in-house industry experts.

In addition to unparalleled networking opportunities, ACI's 7th ERISA Litigation will provide attendees with the latest insights and expert advice from our exceptional faculty including on:

- **Equitable Remedies** Under ERISA §502(a)(3), *Cigna v. Amara* and *U.S. Airways v. McCutchen*: The Ongoing Fallout From These Cases and Its Progeny and Their Impact on Surcharge, Reformation, Restitution Reimbursement and Subrogation, Equitable Relief, Tracing Rules
- **Class Actions** With Regard to Excessive Fees, Stock Drop, Defined Benefit and Welfare Plan Class Claims: New and Emerging Cases and Theories; The Continuing Impact of *Dukes* and Progeny on Certification; New Settlement Considerations; Nuances on Rule 23 (A), (B) and (F); Subclasses and Bifurcation; Interlocutory Appeals; and More
- **ERISA Fiduciary Litigation**: Minimizing Exposure to Fiduciary Liability Through Procedural Prudence and Documentation, New and Emerging Theories of Liability and Defenses, Arguments that Start Claim Accruals Early and Support 413(1)(a) Fiduciary Breach Claim Statute of Repose, the Application of Releases to Claims
- **Litigation Regarding Plan Investments**: The Latest on Employer Stock - *Fifth Third v. Dudenhoefter* and Beyond; New Theories of Liability; Defenses such as Standing, Statute of Limitations, and 404(c); Alternative Investments; Issues in De-Risking
- **Withdrawal Liability**: What You Need to Know and How to Avoid and/or Challenge It
- **ESOP Litigation**: Defending Against New and Emerging Claims and Assessing Recent Developments, With a Focus on DOL Investigations and Settlements
- **401(k) Fee Cases**: Current Litigation Trends, Evolving Defense Strategies, New DOL Disclosure Rules and Enforcement Initiatives, Impact of *Tussey* and *Tibble*, the Extension of the Arbitrary and Capricious Standard of Review, the Issue of Service Providers, and More
- **Affordable Care Act Issues**: The Intersection Between ACA Retaliation and ERISA 510 Cases, Decisions Affecting Full/Part-Time, Workforce Re-Structuring and Alternative Workforces, and Beyond
- **Fiduciary Liability Insurance**: Assessing Current Coverage and Future Needs and Strategic Litigation and Settlement Considerations
- **Benefit Claims Litigation**: The Scope and Limitations of Discovery, Addressing Requests for Evidence Outside of the Record in 'Conflict' Situations, Judicial Review of Claims Decisions and the Battle Over Discretion, Attorney Fees Post-*Hardt*, the Enforceability of ERISA Plan Limitation of Actions Clauses, and More

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Attorneys handling litigation for:

- ERISA fiduciaries
- ERISA service providers
- Benefit plan sponsors
- Employee benefit plans

In-house counsel for:

- Plan sponsors
- Service providers

- Fiduciary liability insurance policy writers
- Employee pension and benefit attorneys
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7:30 Registration and Continental Breakfast

8:00 Chairs' Welcoming Remarks



H. Douglas Hinson
Partner
Alston & Bird LLP





Amanda S. Amert
Partner
Jenner & Block LLP



Michael J. Prame
Principal
Groom Law Group, Chartered

8:10 **In-House Roundtables: Perspectives on Plan Sponsor Liability, Limiting Fiduciary Liability, Implications of the ACA, Plan Document Language, De-Risking, Managing Litigation, Service Provider Liability, Disclosure Requirements, the Claims Review Process, Securities Piggyback Litigation and More**


Panel 1: 8:10 – 9:25	Panel 2: 9:25 – 10:40
<p>Allison R. Klausner Assistant General Counsel – Benefits Honeywell International Inc.</p> <p>Cathy Cleveland Assistant General Counsel Northrop Grumman Corp.</p> <p>Ron Peppe Vice President Legal & Human Resources Canam Steel Corporation</p> <p>Rachel S. Urquhart Sr. Attorney, Employment and Benefits Argonne National Laboratory</p> <p>Vicki D. Blanton Senior Benefits Counsel American Airlines, Inc.</p> <p>Sharon Goldzweig Associate Counsel Consolidated Edison Inc.</p> <p>Derek J. Windham Associate General Counsel Del Monte Corporation</p>	<p>Laura Tholen Senior Legal Counsel FMR LLC/Fidelity Investments</p> <p>Jessica M. Lermond Complex Claims Director AIG</p> <p>Peter M. Kelly Chief Employee Benefits Counsel Blue Cross Blue Shield Association</p> <p>Rian Miller Vice President & General Counsel Mercer</p> <p>Douglas Morris Senior Vice President Lockton Financial Advisors, LLC</p> <p>Lisa Hughes Cain Counsel Humana</p> <p>Wendy Katherine Von Wald Assistant Vice President, Sr. Specialist Chubb Insurance</p> <p>Eric Powers Associate General Counsel Crawford & Company</p>
<p>Moderator:</p> <p> Nancy G. Ross Partner McDermott Will & Emery LLP</p>	<p>Moderator:</p> <p> Miriam (Dusty) M. Burke Partner Vinson & Elkins LLP</p>

- Implications of the ACA for in-house counsel
- Due diligence in the selection of service providers
- Managing the blurring of lines (and liabilities) among different service providers
- Liability arising from alternative investments, such as hedge funds and private equity
- Minimizing the potential for litigation arising from DOL disclosure requirements
- Overlap of independent contractor misclassification claims with ERISA fiduciary liability claims
- Managing relationships with plan sponsors and best practices for overcoming conflicts

- Litigation arising between service providers and plan sponsors
- Assessing the potential liability of a plan sponsor for actions of the plan record keepers
- Making the decision to de-risk
- Ensuring that the language in plan documents adequately protects the plan sponsor and minimizes exposure to litigation
- Claims handling considerations
- Directors and officers liability exposure in ERISA and securities piggyback lawsuits


10:40 Morning Coffee Break

10:50 **Equitable Remedies Under ERISA §502(a)(3), *Cigna v. Amara* and *U.S. Airways v. McCutchen*: The Ongoing Fallout From These Cases and Their Progeny**

**Reena R. Bajowala**
Partner
Jenner & Block LLP

**Lori A. Meaders**
Senior Attorney
Southern California Edison Company

**Andrew L. Oringer**
Partner
Dechert LLP

**John J. Myers**
Partner
Eckert Seamans Cherin & Mellott, LLC

- Assessing the ongoing impact of *Amara* and its progeny on ERISA litigation
- The new remedies and 502(a)(3) landscape
- Impact of *U.S. Airways v. McCutchen* on remedies
- Best strategies for arguing against monetary damages as a form of 'equitable relief'
- Minimizing damages in the wake of *Amara*
- How have *Amara* and its progeny changed the remedies landscape from the plaintiff's viewpoint
- How have the courts interpreted 'plan terms'?
- Assessing whether *Amara* only applies to cases involving intentional misrepresentations or if it is also applicable to cases involving negligent misrepresentations
- Lessons learned from *Amara* and its progeny regarding disclosure issues

11:55 **Networking Lunch for Speakers and Delegates**


12:55 **Litigation Regarding Plan Investments: The Latest on Employer Stock - *Fifth Third v. Dudenhoeffer* and Beyond; New Theories of Liability; Defenses Such as Standing, Statute of Limitations, and 404(c); Alternative Investments; Issues in De-Risking**

**Mark Casciari**
Partner
Seyfarth Shaw LLP

Denise Sisk
Managing Director
State Street Global Advisors

Mary Jo Anderson
Corporate Counsel
Dupont


**H. Douglas Hinson**
Partner
Alston & Bird LLP

**Lewis R. Clayton**
Partner
Paul, Weiss, Rifkind, Wharton & Garrison LLP


- *Fifth Third v Dudenhoeffer* and the Moench presumption of prudence in employer stock drop cases
- Article III standing v. ERISA standing

- Standard of Prudence in Employer Stock Cases: how to combat forum shopping by litigants seeking to challenge employer stock holdings by plans
- Alternative investments (e.g. hedge funds, private equity, derivatives), funds allocation, and breaches of fiduciary duty
- Issues in De-risking: What constitutes de-risking?; Factors to consider when looking to de-risk; cost-benefit analysis; Due diligence; Litigation arising from de-risking; Questions relating to the who the fiduciaries are in these situations; Levels of care
- Disclosure Claims in ERISA Stock Drop Litigation
- Stock drop cases in the wake of recent case law
- ERISA's "Safe Harbor" Defense under Section 404(c): How have the courts interpreted the 404(c) requirements?
- Statute of Limitations issues
- Can the document dictate when the SOL begins to run?
- Forum shopping

2:10 **Withdrawal Liability: What You Need to Know and How to Avoid and/or Challenge It**

**Michael J. Prame**
Principal
Groom Law Group, Chartered

**Evan Miller**
Partner
Jones Day

**James P. McElligott Jr.**
Partner
McGuireWoods LLP


José M. Jara, JD, LLM
Principal, National Practice Leader Multiemployer Plans
Buck Consultants, A Xerox Company


- Redetermination liability and alter ego/control group issues
- Applicable exemptions
- The intent to evade or avoid
- Change in form
- Restructuring of a company
- Reallocation and mass withdrawal
- Auto-claw back v. presumption clawback
- The *Sun Capital* decision and the impact on private company plan sponsors with private equity fund financing

3:05 **Afternoon Break**

3:15 **ESOP Litigation: New and Emerging Claims and Recent Developments, With a Focus on DOL Investigations and Settlements**

Roy Tyson
Vice President
Chubb & Son

**Eric G. Serron**
Partner
Step toe & Johnson LLP

**Scott J. Stitt**
Partner
James E. Arnold & Associates, LPA

ESOP litigation is on the rise, in large part due to the DOL's enhanced scrutiny of these plans. This panel will focus on recent litigation trends, including related legal and fiduciary issues, as well as the DOL's increased attention to these plans.

- Enforceability of ESOP indemnity agreements
- Recent trends in ESOP private litigation and DOL enforcement priorities
- DOL audits and investigations
- “Hot button” issues that can come up in DOL audits and private litigation and recent decisions in ESOP cases that have addressed some of these issues
- Looking to the Future: DOL’s Proposed Regulation on the Definition of “Fiduciary”
- Whether, when and how courts may factor in the value of the ESOP notes acquired by seller
- Whether and when courts will allow ESOP-owned companies to indemnify ESOP fiduciaries

4:10 **401(k) Fee Cases: Current Litigation Trends, Evolving Defense Strategies, New DOL Disclosure Rules and Enforcement Initiatives, Impact of *Tussey and Tibble*, and More**

Michele Varnhagen
AARP



Mark B. Blocker
Partner
Sidley Austin LLP



David Tetrick Jr.
Partner
King & Spalding



Gregory Y. Porter
Partner
Bailey & Glasser LLP

- Current litigation landscape from *Tussey* and *Tibble*
- Extension of the arbitrary and capricious standard of review in fiduciary actions by *Tibble*
- New statute of limitation issues
- Impact on service providers
- DOL enforcement activity and initiatives
- Service provider and procedural process activities
- Class actions challenging fiduciaries and record keepers for failure to comply with DOL regulations
- The use of proprietary funds as investment choices

5:20 **Affordable Care Act Issues: The Intersection Between ACA Retaliation and ERISA 510 Cases, Decisions Affecting Full/Part-Time, Workforce Re-Structuring and Alternative Workforces, and Beyond**



Brian S. Cousin
Partner
Dentons US LLP



Elise D. Klein
Partner
Lewis Brisbois Bisgaard & Smith LLP

- Assessing the likelihood of a surge of ACA litigation in the coming year
- The types of ERISA claims and new theories of liability that can be expected from ACA litigation
- Evaluating the various provisions of the new healthcare law and anticipating the types of ERISA litigation that will result from them
- Developing effective defense strategies and minimizing exposure to such claims

- ACA Retaliation and ERISA 510: 2014 decisions coming down pike and decisions affecting the full-time/part-time mix
- The ACA and Workforce Structuring Issues and Risks in Alternative Workforces
- Impact of the ACA on preemption issues

6:00 **New Trends in Church Plan Litigation**



William Patton
Shareholder
Lane Powell PC

- Assessing recent actions brought against church plans
- Exclusion of such plans from ERISA requirements
- What are successes or failures of church plan litigation? Where does it go from here?
- What are the implications of this litigation in broader context?
- PBGC responsibility for the plans
- Nuances regarding same sex marriage, contraception, and social conscious investment decision-making
- Congressional action on the ERISA’s church plan exemption?
- What is sufficient for participant notice?
- What steps should church plan sponsors take to protect their plans from a successful challenge?

6:25 **Conference Adjourns**

DAY TWO – TUESDAY, APRIL 29, 2014

7:30 **Continental Breakfast**

8:00 **A Focus on Class Actions (E.g., Excessive Fees, Stock Drop, Defined Benefit and Welfare Plan Claims): New and Emerging Cases and Theories; the Continuing Impact of Dukes and Progeny on Certification; New Settlement Considerations; Nuances on Rule 23 (A), (B) and (F); Subclasses and Bifurcation; Interlocutory Appeals; and More**



Charles F. Seemann III
Partner
Jackson Lewis P.C.



Brian Boyle
Partner
O’Melveny & Myers LLP



Jason J. Mendro
Partner
Gibson, Dunn & Crutcher LLP

Matt Gnabasik
Managing Director
Blue Prairie Group

Matthew Shors
Deputy General Counsel
United Health Group

- Assessing the impact of recent case law on ERISA class actions
- Class actions and certification in the wake of *Comcast v. Behrend*
- The continuing fallout from *Wal-Mart v. Dukes* and *AT&T Mobility v. Concepcion* and *American Express Co. v. Italian Colors Restaurant* on ERISA class actions
- Defeating class certification
- Stock Drop Certification and Class Action Issues in Stock Drop
- Class Cert in Defined Benefit and Welfare Plan Litigation

- Determining whether and when a purported class of ERISA plaintiffs will be certified
- How the plaintiffs' bar has adapted to the new class action landscape: New and emerging strategies
- Defense strategies for defeating class certification in the new environment
- Unique issues pertaining to damages in an ERISA class action
- Circumstances in which class certification can be desirable for the defense
- Settlement nuances, including class settlements in excessive fee cases
- New developments on Rule 23(a), (b) and (f), subclasses and bifurcation, and interlocutory appeals
- The role of the United States Supreme Court in ERISA litigation

9:05 **The View From the Bench**



Hon. Ruben Castillo
Chief Judge
U.S. Dist. Ct., N.D. Ill.



Hon. Roslyn O. Silver
Senior District Judge
U.S. Dist. Ct., D. Ariz.



Hon. Wiley Y. Daniel
Chief Judge
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Hon. Donetta W. Ambrose
Senior District Judge
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Hon. Eric F. Melgren
District Judge
U.S. Dist. Ct., D. Kan.



Hon. Richard S. Schmidt
Bankruptcy Judge
U.S. Dist. Ct., S.D. Texas



Hon. Richard A. Kramer
Complex Litigation Judge
Super. Ct. Calif

Moderator:



Caroline English
Partner
Arent Fox LLP

10:35 **Morning Coffee Break**

10:45 **Expert Coordination: Working With Financial and Fiduciary Experts**



Susan Mangiero
Managing Director
Fiduciary Leadership, LLC



Ronald S. Kravitz
Partner
Liner Grode Stein Yankelevitz Sunshine Regenstreif & Taylor, LLP

Joseph M. Callow, Jr.
Partner
Keating Muething & Klekamp PLL

Many ERISA litigators will admit that the quality and communication skills of an economic expert can greatly impact the outcome of a case. Getting the right expert(s) in place sooner than later can be a distinct advantage. When that does not occur, important items may be excluded from discovery

or pre-motion analysis. This panel will focus on the challenges associated with tight client budgets, working with multiple experts, knowing when to bring an expert(s) on board and evaluating how much information to share.

11:35 **ERISA Fiduciary Litigation: Minimizing Exposure to Fiduciary Liability Through Procedural Prudence and Documentation, New and Emerging Theories of Liability and Defenses, Strategies for Statute of Limitations and Statute of Repose Defenses, and More**



Amanda S. Amert
Partner
Jenner & Block LLP



Mark Spencer
Partner
McAfee & Taft, PC



Denise M. Clark
Partner
Clark Law Group, PLLC



Jeanne L. Bakker
Partner
Montgomery McCracken Walker & Rhoads LLP

- Best practices for limiting fiduciary liability
- “Procedural” prudence and documentation of process
- Expected litigation should a broadening of the DOL fiduciary standard occur
- Fiduciary status of service providers
- When is a service provider a fiduciary?
- Assessing claims of breach of fiduciary duty relating to proprietary funds
- Determining who the ERISA plan fiduciaries are and defeating plaintiffs’ attempts to delineate the plan fiduciaries
- Countering the efforts of plaintiffs’ counsel to expand ERISA fiduciary duties
- Winning dismissal of improperly-named defendants
- Assessing new and emerging theories of liability from the plaintiffs’ bar
- Developing effective defense strategies against new plaintiffs’ theories
- Arguments that start claim accruals early and support 413(1)(a) fiduciary breach claim statute of repose
- Whether the “actual harm” element of a fiduciary breach turns on individual reliance
- What to do when a fiduciary finds out that a plan trustee has made an investment that has suffered a loss
- Assessing the available remedies and damages when fiduciary liability is determined
- Defending against a DOL, DOJ or SEC investigation
- The “continuing violation” theory and the statute of limitations
- Releases: extension of general releases; release application
- Can a “properly” worded release preclude plaintiff from initiating, taking part in, or benefitting from a breach of fiduciary duty class action?

12:45 **Fiduciary Liability Insurance: Assessing Current Coverage & Future Needs & Strategic Litigation and Settlement Considerations**

Barbara Gubitose
Senior Vice President
Wells Fargo Insurance

Carrie O'Neil
Senior Vice President
Aon Risk Insurance Services West, Inc.



Kimberly Melvin
Partner
Wiley Rein, LLP

- Strategic Litigation Considerations When Fiduciary Insurance Is Involved
- Settlement Considerations When Fiduciary Insurance is Involved
- Assessing your needs and ensuring proper coverage: Key terms and conditions and common coverage disputes; Key exclusions; Insurance issues that arise when service providers (TPAs, record keepers, etc.) are involved
- Typical policy provisions and the issues they raise, and strategic considerations that arise as a result
- Coverage issues under ERISA fiduciary liability insurance
- What's currently being covered and not covered in fiduciary liability policies? Coverage extensions?
- Indemnification and liability insurance coverage options for ERISA fiduciaries
- Lessons to learn from recent ERISA fiduciary liability insurance coverage cases
- ERISA fiduciary liability insurance negotiation, placement and underwriting issues

1:40 **Networking Luncheon**

2:35 **Benefit Claims Litigation: The Scope and Limitations of Discovery, Addressing Requests for Evidence Outside of the Record in 'Conflict' Situations, Judicial Review of Claims Decisions and the Battle Over Discretion, Attorney Fees Post-Hardt, Limitation Periods in Plans Post-Heimeshoff, and More**



Stephanie Edwards
General Attorney
AT&T Services, Inc.

Victoria L. Gorokhovich
Senior Counsel
Cigna Legal



Norris A. Adams, II
Partner
Essex Richards, P.A.



Michael H. Bernstein
Partner
Sedgwick LLP



James A. Keller
Partner
Saul Ewing LLP



Daniel W. Maguire
Partner
Burke, Williams & Sorensen, LLP

- Assessing recent key cases in benefits litigation
- The evolution of permissible discovery
- Conflicts of interest and the proper scope of discovery
- Avoiding ERISA penalties when responding to document requests
- Best practices for limiting discovery to the administrative record

- Current status of the arbitrary and capricious standard of review
- Judicial review of claims decisions – how has the case law evolved?
- What deference should a court give to a plan administrator's decision denying a claim for benefits?
- The continuing evolution of attorneys' fee awards after Hardt
- Plan limitations period issues
- Issues specific to retiree benefits
- Accidental Death & Dismemberment ("AD&D") cases, decided in the past year, that were brought under ERISA
- Disability claims: State prohibitions on discretionary clauses; Limitation periods in ERISA benefit plans post-*Heimeshoff*; Implications and challenges of a court's decision to remand; Subrogation and recovery of overpayments
- Litigation relating to healthcare plans and prevailing or average rates

4:15 **New Trends in Executive Compensation Litigation**



Michael J. Prame
Principal
Groom Law Group, Chartered



David Tetrick Jr.
Partner
King & Spalding

Derek J. Windham
Associate General Counsel
Del Monte Corporation

- The relationship between ERISA claims and executive compensation claims
- Challenges under the clawback division of Dodd Frank
- Issues related to mergers and acquisitions
- What you need to know to prepare for these types of claims

5:15 **Conference Ends**

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