

# ERISA LITIGATION

*Expert defense strategies for leading outside counsel and in-house counsel  
on litigating today's key issues involving fiduciaries, plan fees and benefit claims*

April 14-15, 2011 • J.W. Marriott at Union Square • San Francisco, CA

3 Circuit judges and 17 District judges from courts located in 7 Circuits will help you convey ERISA complexities:



*Hon. Michael S. Kanne*  
United States Court of Appeals, Seventh Circuit



*Hon. Michael R. Murphy*  
United States Court of Appeals, Tenth Circuit



*Hon. Carl E. Stewart*  
United States Court of Appeals, Fifth Circuit



*Hon. Lance Africk*  
U.S. Dist. Ct., E.D. La.



*Hon. Harold Baer*  
U.S. Dist. Ct., S.D.N.Y.



*Hon. Robert Collings*  
U.S. Dist. Ct., D. Mass.



*Hon. Lloyd D. George*  
U.S. Dist. Ct., D. Nev.



*Hon. David R. Herndon*  
U.S. Dist. Ct., S.D. Ill.



*Hon. Daniel E. Knowles, III*  
U.S. Dist. Ct., E.D. La.

## Faculty includes 23 in-house counsel from:

Aetna	Fidelity
Alcoa Inc.	Honeywell
American Airlines	Lockton Financial Advisors
Aon Financial Services	Paychex, Inc.
Automobile Protection Corp.	Prudential
Blue Prairie Group	Segal
Chartis	State Street Bank
Chubb & Son	United Retirement Plan Consultants
Computer Sciences Corp.	Wells Fargo Insurance
Continental	Willis
Crawford & Co.	

## Senior in-house counsel, top outside defense litigators & renowned federal jurists will provide you with winning strategies & practical information on:

- Preventative measures to eliminate or mitigate ERISA exposure
- Anticipating litigation that will arise out of the Affordable Care Act
- In-house counsel and service provider solutions to the problems inherent in plan administration and fiduciary liability
- 401(k) fee trials, the DOL's fee transparency initiatives, and the latest trends in stock drop litigation
- Managing litigation that arises between service providers and sponsors
- Structuring plan documents to comply with the DOL's new regulations on fee disclosure
- Strategies for reducing litigation surrounding retiree welfare benefits
- **Judicial communication:** Explaining plan documents and ERISA nuances to the court
- **Insights on the current issues in pension plan litigation,** including defined benefit plans, plan severance and multiemployer plan litigation



*Hon. James Robart*  
U.S. Dist. Ct., W.D. Wash.



*Hon. Stephen Wm. Smith*  
U.S. Dist. Ct., S.D. Tex.



*Hon. John Coughenour*  
U.S. Dist. Ct., W.D. Wash.



*Hon. Denise Page Hood*  
U.S. Dist. Ct., E.D. Mich.



*Hon. Dan Aaron Polster*  
U.S. Dist. Ct., N.D. Ohio



*Hon. Nancy G. Edmunds*  
U.S. Dist. Ct., E.D. Mich.



*Hon. Marilyn D. Go*  
U.S. Dist. Ct., E.D.N.Y.



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



*Hon. Viktor Pohorelsky*  
U.S. Dist. Ct., E.D.N.Y.



*Hon. Keith Starrett*  
U.S. Dist. Ct., S.D. Miss.



*Hon. Richard Stearns*  
U.S. Dist. Ct., D. Mass.

## Exhibitors:

**ALSTON  
+ BIRD** LLP

**BARNES &  
THORNBURG** LLP

**GT** GreenbergTraurig

**SCHIFFHARDIN** LLP  
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## The ERISA conference that quickly established itself as the industry's best is back for its third installment...this time on the West Coast.

*You can't miss the only conference that is devoted entirely to the defense of claims and led by an unparalleled faculty of 23 in-house counsel, 20 federal judges and top outside defense counsel. No other ERISA conference will provide you with as much comprehensive, practical information to help you shape and win your ERISA cases.*

ERISA related litigation continues to capture the headlines and fill the federal courts' dockets. On the heels of the economic crisis, the DOL is stepping up its initiatives to regulate service providers, plan sponsors and fiduciaries in an effort to establish pension security for America's workforce. Also, with the sweeping changes of the Affordable Care Act having increased costs to plan sponsors, implemented new procedural safeguards for plan participants, and required sweeping overhauls for insurance companies nationwide, benefit claim litigation is almost certain to increase as companies begin to comply with the new mandates.

In-house counsel, service providers and other ERISA fiduciaries know that as fast as companies are responding to allegations of ERISA violations and implementing procedures to protect themselves from further litigation, plaintiffs' counsel are creating new strategies for bringing – and winning – ERISA suits. As a result, the stakes involved for defendants continues to grow and there is simply no room for error in the defense of these claims. *There has never been a more important time for defense attorneys, in-house counsel and service providers to gain insights on plaintiffs' approaches and the best defense arguments so they can work proactively to reduce and manage ERISA litigation.*

At American Conference Institute's 3<sup>rd</sup> National Conference on Defending and Managing ERISA LITIGATION, for the first time on the West Coast, participants will have the unique opportunity to benchmark their practices with leading in-house counsel, insurers and outside defense counsel. You will gain crucial knowledge, practical strategies and exchange tactics with some of the most successful lawyers in the country who defend these claims regularly. Conference highlights include:

- **An in-house roundtable** with counsel from major corporations on **how to limit fiduciary liability, administer changes brought on by the ACA and manage ERISA related litigation**
- **A service provider roundtable** with tips on managing plan sponsor/ service provider relationships and strategies to limit the fiduciary role of service providers
- **A panel led by the top fiduciary liability insurance providers and the outside counsel who represent them**, with a discussion on how much coverage your clients need, how to structure your policy to ensure coverage and how to avoid common coverage disputes
- **A focus on 401(k) fee regulations, disclosure requirements and the trials that have already taken place** – led by the outside counsel who tried and the in-house counsel who managed those cases
- **The View From the Bench:** led by 3 Circuit Court judges and 17 District Court Judges, these renowned jurists will provide you with strategic insights on conveying your case to the court

*No other conference in the industry allows you to interact with the leaders in the industry while hearing the theories and defenses that can turn cases for – or against – you!* Do not miss the opportunity to learn from and network with the best, while obtaining unparalleled advice for dealing with this complex area.

*Also, be sure to take advantage of the Pre-Conference Workshops*

Wednesday, April 13, 2011

- A | **ERISA's Enforcement Scheme:** The Procedural Nuances, Available Remedies and Proper Parties Under §502(a) 9:00 a.m. – 11:30 a.m.
- B | **ERISA Preemption:** Countering Plaintiffs' Attempts to Overcome the Procedural and Substantive Aspects of the Defense 12:00 p.m. – 2:30 p.m.
- C | **ERISA Fiduciary Litigation:** The Newest Developments in Plaintiffs' Theories of Liability, Substantive Defenses and the DOL's Regulations on Fiduciary Status 3:00 p.m. – 5:30 p.m.

### What last year's delegates had to say:

*"This was a terrific seminar and it is not just for litigators. Anyone who counsels fiduciaries and plan sponsors about how to reduce liability exposure will find it valuable."*

– Carol Buckman, Osler Hoskin & Harcourt LLP

*"This seminar exceeded my expectations in all respects....First rate all the way."*

– Russell Buhite, Fowler White Boggs

*"Topics were great. Presenters were great. Incredibly practical."*

– Mary Pat Ninneman, Quarles & Brady LLP

*"This session was exceptional. The presenters were both engaged and engaging. They provided useful & creative views on ways in which defense counsel can defend their clients in the evolving ERISA landscape."*

– Erika Stanat, Harter Secrest & Emery LLP  
(commentary on the pre-conference workshop)

### Who You Will Meet

- ✓ 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 policy writers
- ✓ The in-house and outside counsel who managed and tried *Tibble v. Edison*
- ✓ Service providers for benefit & pension plans
- ✓ Federal Circuit and District Court judges from 7 circuits
- ✓ Employee pension & benefit attorneys
- ✓ Fiduciary liability insurance brokers & attorneys for insurers who write policies for ERISA related risks

## DAY ONE: Thursday, April 14, 2011

7:15 **Main Conference Registration & Continental Breakfast**

8:00 **Co-Chairs' Welcoming Remarks**



*H. Douglas Hinson*  
Partner  
Alston & Bird LLP (Atlanta, GA)



*Alison Martin*  
Assistant Vice President  
Chubb & Son (Pittsburgh, PA)

8:05 **In-House Roundtable on Administering Changes Brought by the Affordable Care Act, Managing Litigation, and Limiting Fiduciary Liability**

*Darren A. Fehring*  
Managing Attorney, Employee Benefits  
Continental Airlines, Inc. (Houston, TX)

*R. Eric Powers III*  
Corporate Counsel  
Crawford & Company (Atlanta, GA)

*Kurt D. Hallock*  
Assistant General Counsel  
Computer Sciences Corp. (El Segundo, CA)

*Vicki D. Blanton*  
Senior Benefits Counsel, Legal Department  
American Airlines (Fort Worth, TX)

*Virginia Wadsworth*  
General Counsel  
Automobile Protection Corp. (Norcross, GA)

*Wendy S. Laurento*  
Counsel  
Aetna (Blue Bell, PA)

*Nicolaas G. Storm*  
Senior Counsel (Benefits & Labor)  
Alcoa Inc. (Pittsburgh, PA)

Moderator



*Joelle C. Sharman*  
Lewis, Brisbois, Bisgaard & Smith LLP (Atlanta, GA)

- Preventative measures to eliminate or mitigate ERISA exposure
- Managing compliance with the *Affordable Care Act*
- Are there cost-effective ways to implement changes?
- Dealing with the new review procedures and finding independent third-party reviewers
- Developing a complete and well-reasoned administrative record
- Dispelling conflict of interest concerns
- Coordination of counsel, experts and litigation strategy
- How are outside counsel selected?
- Coordinating the defense between insurance carrier, in-house counsel, outside counsel and the client

9:25 **Service Provider Roundtable: Inside Views from TPAs, Consultants, Actuaries, and Record Keepers on the Problems Inherent in the Administration of Employee Benefit Plans**

*Brian Madrazo*  
Senior Corporate Counsel  
Paychex, Inc. (Rochester, NY)

*Margaret Raymond*  
Vice President, Associate General Counsel  
FMR LLC (Boston, MA)

*Russell Dempsey*  
Vice President & Chief Legal Officer  
United Retirement Plan Consultants (Dublin, OH)

*James McDowell*  
Vice President & Senior Counsel  
State Street Bank & Trust Co. (Alameda, CA)

*Matthew Gnabasiak*  
Managing Director  
Blue Prairie Group LLC (Chicago, IL)

*Steven Kjar*  
Vice President  
Lockton Financial Advisors (San Francisco, CA)

Moderator



*Michael J. Prame*  
Groom Law Group, Chartered (Washington, D.C.)

- Managing relationships with plan sponsors
- Recognizing trouble spots in plans and communicating them with the sponsor
- Strengthening the sponsor/service provider relationship through effective communication
- Coordinating the defense once a suit is filed
- Top areas of concern for service providers
- Tips for reducing sponsor and service provider liability

10:45 **Morning Coffee Break**

11:00 **Fiduciary Liability Insurance: Assessing Current Coverage and Future Needs**



*Christine A. Dart*  
Vice President, Global Fiduciary Liability Product Manager  
Chubb & Son (Simsbury, CT)



*Angela R. Elbert*  
Neal, Gerber & Eisenberg LLP (Chicago, IL)



*Lawrence Fine*  
SVP and Chief Technical Officer – Financial Lines  
Chartis Claims, Inc. (New York, NY)



*Kimberly M. Melvin*  
Wiley Rein LLP (Washington, D.C.)



*Steven Shappell*  
Managing Director, Aon Financial Services Group

*Ann Longmore*  
Executive Vice President, Willis of New York, Inc. (New York, NY)

*Miles R. Afsbarnik*  
Vice President, Claim & Legal Resource Director  
Wells Fargo Insurance Services (New York, NY)

*Harold Neher*  
Vice President – Claims, AXIS Insurance (Berkeley Heights, NJ)

- How much insurance should your fiduciaries have?
- Strategic considerations for purchasing fiduciary liability insurance policies
- Key terms and conditions and common coverage disputes
- Negotiation, placement and underwriting issues
- Structuring your policy to prevent coverage litigation and ensure coverage where you need it
  - Understanding the scope of the bad conduct exclusion
  - Ensuring that there is a duty to defend until there is adjudication on the bad conduct issue

- How you can structure early pleadings to insure coverage
- Insurance negotiation, placement and underwriting issues
- Understanding the top concerns of underwriters and how to alleviate them – structuring your fiduciary’s role to minimize risk and lower the cost of insurance
- Structuring priority obtainments for defense costs
- Coverage triggers: knowing your claims made policy obligations

## 12:30 Networking Luncheon for Speakers & Delegates

### 1:45 401(k) Fees & Disclosure: A Focus on Fee Litigation Trials and the DOL’s Regulatory Initiatives

*Margaret Raymond*

Vice President, Associate General Counsel, FMR LLC (Boston, MA)



*Jonathan L. Sulds*

Greenberg Traurig, LLP (New York, NY)



*Sarah L. Burt*

Vice President, Corporate Counsel  
Prudential Insurance Company of America (Newark, NJ)



*Gary S. Tell*

O’Melveny & Myers LLP (Washington, D.C.)



*Thomas L. Cabbage III*

Covington & Burling LLP (Washington, D.C.)



*Paul J. Ondrasik, Jr.*

Stephens & Johnson LLP (Washington, D.C.)

#### The Current Overview

- Plaintiffs’ evolving theories of liability and recent decisions
- Optimizing strategies in a motion to dismiss
- Retail v. Institutional share classes: defending your investment platform
- Defending the prudence of actively managed funds

#### Spotlight on the DOL’s Disclosure Rules

- The DOL’s Proposed 408(b)(2) Regulation: Impact of the mandated disclosures on plan fiduciaries and service providers
- What disclosure is required?
- Getting disclosure documents in order in light of new legislation
- What will DOL enforcement initiatives look like?
- Establishing transparency in fees

#### Fee Litigation Trials: *Tussey v. ABB* & *Tibble v. Edison*

- An overview and critical insights from defense counsel
- Defending the procedural process record and the fiduciary’s decision in choosing service providers
- Coordinating pre-trial motions and trial strategy to develop a comprehensive defense of plan investment decisions
- Expert testimony: what experts are needed, how to develop their testimony at trial, and the role it plays in the defense
- Defending the service provider in fee litigation cases
- What constitutes a “reasonable” fee? Benchmarking your clients’ plan fees against industry standards
- How much negotiation of fees is required to meet fiduciary standards?

## 3:00 Afternoon Refreshment Break

### 3:15 Avoiding the Pitfalls in Retiree Welfare Benefits Litigation: Alternative Strategies for Funding Retiree Healthcare, Bargaining with the Retired Workforce, and Strategies Once a Case is Filed



*Charles S. Mishkind*

Miller Canfield Paddock & Stone, P.L.C. (Grand Rapids, MI)



*Nancy G. Ross*

McDermott Will & Emery LLP (Chicago, IL)



*Steven J. Sacher*

Jones Day (Washington, D.C.)



*Howard E. Kochell*

Barnes & Thornburg, LLP (Indianapolis, IN)

#### Liability & Litigation Strategy Overview

- An analysis of the issues in funding retiree medical
- How does health care reform affect costs going forward now? After 2014?
- Where will retiree medical face the most litigation trouble?
- Preventing the union’s effort to get involved in retiree medical litigation
- Determining when an employer can make unilateral changes in retiree health care obligations
- Forum shopping:
  - Strategies for preventing plaintiff forum shopping
  - Taking proactive steps to be in a favorable district/circuit
  - An overview of where multi-state employers want to litigate
- The intersection of ERISA and Taft-Hartley §301

#### VEBAs

- The pros and cons of VEBAs
- When a company with large amounts of OPEB liability should consider a VEBA
- The procedural issues paramount in class action litigation and binding the class

4:30

### Conflicts in Plan Sponsor and Service Provider Relationships: Strategies for Establishing Clear Relationships and Fiduciary Responsibility, Coordinating the Defense Once a Suit Has Been Filed, and Managing the Litigation



*Michael J. Prame*

Groom Law Group, Chartered (Washington, D.C.)



*Elizabeth J. Bondurant*

Smith Moore Leatherwood LLP (Atlanta, GA)



*Susan Mangiero*

Investment Risk Governance Expert  
Fiduciary Leadership, LLC (Trumbull, CT)



*Bradley J. Schlichting*

Counsel, Wells Fargo & Co. (Minneapolis, MN)

- The unique issues that arise in connection with the provision of services to employee benefit plans
- Understanding the division of responsibilities and whether discretion has been delegated to the service provider
- Assessing the fiduciary status of third-party service providers
- Countering claims involving fiduciary duties in selection and monitoring service providers
- Defending litigation between plan sponsors and service providers
- Issues inherent in the use of TPAs, recordkeepers, actuaries, investment advisors and other consultants

5:30

## Conference Adjourns

## Continuing Legal Education Credits



Accreditation will be sought in those jurisdictions requested by the registrants which have continuing education requirements. This course is identified as nontransitional for the purposes of CLE accreditation.

ACI certifies that the activity has been approved for CLE credit by the New York State Continuing Legal Education Board in the amount of 15.0 hours, of which 1.0 will apply to ethics. An additional 3.0 credit hours will apply to each workshop.

ACI certifies that this activity has been approved for CLE credit by the State Bar of California in the amount of 12.75 hours, of which 1.0 will apply to ethics. An additional 2.5 credit hours will apply to each workshop.

You are required to bring your state bar number to complete the appropriate state forms during the conference. CLE credits are processed in 4-8 weeks after a conference is held.

ACI has a dedicated team which processes requests for state approval. Please note that event accreditation varies by state and ACI will make every effort to process your request.

Questions about CLE credits for your state? Visit our online CLE Help Center at [www.americanconference.com/CLE](http://www.americanconference.com/CLE)

7:30 **Continental Breakfast**

8:00 **The Issues on Appeal: Federal Circuit Court Judges Weigh in on ERISA's Appellate Issues**



*Hon. Michael S. Kanne*  
United States Court of Appeals,  
Seventh Circuit  
*Moderator*



*Hon. Michael R. Murphy*  
United States Court of Appeals,  
Tenth Circuit



*Hon. Carl E. Stewart*  
United States Court of Appeals,  
Fifth Circuit



*H. Douglas Hinson*  
Alston & Bird, LLP (Atlanta, GA)

- The debate over the *Moench* presumption regarding employer securities
- The existence and parameters of a duty to disclose under ERISA beyond the statutory requirements
- The 404(c) defense
- *Glenn v. Metlife*, and its effect on benefit claims litigation
- Preemption in the wake of Obamacare and state regulatory reforms
- Estoppel, fiduciary breach and other claims based on oral communications v. written plan requirement
- DB Litigation – anti-cutback, backloading, whipsaw and more

9:00 **The View from the Bench: Federal District Court & Magistrate Judges Speak Out on How to Convey ERISA Complexities to a Court, Conflict Discovery, Effective Theories/Defenses and More**

*Panel 1 9:00 – 10:25 (break from 10:25 – 10:35)*



*Hon. David R. Herndon*  
U.S. Dist. Ct., S.D. Ill.



*Hon. Denise Page Hood*  
U.S. Dist. Ct., E.D. Mich.



*Hon. Dan Aaron Polster*  
U.S. Dist. Ct., N.D. Ohio



*Hon. James Robart*  
U.S. Dist. Ct., W.D. Wash.



*Hon. Richard Stearns*  
U.S. Dist. Ct., D. Mass.



*Hon. Daniel E. Knowles, III*  
U.S. Dist. Ct., E.D. La.



*Hon. Denise Go*  
U.S. Dist. Ct., E.D.N.Y.



*Hon. Stephen Wm. Smith*  
U.S. Dist. Ct., S.D. Tex.

*Moderator*



*Nicholas J. Pappas*  
Weil, Gotshal & Manges LLP (New York, NY)

*Panel 2 10:35 – 12:00*



*Hon. Lance Africk*  
U.S. Dist. Ct., E.D. La.



*Hon. Harold Baer*  
U.S. Dist. Ct., S.D.N.Y.



*Hon. John Coughenour*  
U.S. Dist. Ct., W.D. Wash.



*Hon. Nancy G. Edmunds*  
U.S. Dist. Ct., E.D. Mich.



*Hon. Lloyd D. George*  
U.S. Dist. Ct., D. Nev.



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



*Hon. Keith Starrett*  
U.S. Dist. Ct., S.D. Miss.



*Hon. Robert Collings*  
U.S. Dist. Ct., D. Mass.



*Hon. Viktor Pohorelsky*  
U.S. Dist. Ct., E.D.N.Y.

*Moderator*



*Michael J. Newman*  
Dinsmore & Shohl LLP (Cincinnati, OH)

You cannot afford to miss the unique opportunity to hear federal district court judges and magistrates speak out on: *the theories and defenses that are the most effective, which arguments work in a motion to dismiss, the best way to limit discovery in a conflict situation, and judicial pet peeves.* This is the information that could turn your case! Come prepared with your most important and pressing questions to get the most out of this interactive session.

12:00 **Pension Plan Litigation: Current Issues in Defined Benefit Plans, Plan Severance and Multiemployer Plan Litigation, and a Look into the Future of Litigation Surrounding Public Pension Plans**

*Brian L. Smith*  
S.V.P. & Practice Leader, Segal Insurance Services (New York, NY)



*Susan K. Hoffman*  
Littler Mendelson P.C. (Philadelphia, PA)



*Carol Conner Cohen*  
Arent Fox LLP (Washington, D.C.)



*David Tetrick, Jr.*  
King & Spalding LLP (Atlanta, GA)

*Multi-employer Fund Litigation*

- Issues when a fund is in the red zone: making and recording requests for verifiable actuarial statements and what constitutes good cause for delay in an administrator's response to a request for liability
- Withdrawal and successor liability and other hidden traps in contribution litigation

*Litigation Arising From Defined Benefit Plans*

- 204(h) notice litigation
- 204(g) cutback litigation: determining when a benefit has accrued and when cutbacks are permitted
- The recessionary economy's impact on defined benefit plans
- Benefit limitations in bankruptcy under §206(g) and IRC §436
- Backloading and cash balance plan litigation updates
- Funding relief and its restrictive effect on executive compensation

### Severance and Downsizing Litigation

- PBGC liability and notice requirements
- 4062(e) litigation

### An Issue on the Horizon: A Focus on the Future of Public Pension Plans and Insights Into the Rising Trend in Litigation

- An analysis and overview of the litigation that is coming
  - Who are the plaintiffs?
  - What law will govern these claims?
  - What defenses will be available?
  - Where to look for guidance
- What standards will fiduciaries be held to for plan investment choices?
- How will public entities deal with underfunded plans?
- Restructuring pension plans for new hires – what can public entities do now to prevent underfunding in the future?
- Dealing with union negotiated pension plans for public employees
- How similar will these cases be to ERISA claims? What ERISA concepts can/will the courts rely on?

## 1:10 Networking Luncheon for Speakers & Delegates

## 2:10 ESOP & Stock Drop Litigation: The Complexities of Offering Employer Stock, Defending Against Stock Drop Suits, Establishing Investment Prudence, Procedural Cautions in Fund Management, and Selection of Service Providers



### *Lawrence Fine*

SVP and Chief Technical Officer – Financial Lines  
Chartis Claims, Inc. (New York, NY)



### *Alison Martin*

Assistant Vice President, Chubb & Son (Pittsburgh, PA)



### *Christopher J. Rillo*

Schiff Hardin LLP (San Francisco, CA)



### *H. Douglas Hinson*

Alston & Bird LLP (Atlanta, GA)



### *Miriam "Dusty" M. Burke*

Vinson & Elkins LLP (Austin, TX)

- What are companies considering when deciding whether to offer employer stock as an investment option?
- Getting unfounded cases dismissed at the pleadings stage by:
  - Advantages and legal issues involved with mandatory plan requirements to invest company stock
  - Showing company performance expectations in the most favorable light
  - Choosing and effectively using financial experts
- Special considerations for publicly traded companies
  - What effect will pulling company stock out of the plan have on stock price?
  - What financial information must be disclosed to other shareholders when a company decides to pull company stock out of the pension plan?
  - What are the securities liabilities for removing stock from a plan based on unpublicized information?
- Are defined benefit plans subject to stock drop challenges?
- *Quan v. Computer Sciences Corp.*: The implications of the 9<sup>th</sup> Circuit's adoption of the *Moench* presumption
- Private company ESOP litigation
  - Concerns about indemnification
  - Selecting the right experts
  - Transaction based claims
  - Defending claims based on annual valuations
- Similarities and differences in the defense of companion securities litigation cases
- Can investment decisions be subject to administrative review under ERISA?
- Coordinating the defense of fiduciaries and managing conflicts where a fiduciary is alleged of misconduct
- Attaching the plaintiff's standing and adequacy as a class representative

## 3:30 Afternoon Refreshment Break

3:40

## A Focus on Health & Welfare Benefit Plans: Coordinating Uniform Interpretation of Plans & Administration of Claims, Strategies for Resolving and Defending Litigation with Plan Participants, and Complying with the ACA



### *Allison Klausner*

Assistant General Counsel – Benefits, Corporate Law  
Honeywell International, Inc. (Morristown, NJ)



### *Craig R. Carlson*

Porter Wright Morris & Arthur LLP (Columbus, OH)



### *Anthony F. Shelley*

Miller & Chevalier Chartered (Washington, D.C.)



### *Rene E. Thorne*

Jackson Lewis LLP (New Orleans, LA)



### *Steven L. Severson*

Faegre & Benson LLP (Minneapolis, MN)



### *Joseph C. Liburt*

Orrick, Herrington & Sutcliffe LLP (Menlo Park, CA)

### Proper Evidence Before the Court, Limiting Conflict Discovery & the Standard of Review

- Dealing with the case as it was handed to you following a poor administrative process
- Defending the adequacy of the claims review process
- Limiting conflict discovery
- What is the scope of discovery in claims that are subject to the arbitrary and capricious standard of review?

### Provider Litigation

- Firming up your anti-assignment clause
- Defending against participating and non-participating provider litigation

### ACA Compliance

- Evolving your due diligence in light of the ban on retroactive rescission
- What changes do employers need to be making now? By 2014?
- Understanding and streamlining the new appeals procedures and dealing with the efficiency of third party claims reviewers
- Calculating and reporting the value of benefits
- The pros and cons of maintaining grandfathered status
- How to revise CBAs to reflect the new health care mandates
- How will health care reform affect a plan's relationship with its stop loss carrier?
- Anticipating litigation that will arise out of health care reform
- Determining medical loss ratios

4:50

## Overcoming ERISA's Ethical Issues: Establishing Representation with Proper Parties, Preserving Privilege, and Limiting Discovery of Privileged Documents



### *Michael J. Newman*

Dinsmore & Shohl LLP (Cincinnati, OH)



### *Amanda S. Amert*

Jenner & Block LLP (Washington, D.C.)

- Establishing the attorney-client relationship with the proper party in fiduciary liability situations
- Understanding the fiduciary exception to confidentiality
- Maintaining documents and the administrative record in a way that preserves privilege
- Counseling your client in making benefit decisions: how to maintain your role as the attorney, protect privilege and prevent being called as a witness
- Educating your clients about their different fiduciary hats
- Determining whether representation of multiple fiduciaries is possible
- Addressing the line of cases that apply the fiduciary exception to the attorney client privilege in matters of plan administration and claim adjudication
- Can a fiduciary assert privilege when discussing a claim for benefits before litigation arises?

5:50

## Conference Ends

ETHICS

# PRE-CONFERENCE WORKSHOPS

Wednesday, April 13, 2011

**A** 9:00 a.m. – 11:30 a.m.

## ERISA's Enforcement Scheme: The Procedural Nuances, Available Remedies and Proper Parties Under §502(a)



*Miriam "Dusty" M. Burke*  
Vinson & Elkins LLP (Austin, TX)

*This pre-conference workshop will lay the groundwork for the two days ahead! Join our experts at this ERISA primer to gain a strong grasp of this complicated statute, which can often be so hard to navigate. This course will provide an overview of the topics for the two days ahead and will leave even the most experienced participants with detailed information on and a practical analysis of the ERISA framework.*

### 502(a)(1)(A)

- What constitutes a "notice case" under 502(a)(1)(A)
- Who are the members of the Notice Class?

### 502(a)(1)(B)

- Limiting the claimant to benefits available under the plan
- The exhaustion requirement and the futility exception
- Limiting the scope of permissible discovery to the administrative record
- Standing to sue and assignment of rights
- Who can be a defendant in a 502(a)(1)(B) action?
- Preventing forum shopping



*Jonathan L. Sulds*  
Greenberg Traurig, LLP (New York, NY)

### 502(a)(2)

- Who is a plaintiff: the DOL, a participant, a beneficiary and other fiduciaries
- What are the available remedies, both legal & equitable
- Individual participant standing and remedies after *LaRue*
- Use of 502(a)(2) to avoid the exhaustion requirement and arbitrary and capricious standard of review under 502(a)(1)(B)
- Defeating class certification in investment loss claims under the "winners and losers" theory
- FRCP 23 requirements for class certification of ERISA fiduciary breach claims

### 502(a)(3)

- Determining when a violation of ERISA gives rise to only equitable relief
- The distinction between 502(a)(3) actions for violations of ERISA and 502(a)(1)(B) actions for claims for benefits under the plan

**B** 12:00 p.m. – 2:30 p.m.

## ERISA Preemption: Countering Plaintiffs' Attempts to Overcome the Procedural & Substantive Aspects of the Defense



*Craig R. Carlson*  
Porter Wright Morris & Arthur LLP (Columbus, OH)

*Time and again, ERISA preemption is raised – and fought – as both a procedural and substantive defense. Understanding what claims ERISA preempts and when can be challenging for even the most seasoned practitioners. This workshop will examine the key areas in which preemption arises, the strategies for countering plaintiffs' arguments against preemption and how to convey these complexities to the court.*

- The latest developments and litigation trends in ERISA preemption
- Determining how the ACA chips away at preemption
- Preemption analysis: what is and is not an ERISA plan?



*Anthony F. Shelley*  
Miller & Chevalier Chartered (Washington, D.C.)

- Common areas of preemption and determining which claims are not preempted
- Adequately pleading both complete and ordinary preemption
- How to defeat plaintiffs' arguments for common law theories of liability, a jury trial, remand to state court and common law contractual remedies
- Determining whether substantive preemption (under 514) is required for complete preemption removal (under 502)
- Preemption of state laws that relate to employee benefit plans
- Effectively conveying preemption theories to state and federal courts

**C** 3:00 p.m. – 5:30 p.m.

## ERISA Fiduciary Litigation: The Newest Developments in Plaintiffs' Theories of Liability, Substantive Defenses and the DOL's Regulations on Fiduciary Status



*Amanda S. Amert*  
Jenner & Block LLP (Washington, D.C.)

*With the DOL's new mandates on fiduciary status and responsibilities, plaintiffs' attorneys are sure to capitalize on the ever-increasing areas for liability. This highly focused workshop will take an in-depth look at ERISA Fiduciary Litigation – an area that is sure to see more action in light of the new regulatory framework. Join this interactive session to gain a clear view on the duties of ERISA plan fiduciaries, plaintiffs' oft-used theories of liability and the most effective defenses.*

### Determining Fiduciary Status & What Qualifies as Fiduciary Activity

- Determining when a company, sponsor, employee, officer, director or third party service provider is a fiduciary and what their fiduciary obligations are
- Winning dismissal for improperly named defendants

### The Impact of DOL Regulation on Defenses

- An overview and analysis of the DOL's new rules on:
  - Who is a fiduciary?
  - Can fiduciaries be liable for the mistakes of others?
  - What functions constitute fiduciary activity?



*Steven J. Sacher*  
Jones Day (Washington, D.C.)

### Fiduciary Governance

- How to select and organize your fiduciary committee
- Insulating your board and executives from fiduciary responsibility

### Liability and Damage Theories for Breaches of Fiduciary Duty

- Plaintiffs' new breach of fiduciary duty theories
- Reducing fiduciary liability by hardwiring your plan language
- Establishing procedural prudence in selection of service providers
- Developing procedures and documents that you can use to defend your fiduciary's position/decisions
- Making sure your fiduciaries have access to proper staff & consultants
- Defending fiduciary's asset management decisions
- Remedies and damages:
  - Countering the view that uncertainty in fixing damages must be resolved against the fiduciary
  - The legal uncertainties over whether and when damages arising from a breach of fiduciary duty may be recovered by an individual participant

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- A | ERISA'S Enforcement Scheme: The Procedural Nuances, Available Remedies and Proper Parties Under §502(a): 9:00 a.m. – 11:30 a.m.
- B | ERISA Preemption: Countering Plaintiff's Attempts to Overcome the Procedural and Substantive Aspects of the Defense: 12:00 p.m. – 2:30 p.m.
- C | ERISA Fiduciary Litigation: The Newest Developments in Plaintiffs' Theories of Liability, Substantive Defenses and the DOL's Regulations on Fiduciary Status: 3:00 p.m. – 5:30 p.m.

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