

## The Executive is Only Going to be Able to Litigate One Type of Claim or the Other

- The executive will either have a contract case to litigate or an ERISA claim to litigate, but almost certainly will not be allowed to prosecute both types of cases
- Theoretically possible, but courts generally don't allow it.
- *W.E. Aubuchon Co., Inc. v. BeneFirst, LLC*, 661 F.Supp.2d 37, 47 *Employee Benefits Cas.* 2629 (D.Mass. Jun 12, 2009)
  - Aubuchon seeks recovery under two mutually exclusive theories. First, it contends that BeneFirst breached its fiduciary duty under ERISA. Second, and in the alternative, it contends that BeneFirst breached its contractual obligations in its administration of the plans. In response, BeneFirst contends (1) that it is not subject to suit under ERISA because it is not a “fiduciary” for purposes of that statute and (2) that any state law action against it sounding in contract is preempted by ERISA. If correct, this line of reasoning would essentially leave BeneFirst immune from suit. Aubuchon contends that BeneFirst cannot have it both ways. Either BeneFirst is an ERISA fiduciary, and thus subject to suit for breach of fiduciary duty under ERISA, or it is not an ERISA fiduciary, and thus subject to suit for breach of contract.
  - Court allowed contract action to proceed, after finding that the dispute, despite involving employee benefit plans, was not controlled by ERISA.

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