

American Conference Institute's Premier Forum on Defending and Managing

ERISA LITIGATION

Expert defense strategies for leading outside counsel and in-house counsel
on litigating today's key issues involving benefit plans and fiduciaries

October 19-20, 2009 – The Helmsley Park Lane Hotel – New York City

21 federal judges from
district courts located in
8 circuits will help you convey
ERISA complexities to a court.
HEAR FROM:



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U.S. Dist. Ct., D. Conn.



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U.S. Dist. Ct., E.D. Mich.



Hon. Patrick J. Duggan
U.S. Dist. Ct., E.D. Mich.



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International Paper	JCPenney	Lowe's
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Senior in-house counsel, top outside defense litigators and renowned jurists will provide you with up-to-the minute practical information on:

- » Using the **claims review process** to set up, control and strengthen the defense
- » Addressing evidence outside the **administrative record, standards of review, conflicts of interest & discovery**
- » **ERISA fiduciary litigation**: Newest plaintiffs' liability theories and substantive defenses, and trends in defense pleadings and motions
- » Employer stock in light of the economic downturn: Defending against **stock drop suits**, 401(k) fee cases and other defined contribution plan claims
- » **Communication with the Judge**: Explaining a plan and the ERISA statute to the court
- » **Service provider relationships**: Defending and managing litigation that arises between plans and providers
- » Analyzing plan **remedies** and the scope of equitable remedies to achieve realistic settlement expectations
- » ERISA **preemption** – the procedural and substantive aspects of the defense
- » **Welfare benefit cases and retiree health benefit litigation** post-*MetLife v. Glenn*
- » Defending against **age-based and other "recessionary economy" ERISA claims**: Cash balance plans, early retirement, reductions in force, and beyond
- » Devising procedural strategies in ERISA **class actions**
- » Overcoming the vexing ethical issues that arise with the **attorney-client privilege**

...AS WELL AS FROM:



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



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The premier ERISA litigation conference devoted *entirely to the defense of claims*, led by an unparalleled faculty of 28 in-house counsel, 21 federal judges, and the top outside counsel defense litigators and firms.

The volume of ERISA litigation has greatly increased. The cases are complex and the stakes involved for defendants are exceptionally high. There are huge variations in the types of cases that arise under ERISA, as well as substantive differences involved in defending against the various claims. The best plaintiff attorneys are getting into these cases because, among other things, they can recover attorney fees. As a result, the defense bar is seeing more and more class actions, with the top ten settlements for ERISA-related class action cases topping \$17 billion in 2008.

Throw in the current ERISA “environment” (including a recessionary economy and growing ranks of retirement-age demographic) and it’s entirely evident that *in defending and managing these complex claims, counsel for companies, plan fiduciaries, sponsors, administrators, advisors and insurers face a distinct uphill battle*, including:

- ERISA is a very **complex** law, making a detailed and thorough knowledge of its nuances absolutely necessary to be successful in litigation
- The relatively **scant legal precedent** and frequent legislative developments have made this knowledge difficult to obtain
- ERISA lawsuits often involve **novel and untested legal theories** (potentially creating new responsibilities and liabilities), making it even more important for those involved to know the law to craft a creative and effective case
- **Educating the judge** with respect to the technical/complicated issues involved with plans and the ERISA statute
- A **failure of plan professionals, sponsors or administrators** to have written procedures, follow those procedures, or document what they did to follow them
- Organized, well-connected, and effective **plaintiff attorneys** filing large numbers of lawsuits/theories and seeing what sticks, with the sheer volume of cases alone placing a huge burden on defense resources
- **Sympathy** for plaintiffs in today’s landscape and **juror bias** against defendant companies

As a result of this uphill battle, **there is simply no room for error in the defense of these claims**. In response, American Conference Institute is proud to introduce its premiere installment of *the essential advanced defense forum that will shape the future of ERISA strategies for leading litigators and in-house counsel*: **Defending and Managing ERISA Litigation**. Through a faculty of *distinguished outside defense counsel, 28 in-house counsel, and 21 renowned federal jurists*, this conference will provide even the most seasoned ERISA litigators with clarity and certainty with respect to *today’s key issues crucial to mounting a rigorous and complete defense*.

Our employment litigation events, including our annual *Wage & Hour* and *EPLI* conferences, offer unique opportunities for law firm litigators to learn from some of the best in the industry and for in-house counsel to gain expertise in evaluating litigation tactics and approaches and providing valuable input to the team. They offer tremendous networking opportunities.

Register now by calling 888-224-2480, faxing your registration form to 877-927-1563 or registering online at www.AmericanConference.com/ERISA

Who You Will Meet

- ✓ Attorneys handling litigation for:
 - employee benefit plans
 - benefit plan sponsors
 - ERISA fiduciaries
 - ERISA service providers
- ✓ Attorneys for insurers who write policies for ERISA related risks
- ✓ Employee pension and benefits attorneys
- ✓ Executives and decision makers whose actions could result in employee benefits litigation



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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.

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7:20 Registration and Continental Breakfast

8:00 Co-Chairs' Welcoming Remarks



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



Peter M. Varney
Counsel, Employee Benefits / ERISA
Lowe's Companies, Inc. (Mooresville, NC)

8:00 **In-House Think Tank on Containing Costs, Preventing and Managing Litigation, & Using the Claims Review Process to Set Up, Control and Strengthen the Defense**

<p>Panel 1 8:00-9:00</p> <p>Kevin M. Covert VP and Deputy General Counsel Honeywell International Inc. (Morristown, NJ)</p> <p>Stephanie A. Edwards General Attorney AT&T (Atlanta, GA)</p> <p>Wanda E. Flowers Chief Counsel, Labor, EEO & Employment Sunoco, Inc. (Philadelphia, PA)</p> <p>William M. Hassan Senior Counsel, Employment/Employee Benefits, Bayer Corporation (Pittsburgh, PA)</p> <p>Dori Anne Kuchinsky Senior Litigation Counsel W.R. Grace (Leesburg, VA)</p> <p>Diane Meess Senior Counsel, Benefits International Paper (Memphis, TN)</p> <p>Margaret Raymond V.P. Associate General Counsel FMR LLC (Boston, MA)</p> <p>Michael J. Rosner Attorney, Law Department The Goodyear Tire & Rubber Company (Akron, OH)</p> <p>Andrea Unterberger Assistant General Counsel Corporation Service Company (Wilmington, DE)</p> <p>Moderator:</p> <p> Evan J. Spelfogel Epstein Becker & Green, P.C. (New York, NY)</p>	<p>Panel 2 9:00-10:00 <i>(morning coffee break from 10:00-10:10)</i></p> <p>Marianne W. Culver Counsel The Boeing Company (Chicago, IL)</p> <p>John P. Forgach Senior Benefits Counsel W.R. Grace & Co. (Columbia, MD)</p> <p>Sharon Goldzweig Associate Counsel- Benefits, Law Department Consolidated Edison Company of New York (New York, NY)</p> <p>E. Jane Hix Associate Counsel, Office of General Counsel Thomas Jefferson University Hospitals, Inc. (Philadelphia, PA)</p> <p>Allison R. Klausner Assistant General Counsel – Benefits, Corporate Law Honeywell International Inc. (Morristown, NJ)</p> <p>Elliot D. Raff Counsel, HR Law Group Bristol-Myers Squibb Company (Princeton, NJ)</p> <p>Mary Ann Root Senior Managing Counsel JCPenney Corporation, Inc. (Dallas, TX)</p> <p>Jennifer Ting Senior Counsel Corporate Secretary, Security & Benefits Law, Legal Division The Procter & Gamble Company (Cincinnati, OH)</p> <p>Peter M. Varney Counsel, Employee Benefits / ERISA Lowe's Companies, Inc. (Mooresville, NC)</p> <p>Moderator:</p> <p> Elizabeth Bondurant Smith Moore Leatherwood LLP (Atlanta, GA)</p>	<p>Panel 3 (Insurers) 10:10-11:00</p> <p>Daniel J. Gallagher Assistant General Counsel ACE INA Holdings, Inc. (Philadelphia, PA)</p> <p>Alison L. Martin Assistant Vice President Chubb Group of Insurance Companies (Pittsburgh, PA)</p> <p>R. Eric Powers, III Corporate Counsel Crawford & Company (Atlanta, GA)</p> <p>Steve Shappell, Esq. Managing Director, Legal and Claims Practice, and National D&O Practice Leader Aon Financial Services Group (Denver, CO)</p> <p>Ronda S. Tranter Assistant Vice President & Counsel Unum (Chattanooga, TN)</p> <p>Clifford Scott Counsel MetLife (New York, NY)</p> <p>Jessica M. Lermond Complex Claims Director Domestic Claims - Financial Lines, a division of AIU Holdings (New York, NY)</p> <p>Moderator:</p> <p> Margaret Levy Manatt, Phelps & Phillips, LLP (Los Angeles, CA)</p>
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Preventive Measures to Eliminate or Mitigate ERISA Exposure

- Internal compliance assessment and making sure your ERISA house is in order – Knowing the plans, fiduciary roles, insurance coverage issues, and contracts well before a lawsuit is filed

The Administrative Record

- Proper/complete plan documentation: Developing a complete, well reasoned administrative record
- How to avoid inconsistent plan language that can significantly weaken defensible claims
- State of the record upon which a decision was based: Anticipating claims when making the decision and preparing to defend it before the decision is made
- Ensuring proper judicial review
- Ensuring a thorough investigative and decisional process to dispel conflict of interest concerns
- The Claims Administrator: making sure he/she conducts a thorough investigation
- The role of collective bargaining in the mix, including the interaction of ERISA and NLRA

Costs

- Managing outside counsel through realistic and accurate budgets
- Do flat fees really exist? What alternative billing arrangements are being used successfully?

Expertise and Coordination

- How is the decision made with respect to selection of outside counsel?
- Handling the defense more efficiently and effectively through national/regional counsel

11:00 **Once a Suit is Filed for Benefits Under an ERISA Plan, How to Address Evidence Outside the Administrative Record, Standards of Review, Conflicts of Interest & Discovery**



Jeanne L. Bakker

Montgomery, McCracken, Walker & Rhoads, L.L.P.
(Philadelphia, PA)



Jeffrey Knapp

Lane Powell PC
(Portland, OR)



Richard J. Pautler

Thompson Coburn LLP
(St. Louis, MO)



Michael Newman

Dinsmore & Shohl LLP
(Cincinnati, OH)



Myron D. Rumeld

Proskauer Rose LLP
(New York, NY)

Evidence Before the Court

- Dealing with the case as it is handed to you following a poorly handled administrative process
- Defending the adequacy of administrative claims review
- Limiting the evidence that plaintiff attorneys can present regarding the claim

Standard of Review and Its Impact on the Level of Deference post-MetLife v. Glenn

- Judicial review of claims decisions after *MetLife v. Glenn*
- What deference, if any, should a court give a plan administrator's decision denying a claim for benefits, after *LaRue v. DeWolff, Boberg and Associates*?
- Establishing express discretionary authority and an arbitrary and capricious standard of review, thereby limiting discovery and evidence to the administrative record
- The arbitrary and capricious standard – is it still the benefit it once was?

Conflict of Interest and the Scope of Discovery

- The vitality of deferential review and scope of related discovery
 - what's the scope of permissible discovery in claims in which the administrator's decision is subject to arbitrary and capricious review?
- How to counter the plaintiff counsel's use of *Glenn* to open up discovery in simple claims for benefits, requiring enormous expenditures by plans in defending their denials and forcing some plans to capitulate or settle matters for more than their real settlement value
- Scope of discovery in benefit claims and conflict of interest after *Glenn* – limiting discovery so as to conform to the ERISA statute's purpose of expeditious and inexpensive claims handling
- Navigating the question of whether discovery is to be allowed in denial of benefit cases post-*Glenn*
- 1132(a)(1)(B): discovery limits in 1132(a)(1)(B) case; discovery issues in cases involving benefit claims under 1132 (a)(1)(B)
- The advent of open door to discovery and other items to increase the costs of litigation: defending against overbroad discovery and determining just how far e-discovery will go in ERISA cases
- Objecting to plaintiff's discovery requests that sweep beyond the administrative record
- Dealing with the impact of actual or potential/alleged conflicts on the standard of review in the wake of *LaRue*, and the resulting discovery issues
- How to "stop the bleeding" once a court allows extensive conflict of interest discovery
- Addressing conflict of interest-based attacks on the level of deference to accord the plan administrator's decision – knowing who the plan administrator is and the connection between it and the plan sponsor

12:00 **ERISA Fiduciary Litigation: Newest Plaintiffs' Liability Theories and Substantive Defenses, and Trends in Defense Pleadings and Motions**

Miles R. Afsharnik, Esq.

Vice President, Director
National Claims and Legal Resource, Executive Liability Advisors
Wachovia Insurance Services, A Wells Fargo Company
(New York, NY)



Brian S. Cousin

Seyfarth Shaw LLP
(New York, NY)



Nicholas J. Pappas

Weil, Gotshal & Manges LLP
(New York, NY)



Lee T. Polk

Barnes & Thornburg LLP
(Chicago, IL)



Nancy G. Ross

McDermott, Will & Emery
(Chicago, IL)

Determining Fiduciary Status and What Qualifies as Fiduciary Activity

- Who the ERISA plan fiduciaries are: Determining when company, sponsor, officers and directors are fiduciaries
- After identifying, what were the fiduciaries' obligations?
- Countering plaintiff bar's success in fostering the idea that there are two paths to fiduciary status – one being to fit within the definition in section 3(21) and the other being to fit within the definition of "named fiduciary," as well as the concerted effort by class action plaintiff counsel to expand ERISA fiduciary duties beyond the plan to which fiduciary duties are owed by statute
- Successfully arguing that your client is either not an ERISA fiduciary at all or, at least, not a fiduciary for the purpose alleged in the complaint
- Convincing employee-plaintiffs, and sometimes the court, that certain named parties (such as TPAs) are not ERISA fiduciaries and thus not proper defendants
- Differentiating between general and limited fiduciaries
- Are corporate officers who perform corporate duties plan fiduciaries?

Liability and Damage Theories for Breach of Fiduciary Duties

- Procedural prudence and the record
 - how well do your fiduciaries' procedures and documents support your fiduciary position?
 - compliance with the plan documents and monitoring it
- Independent Fiduciary – Making intelligent, proactive use of the independent fiduciary mechanism; managing the process in a way that both preserves the independence and keeps him/her/them from overspending/overworking the assignment
- Determine factually exactly what the fiduciary did (or did not do) in exercising the duty of prudence and whether or not such conduct satisfied the fiduciary's duty of prudence under caselaw
- Conflicts of interest: Managing the potential conflicts between the sponsor and fiduciary
- Dealing with disclosure issues and convincing the court that ERISA's fiduciary duties do not create a duty to disclose beyond that established in Section 104 under most circumstances
- Defending fiduciaries on asset management questions
- Investment activity, disclosing investment advice, and explaining why persons with fiduciary duties, i.e., an investment committee, have never received training about fiduciary responsibilities
- Remedies and damages
 - countering the view that uncertainty in fixing damages must be resolved against the fiduciary, & that the measure of damages must be that which is most advantageous to participants
 - the legal uncertainties over whether and when damages arising from a breach of fiduciary duty may be recovered by an individual participant

§ 404(c)

- How the courts are currently interpreting its requirements
- Liability protection and 404(c) indemnification
- Use of the section 404(c) defense after the Seventh Circuit's *Hecker v. Deere/Fidelity* decision

Potential Liability of Directed Trustees

- The current legal status of directed trustees and fiduciaries
- What are the duties of directed trustees and what triggers those duties?
- Examination of recent plaintiff's theories against directed trustees

Department of Labor

- The impact of DOL regulation on your defense
- Mastering the new issues that come into play when the DOL is involved, including the extent to which the DOL's goals are consistent or inconsistent with the goals of your client(s)

Nuances with Fiduciary Insurance Coverage

- Determining what is covered (and excluded) in litigation against fiduciaries
- Decisions that have to be made in litigating & settling a case when fiduciary insurance is involved
- Typical policy provisions and the issues they raise, & strategic considerations that arise as a result

1:00 **Networking Luncheon for Speakers and Delegates**

1:50 **Employer Stock in Light of the Economic Downturn: Defending Against Stock Drop Suits, 401(k) Fee Cases and Other Defined Contribution Plan Claims**



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



Michael S. Melbinger
Winston & Strawn LLP
(Chicago, IL)



Michael J. Prame
Groom Law Group
(Washington, DC)



Steven J. Sacher
Jones Day
(Washington, DC)

The Stock Drop Case

- Demonstrating procedural prudence
- Getting unfounded cases dismissed at the pleading stage by showing plan interpretations that support a presumption of prudence (such as a requirement or expectation that the plan will invest in company stock), properly characterizing the financial prospects and performance of the company, and demonstrating that the disclosure claims are foreclosed under ERISA
- Conflicts of interest, particularly where a member of the fiduciary committee was also involved in alleged misconduct at the company
- Whether plan sponsors are entitled to a presumption that company stock investments in defined contribution plans were prudent (even when the plan documents appear to provide some discretion over whether such a fund should be offered) and whether that presumption may be asserted on 12(b)(6)
- Establishing the prudence of investments in company stock in the absence of the Moench presumption
- Can a “failure to disclose” count in a “stock drop” case be certified as a class action claim? How do you prevent certification of misrepresentation and non-disclosure claims?
- ERISA and Parallel Securities Cases – carefully managing the cases together, including the legal claims and the factual predicate, minimizing duplicative discovery (including end-runs around PSLRA stay), and intelligently allocating legal fees/costs for insurance purposes
- Drafting plan documents and structuring fiduciary procedures to minimize the risk of successful lawsuit
- Effective use of fiduciary and financial experts
- Attacking the plaintiff - do they have standing and are they adequate class reps?

401(k) Fee Litigation

- The explosion of litigation challenging the fees in individual account 401(k) plans, including the evolving theories of liability and the recent decisions
- Establishing procedural prudence by the plan’s investment/administrative committees
- What is the limit of plan sponsors’ responsibilities for service provider fee arrangements in defined contribution plans?
- The 404(c) defense
- When may a service provider qualify as an ERISA fiduciary
- When do fees stop being plan assets for purposes of the prohibited transaction rules?
- Class certification issues in the service provider fee cases
- Drafting plan documents and structuring fiduciary procedures to minimize the risk of successful lawsuit

Other Defined Contribution Plan Claims

- Non-stock drop claims involving defined contribution plans relating to declining asset value, including risk/diversification cases, private company ESOPs and securities lending and collateral pool litigation
- Madoff and other “ponzi scheme” matters, including “clawback” issues

2:50 **Service Provider Relationships: Defending and Managing Litigation That Arises Between Plans and Providers**



Elise D. Klein
Lewis Brisbois Bisgaard & Smith LLP (Los Angeles, CA)



M. Brian Magargle
Constangy, Brooks & Smith, LLP (Columbia, SC)



Michael J. Nader
Baker & Daniels LLP
(Fort Wayne, IN)



Mark D. Spencer
McAfee & Taft
(Oklahoma City, OK)

- From the start, having a clear understanding of who the defense players are - Plan, Plan Administrator, Claims Administrator, and whether discretion has been delegated to third parties
- The unique issues that arise in connection with the provision of services to employee benefit plans

- Assessing fiduciary status of third-party service providers: litigating cases involving retention, monitoring, and termination of providers of service to employee benefit plans
- Countering claims involving fiduciary duties in selection and monitoring service providers
- Defending litigation between plans/plan sponsors and service providers, including cases concerning the fiduciary status of providers
- Determining whether claims that service providers received secret or excess fees state a breach of fiduciary duty claim under ERISA
- TPAs
 - issues surrounding third-party administrators and getting information from third-party service providers
 - conflicts of interest when TPAs are used, & protecting against conflict of interest claims
 - consideration of tendering

3:50 **Afternoon Refreshment Break**

4:00 **Analyzing Plan Remedies and the Scope of Equitable Remedies to Achieve Realistic Settlement Expectations**



W. Bard Brockman
Bryan Cave LLP
(Atlanta, GA)



Bryan D. LeMoine
Polinelli Shughart PC
(St. Louis, MO)



John J. Myers
Eckert Seamans Cherin & Mellott, LLC (Pittsburgh, PA)



Mark S. Thomas
Williams Mullen
(Raleigh, NC)

- ERISA remedies after *LaRue* and *Amschwand* – how courts are now analyzing remedies under 502(a)(2) and 502(a)(3)
- Determining whether a claim falls within the confines of Section 502 of ERISA, and whether it’s actually “equitable relief” under (a)(3)
- 502(a)(2): what happens to the different approaches suggested by the fractured opinions in *LaRue*?
- Having a clear understanding of the nature of the ERISA claim and associating it with the proper type of remedies (legal or equitable) – examining the significant differences between claims under Sections 502(a)(1)(B), 502(a)(2), and 502(a)(3)
- ERISA’s remedy limitations

5:00 **ERISA Preemption: Countering Plaintiff Counsel’s Attempts to Run from the Procedural and Substantive Aspects of the Defense**



Eric P. Mathisen
Ogletree, Deakins, Nash, Smoak & Stewart P.C.
(Chicago, IL & Valparaiso, IN)



Scott S. Cairns
McGuireWoods LLP
(Jacksonville, FL)



Keith R. McMurdy
Fox Rothschild LLP
(New York, NY)



Judith M. Mercier
Holland & Knight LLP
(Orlando, FL)



Elizabeth A. Venditta
White and Williams LLP
(Philadelphia, PA)

- The latest developments and litigation trends in ERISA preemption
- The preemption analysis: What is and is not an ERISA plan?
- Plaintiff counsel’s attempts to change the complexion of the litigation: what claims are not preempted?; what claims are ultimately expanding the universe of available remedies?
- Adequately raising and/or pleading both complete and ordinary preemption
- Determining whether substantive preemption (under 514) is required for complete preemption and removal (under 502)
- Determining whether a case filed in state court can be removed to federal court on the grounds of federal question jurisdiction
- Getting an ERISA benefits case into federal court on complete preemption grounds and then proceeding on defensive preemption
- Managing preemption and linkages to other statutes
- Preemption of state laws that relate to employee benefit plans and new nuances with regard to removal from state DOL administrative hearing processes
- Disputes between medical providers, TPAs and employers – how can the provider avoid ERISA preemption?
- What you now need to know about 514: Pay or play preemption
- Avoiding traps for the unwary on removal, including joinder in removal when there are multiple defendants and the “first served” rule

6:00 **Conference Adjourns**

7:30 Continental Breakfast

8:00 **View From the Bench: Federal District & Magistrate Judges Speak out on How to Convey Complexities to a Court (including a Plan and the ERISA Statute), Effective Theories/Defenses, Evidentiary Approaches, Statute of Limitations, Deciding Cases Early, Discovery, Forum Shopping and More**

Panel 1 8:00-9:30	Panel 2 9:30-11:00 <i>(morning coffee break from 11:00-11:10)</i>	Panel 3 (Magistrate) 11:10-12:40
<p><i>Hon. Janet Bond Arterton</i> U.S. Dist. Ct., D. Conn.</p> <p><i>Hon. Julian Abele Cook, Jr.</i> U.S. Dist. Ct., E.D. Mich.</p> <p><i>Hon. Patrick J. Duggan</i> U.S. Dist. Ct., E.D. Mich.</p> <p><i>Hon. Fernando J. Gaitan, Jr.</i> U.S. Dist. Ct., W.D. Mo.</p> <p><i>Hon. Kim R. Gibson</i> U.S. Dist. Ct., W.D. Pa.</p> <p><i>Hon. Robert C. Jones</i> U.S. Dist. Ct., D. Nev.</p> <p><i>Hon. Algenon L. Marbley</i> U.S. Dist. Ct., S.D. Ohio</p> <p><u>Moderator:</u>  <i>Miriam (Dusty) M. Burke</i> Vinson & Elkins L.L.P. (Austin, TX)</p>	<p><i>Hon. Larry J. McKinney</i> U.S. Dist. Ct., S.D. Ind.</p> <p><i>Hon. Robert E. Payne</i> U.S. Dist. Ct., E.D. Va.</p> <p><i>Hon. Stephen J. Murphy, III</i> U.S. Dist. Ct., E.D. Mich.</p> <p><i>Hon. Rebecca R. Pallmeyer</i> U.S. Dist. Ct., N.D. Ill.</p> <p><i>Hon. Denise Page Hood</i> U.S. Dist. Ct., E.D. Mich.</p> <p><i>Hon. Peter G. Sheridan</i> U.S. Dist. Ct., D.N.J.</p> <p><i>Hon. Alexander Williams, Jr.</i> U.S. Dist. Ct., D. Md.</p> <p><u>Moderator:</u>  <i>Dirk W. de Roos</i> Faegre & Benson LLP (Denver, CO)</p>	<p><i>Hon. Raymond L. Erickson</i> U.S. Dist. Ct., D. Minn.</p> <p><i>Hon. Robert J. Johnston</i> U.S. Dist. Ct., D. Nev.</p> <p><i>Hon. Stephen Wm. Smith</i> U.S. Dist. Ct., S.D. Tex.</p> <p><i>Hon. Roger B. Cosbey</i> U.S. Dist. Ct., N.D. Ind.</p> <p><i>Hon. Janice M. Stewart</i> U.S. Dist. Ct., D. Ore.</p> <p><i>Hon. Lisa P. Lenihan</i> U.S. Dist. Ct., W.D. Pa.</p> <p><i>Hon. Viktor V. Poborelsky</i> U.S. Dist. Ct., E.D.N.Y.</p> <p><u>Moderator:</u>  <i>Kay Kyungsun Yu</i> Pepper Hamilton LLP (Philadelphia, PA)</p>

- Early defense considerations (motions to dismiss, preemption, summary judgment practice)
- Novel approaches to case management
- Making the decision to allow or not allow extensive conflict of interest discovery
- Discovery limits
- Jury demands, motions to strike, motions to sever non-ERISA claims from ERISA claims
- Conveying the complex to the court, including the technical aspects of the ERISA statute or of the procedural differences in ERISA cases
 - how to enhance the court's knowledge of ERISA application, including the standards on recovery and discovery, scope of review issues, and procedural nuances such as exhaustion, preemption, privilege issues and the like
 - explaining a plan and ERISA to the court in a simple and clear fashion – how to get the judge in your case up to speed on the terms of the ERISA plan and record and the basis for the denial of a claim for benefits
 - how to explain to the court that certain named parties (such as TPAs) are not ERISA fiduciaries and thus not proper defendants
- Procedural and legal interpretative inconsistencies related to venue across the federal circuits – how to handle inconsistent precedent throughout the Circuit Courts and lack of uniformity and significant forum shopping
- When the ERISA limitations period begins to accrue
- Settlement, particularly after losing a decision on a 12(b)(6) motion
- Whether and when to remand the matter to the administrator for further proceedings
- Judicial “pet peeves”

12:40 Networking Luncheon for Speakers and Delegates

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1:30 **Disability and Health Claims in the Wake of *MetLife v. Glenn*: A Focus on Defending Welfare Benefit Cases and Retiree Health Benefit Litigation**

Michael Lalli
Associate General Counsel
Pitney Bowes Inc (Stamford, CT)

Arthur A. Palmunen
Counsel, Aetna
(Hartford, CT)



Ashley B. Abel
Jackson Lewis LLP
(Greenville, SC)



Amanda S. Amert
Jenner & Block, LLP
(Washington, DC)



Jeffrey D. Zimon
Benesch
(Cleveland, OH)

Welfare Benefit

- Sorting out the post-*MetLife v. Glenn* conflict issues
 - Enhanced/expanded discovery, including discovery of/relating to third party vendors (e.g., medical reviewers)
 - Enhanced/expanded duties of claim administrators
 - Trends in courts' applications of the arbitrary and capricious standard to denial cases
- The ability of plan sponsors to terminate/amend welfare plan benefits
- Misuse of pension fiduciary concepts in welfare benefit cases
- Proving disability claims involving subjective impairments & the burden of proof on subjective claims
- Particular problems that arise in relation to mental health claims (health and disability)

Retiree Health

- The vesting of welfare benefits (retiree health issues) – how the result will often be dispositive of the case
- Assuming a company retained the right to reduce the benefits, determining whether it took adequate steps to do so
 - were corporate procedures adequately followed?
 - whether participants were adequately informed about the changes in their benefits
- The deference given to plan administrators in interpreting the rights under their own plans – what deference, if any, should a court give a plan administrator's decision denying a claim for benefits?

2:30 **Defending Against Age-Based and Other “Recessionary Economy” ERISA Claims: Cash Balance Plans, Early Retirement, Reductions in Force, and Beyond**



Carol Connor Cohen
Arent Fox LLP
(Washington, DC)



Chris DeMeo
McGlinchey Stafford PLLC
(Houston, TX)



James Nelson
Greenberg Traurig LLP
(Sacramento, CA)



Juliana Reno
Kutak Rock LLP
(Omaha, NE)

Cash Balance Plans

- Anti-Cutback Claims; Section 204(h), Partial Termination and Section 502(c) Penalties
- Analyzing the continuing controversy over cash balance plans
- Examining the effect of disparate impact claims
- Dissecting other theories of liability
- Current legislative activity affecting cash balance plans

Current ERISA “Environment” – Recessionary Economy, Growing Ranks of Retirement-Age Demographic, etc.

- Early retirement incentives and the “serious consideration” standard - building your case
- Severance arrangements and ERISA status - litigation strategies
- RIFs and ERISA 510 claims - what not to do during a reduction-in-force
- Age discrimination and employee benefits - what you now need to know

3:30 **Afternoon Refreshment Break**

3:40 **Devising Procedural Strategies in ERISA Class Actions**



Lawrence Fine
Senior Vice President, Pension Trust/Middle Market Complex D&O Claims, & Chief Technical Officer
AIG Domestic Claims, Inc. (New York, NY)



Robert P. Davis
Mayer Brown LLP
(New York, NY & Washington, DC)



William J. Kayatta, Jr.
Pierce Atwood LLP
(Portland, ME; Boston, MA; Washington, DC)



Charles S. Mishkind
Miller, Canfield, Paddock and Stone, P.L.C.
(Grand Rapids, MI)

- FRCP 23 requirements for class certification of ERISA fiduciary breach claims
- Pros and cons of opposing class certification, use of declaratory judgment actions
- Timing of class certification in relation to dispositive motions on the complaint and on the merits
- Effect of the *LaRue* decision, and can named plaintiffs sue “derivatively” for recovery to all plan participants without certifying a class?
- Statutory and constitutional standing of class representatives
- Class certification aspects of discovery: depositions and document discovery from class representatives, depositions and document discovery from defendants
- Identifying and contacting class members
- Key class certification issues in ERISA fiduciary breach cases, including intra-class conflicts, individualized claims or individualized defenses, and misrepresentation/reliance claims
- Analysis of the merits in class certification
- Interplay between ERISA equitable relief and FRCP 23(b)(2)
- Duties of class counsel under FRCP 23(g)
- Appellate review of class certification under FRCP 23(f)
- Changing attitudes towards class certification at the settlement stage

4:40 **Overcoming the Vexing Ethical Issues that Arise Vis-à-vis the Attorney-Client Privilege and ERISA Litigation Practice**



Philip M. Berkowitz
Nixon Peabody LLP
(New York, NY)



Frederick A. Brodie
Pillsbury Winthrop Shaw Pittman LLP
(New York, NY)



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



Michael F. Tomasek
Ungaretti & Harris LLP
(Chicago, IL)

- The attorney-client privilege under attack?
- Who is the client in a given situation? Establishing the client relationship with the correct entities and then managing privilege
- Educating your clients about their different hats
- Maintaining documents in a way that preserves the privilege and/or is subject to work-product protection
- How multiple representation is possible
- Joint defense agreements where there are complications such as multiemployer plans (with trustees from separate sides), plans and sponsors being sued together, and separate plan committees
- Addressing the growing line of cases that apply a “fiduciary exception” to the attorney-client privilege in matters of plan administration, including claims adjudication
 - avoiding having to produce otherwise privileged communications when a benefits dispute ends up in litigation
- The latest on the fiduciary exception to the attorney-client privilege – Trouble in the air?

5:40 **Conference Ends**

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