

ASPEN PUBLISHERS

JOURNAL OF PENSION PLANNING & COMPLIANCE

Editor-in-Chief: Bruce J. McNeil

Shareholder:

Leonard, Street and Deinard

To start your subscription to
*Journal of Pension Planning
& Compliance*,
call 1-800-638-8437

VOLUME 35, NUMBER 3
FALL 2009

- EDITOR'S NOTE.....iii

- KENNEDY V. DUPONT:
SUPREME COURT TELLS DIVORCE
ATTORNEYS "FOLLOW ERISA'S
PROCEDURES!" 1
*Jayne E. Zanglein, Jonathan Hubler,
and Alexander Parks*

- COMMON 409A PROBLEMS
AFTER THE TRANSITION PERIOD..... 12
David W. Powell

- ERISA DISABILITY CLAIMS IN
THE EIGHTH CIRCUIT..... 22
Terrence D. Brown

- CIRCUMNAVIGATING THE
SERBONIAN BOG: THE USE OF
ERISA SPECIAL MASTERS TO
EXPEDITE EMPLOYEE BENEFIT
CASES..... 45
Jayne E. Zanglein



Wolters Kluwer
Law & Business

Circumnavigating the Serbonian Bog: The Use of ERISA Special Masters to Expedite Employee Benefit Cases¹

JAYNE E. ZANGLEIN

Jayne Elizabeth Zanglein teaches law and mediation at Western Carolina University. She is the co-author of *ERISA Litigation*, a treatise published by the Bureau of National Affairs.

This article addresses the discomfort with which federal judges decide cases under the Employee Retirement Income Security Act (ERISA). In the first part of the article, I examine the reasons why judges don't like to decide ERISA cases. In the second part of the article, I address the problems of ERISA and discuss whether these problems can be solved by the courts. In the final section, I propose a solution: the creation of a National ERISA Center that would oversee a court-annexed ERISA Special Masters program.²

THE FEDERAL COURTS' DISLIKE OF ERISA CASES

Most federal judges don't like ERISA cases. In support of this statement I offer three types of evidence: personal observations, a review of the courts' use of mythological terms to describe their heroic efforts to interpret ERISA, and comments by Judge Posner.

The Courts' Attitude Toward ERISA—In General

I start with anecdotal evidence because it is the impetus for the proposal I later make to establish a National ERISA Center. I have heard numerous appellate judges complain of the number of ERISA cases that clog the federal courts. In addition, I once worked in the same building as a retired federal appellate judge. When he passed me in the

hallway, he would stretch his arms out before him and form the sign of the cross with his index fingers, as if to ward off an ERISA demon. That gesture, made ten years ago, has stuck in my mind, causing me to ruminate on why judges dislike ERISA cases and whether it is possible to circumvent some of the aspects of deciding ERISA cases that judges uniformly detest.

Use of Mythological Figures to Describe the Challenges of ERISA

This “demonizing” of ERISA naturally calls to mind the second type of evidence I offer to support my belief that federal judges do not like ERISA cases: Judges tend to describe their thought processes in deciding ERISA cases as Odyssean journeys. They either use metaphors that place them in the role of heroes, emerging victorious from a long struggle, or as hapless victims subject to the whim of the gods.

For example, judges like to compare deciding ERISA cases to navigating in treacherous waters. One appellate judge has compared the act of deciding an ERISA case to a “descent into the Serbonian bog,” an Egyptian lake, which because of swirling sand, deceptively appears to be land but really is a bog. The court states:

Lower courts have struggled to maintain some semblance of equity notwithstanding the enormous breadth of the pre-emption test.... Unfortunately, the price of all this has been descent into a Serbonian bog wherein judges are forced to don logical blinders and split the linguistic atom to decide even the most routine cases.³

The court explains its choice of metaphors: “A Serbonian bog is a mess from which there is no way of extricating oneself.”⁴ On second thought, that *does* sound like ERISA!

The Second Circuit has compared portions of ERISA to the seaweed infested waters of the Sargasso Sea, the “graveyard” of ships,⁵ located within the Bermuda Triangle and thus reputed to be the location of many ship and sailor disappearances:

With understated irony, the Supreme Court has described the ERISA section at issue here as “not a model of legislative drafting.” In truth, it is a veritable Sargasso Sea of obfuscation.⁶

Another judge invokes images of Odysseus, rowing through the dire straits of the Mediterranean, narrowly escaping the fearsome teeth

of Scylla, a three-headed monster, and the whirlpool-spewing sea monster Charybdis:

One scholar who courageously attempted [to define the term “accident” under a plan] explained, “the jumbled mass of precedent which has steadily accumulated on the judicial shores over the past 150 years attests the Scylla or Charybdis nature of the task.”⁷

As if these metaphors are not a vivid enough depiction of the plight of judges faced with the Herculean task of deciding ERISA cases, another court uses a double comparison—the Serbonian bog combined with the legendary inmate of the Greek Underworld, Sisyphus, who was sentenced to push a giant boulder uphill for eternity:

Consequently, this case becomes yet another glaring example of the need for Congress and the Supreme Court to put an end to the sisyphian frustration that has resulted from the Serbonian bog of ERISA preemption precedent. Until such action is taken, it is clear to this court that ERISA will continue to act as a shield of immunity, thwarting the often legitimate and serious claims of the very people ERISA was promulgated to protect.⁸

Other judges are not as fussy:

“Whatever kind of bog that is, we concur.”⁹

A View from the Bench: Judge Posner’s Views on ERISA Cases

Finally, I offer as proof of the court’s attitude toward ERISA, Judge Posner’s article, *How I Approach the Decision of an ERISA Case*, in the 2002 volume of the New York University’s *Review of Employee Benefits and Executive Compensation*. Judge Posner explains that as generalists, judges rely heavily on the expertise of the attorneys who argue the ERISA cases before the court:

We hear a fair number of ERISA cases, but not enough to achieve a real expertise in the interpretation of so complex and wide-ranging a statute. This places on you, the specialist bar, a heavy responsibility... [to] help us do a better job in deciding ERISA cases.¹⁰

Judge Posner immediately admits that he is unusual in that he enjoys the intellectual challenge of ERISA cases: “I savor, I revel, in

ERISA.”¹¹ He enjoys ERISA cases because “they frequently are difficult and fascinating, and often rich in economic and human interest as well.”¹² But, like most judges, he doesn’t like the statute itself: “I don’t quite see ...[the] point” of ERISA.¹³

Judge Posner observes that ERISA’s preemption scheme seems to favor employers: Because “federal judges tend to be less plaintiff-oriented than state judges... employers probably fare better on average in federal than in state courts.”¹⁴ He notes that “[t]he fact that preemption benefits employers ... doesn’t make it sound public policy.... Cynics may wonder whether ERISA’s actual origins have much to do with the public interest.”¹⁵

Judge Posner explains some of the reasons federal judges don’t like ERISA. First, many of the cases are routine breach of contract cases that are better suited for state courts:

We judges find it difficult to imagine why welfare plans should be enforceable in federal courts at all, when the typical dispute over application of such a plan is indistinguishable from the garden-variety breach of contract suit, the sort of thing a state court should be able to handle without any difficulty.¹⁶

Second, although ERISA is a complex statute, it does not contain all the answers. Judges often must look outside of ERISA to decide cases based on common law, contract law, trust law, insurance law, and administrative law.¹⁷ This means that ERISA advocates and neutrals not only need to be ERISA experts, but also general law specialists.

In closing, Judge Posner states:

In summary, we judges approach the decision of an ERISA case with due regard for the fact that, as generalists, our ability to deal intelligently with complicated statutes that generate only intermittent appeals to our court is limited. Our limitations place a great responsibility on the bar to educate and guide us.¹⁸

THE COURTS’ INABILITY TO ADDRESS THE INADEQUACY OF ERISA

Judge Posner is not alone in wondering whether ERISA is “sound public policy.”¹⁹ Although Judge Posner analyzes ERISA from an economic point of view, other judges tend to focus on ERISA’s lack

of remedies. Consider Judge Becker's reference to the "rising judicial chorus":

I ... add my voice to the rising judicial chorus urging that Congress and the Court revisit what is an unjust and increasingly tangled ERISA regime.²⁰

Courts are mindful that they have no authority to address ERISA's lack of remedies:

ERISA, in turn, provides infertile soil for an employee to cultivate a meaningful remedy for anything beyond the recovery of basic benefits.... Constrained as we are by both ERISA's statutory provisions and the Supreme Court's construction of that language, this case provides no opportunity for us to redress the problems that employees face when pursuing a remedy under ERISA for an employer's or insurer's misdeeds beyond the recovery of the basic benefits to which they are entitled. Accordingly, we AFFIRM...²¹

This lack of remedies is a serious issue that can be only addressed by the legislature or the Supreme Court:

The vital thing . . . is that either Congress or the Court act quickly, because the current situation is plainly untenable.²²

This is not a problem to be taken lightly. Justices Ginsburg and Breyer have quoted Judge Becker with approval.²³ Clearly, something has to be done about ERISA's lack of remedies. But that is for Congress, not the courts, to do.

An Inappropriate Solution: Cutting the Gordian Knot

The Eighth Circuit hinted at a solution when it described ERISA as a Gordian knot, a term that has come to mean "an intractable problem, solved by a bold stroke."²⁴ According to legend, the person who untied the Gordian knot would become king. After numerous attempts to unravel the knot, Alexander the Great succeeded by cutting the rope. The Eighth Circuit attempts to unravel the knot:

The court must now attempt to unravel the Gordian knot of the scope of ERISA "relate to" preemption, the question that has so troubled the courts of appeals and the Supreme Court.²⁵

But the court's hidden message is: What if instead of unraveling the Gordian knot, we just cut the knot?

Cutting the knot is inappropriate. Judges do not have this option: they must follow law and precedent. In the meantime, is there a way to relieve the courts of the Sisyphean task of trekking, for all eternity, through the Serbonian bog?

A Possible Solution: Diversion of ERISA Cases to Special Masters

What if instead of getting mired in the bogs of ERISA, we circumnavigate the bogs? Or better yet, why not counter the courts' adoption of mythological figures with our own ancient sea-goddess? We can invoke the protection of Leukothea, the goddess of the sea, who holds "the key of calm waters" and is the protector of sailors and ships.²⁶

Later in this article, I propose my version of Leukothea: the creation of a court-annexed ERISA program that would divert employee benefit disputes to ERISA special masters who would decide the case within the current parameters of ERISA, subject to review by the court. This would allow plaintiffs, who perhaps do not have a remedy, to have their case decided quickly and efficiently by a special ERISA master who, although perhaps is not better equipped to traverse the ERISA bogs, at least enjoys doing so,²⁷ as is evidenced by his or her chosen profession. For those plaintiffs who cannot afford to hire an attorney to serve as an intrepid guide through the ERISA bogs, diversion of the case to a ERISA Special Master who can decide the case within a reasonably short time will reduce attorney's fees simply by allowing the case to be decided on motions within months, not years.

I note that Judge Posner may disagree with this concept as he has commented that because ERISA cases extend beyond statutory issues, there is a "powerful argument against the creation of a specialized court to deal with benefits issues."²⁸ However, the concept of an ERISA Special Master, who reports to a federal judge, is designed to address his concerns by ensuring that the Special Master is an experienced ERISA litigator or former litigator who can interpret ERISA in the context of general trust, contract, insurance, and common law.

The Need for Speed in ERISA Appeals

Elsewhere, I have addressed the problems with ERISA's goal of "ready access to federal courts," which is exacerbated by ERISA's required internal claims appeal process. In a previous article,²⁹ I chronicle the time delay suffered by a participant who has been denied a benefit:

Let's assume a participant files a claim for benefits on January 1, 2007. [With luck, the participant's internal appeals will be

exhausted by] July 30. Having exhausted the internal claims procedure, the participant may now file suit under ERISA Section 502(a)(1)(B).

Let's assume our participant takes two months to find an attorney who will handle her case and the attorney files the suit one month later on November 1. The median time from the filing of a lawsuit in federal court to disposition of the case by trial, is 21.8 months.³⁰ Our participant's case will be decided by September 1, 2009. By then, the participant may have paid tens of thousands of dollars in attorneys' fees. ERISA permits, but does not require, the payment of attorneys' fees and so our participant is not assured of reimbursement for attorneys' fees.... More importantly, our participant probably has not received the treatment he was seeking.³¹

In this previous article, I also examined other dispute resolution methods that might be available to participants, including mediation, arbitration, and early neutral evaluation.³² These options remain available to ERISA litigants. In this article, however, I will focus exclusively on the proposed use of ERISA Special Masters in a court-annexed program to expedite ERISA cases.

The Inability of ERISA Participants to Pay Out-of-Pocket

In *Aetna Health Inc. v. Davila*,³³ the Supreme Court considered two cases: Ruby Calad and Juan Davila. The Court briefly outlined the participants' complaints:

Respondents both suffered injuries allegedly arising from Aetna's and CIGNA's decisions not to provide coverage for certain treatment and services recommended by respondents' treating physicians. Davila's treating physician prescribed Vioxx to remedy Davila's arthritis pain, but Aetna refused to pay for it. Davila did not appeal or contest this decision, nor did he purchase Vioxx with his own resources and seek reimbursement. Instead, Davila began taking Naprosyn, from which he allegedly suffered a severe reaction that required extensive treatment and hospitalization. Calad underwent surgery, and although her treating physician recommended an extended hospital stay, a CIGNA discharge nurse determined that Calad did not meet the plan's criteria for a continued hospital stay. CIGNA consequently

denied coverage for the extended hospital stay. Calad experienced postsurgery complications forcing her to return to the hospital. She alleges that these complications would not have occurred had CIGNA approved coverage for a longer hospital stay.³⁴

The Court was judicious in its recitation of the facts. It neglected to mention that as a result of Davila's plan's decision to approve a cheaper medicine, Davila suffered from bleeding ulcers and a near heart attack, and was in critical condition for five days.³⁵ He can no longer take any pain medication that is absorbed through his stomach.³⁶ The Court also failed to take judicial notice of the cost of Vioxx, which, at about \$2.50 per pill,³⁷ could easily become unaffordable. Instead, the Court callously suggested that Davila and Calad could have paid for the treatment themselves and then sought "reimbursement through a Section 502(a)(1)(B) action, or sought a preliminary injunction."³⁸ The Supreme Court forgets that most participants are not financially able to pay for medical treatment they assumed would be covered by their health insurance. In fact, many Americans have difficulty paying for medical premiums, deductibles, and co-payments, let alone denied benefits.³⁹

I have not been able to obtain an estimate on how many claims for ERISA benefits are denied a year. A conservative estimate, however, would run in the millions because claims are denied for routine reasons such as failure to meet deductibles. Let's assume that a majority of denied claims are properly denied. Let's choose an arbitrary number—2,500,000—as the number of claims that are improperly denied. Let's also assume that participants only appeal five percent of the denied claims. If five percent of the participants whose claims have been denied file an internal claim appeal ($n = 125,000$), and five percent of the losing participants appeal to court ($n = 5,937$), then we have arrived at a number close to the number of actual ERISA denial of benefits cases filed per year. According to the Administrative Office of the U.S. Courts, 11,171 ERISA cases are filed per year,⁴⁰ approximately half of which are denial of benefit claims ($n \approx 5,585$).⁴¹

Although ERISA Section 2(b) states that one of the purposes of ERISA was to provide "ready access to the Federal courts," access to the courts is not easy. The participant must exhaust internal remedies, which as previously indicated, easily can take more than six months. The Administrative Office of the U.S. Courts estimates that once a case is filed in federal court, it takes, on average, 28 months until final disposition. Certainly, there has to be a better way for ERISA to provide "ready access" to a review of claim determinations.

LEUKOTHEA: A PROPOSAL TO ESTABLISH A COURT-ANNEXED DIVERSION PROGRAM TO ERISA SPECIAL MASTERS

In this section I propose the creation of a court-annexed program that will divert employee benefit cases to special masters with expertise in ERISA. Initially, I propose a three-year pilot project under the auspices of a National ERISA Center for the Resolution of Employee Benefit Disputes. The National ERISA Center would serve as the intermediary between the courts and the ERISA Special Masters. The National ERISA Center would also promote the use of alternative dispute resolution procedures such as mediation, arbitration, and early neutral evaluation, which could be used as an alternative to litigation or could be court-referred.

Three-Year Pilot Program

A three-year pilot program would allow the National ERISA Center time to negotiate and fund a multi-state pilot program. Because the author resides in Western Carolina, it is proposed that the pilot project commence in the Northern District of Georgia and all districts of North Carolina. We expect 20 cases in the first year, 50 cases in the second year, and as we expand the program nationwide, we hope to achieve a steady flow of about 250 to 300 cases per year thereafter.⁴² Other venues for possible pilot projects include the tri-state area of New York, New Jersey, and Pennsylvania, the state of California, or the state of Minnesota, which has a long and rich history of the use of alternatives to litigation.⁴³

In the first year of the pilot program, the National ERISA Center will form an Advisory Council consisting of federal judges, ERISA attorneys, health care advocates, government representatives, dispute resolution experts, law professors, and others. The Advisory Council will provide guidance and direction to the National ERISA Center as to the design, structure, and location of the pilot project. The Advisory Council also will assist the Center as it applies for a grant to fund a three-year pilot program. Center staff will meet with the Advisory Council and experts and will conduct research on current similar benefit appeals programs, such as Social Security, Workers' Compensation programs, and court-referred arbitration programs, to design an appropriate structure. Center staff will draft a working paper on the problem of ready access to health care decision-makers under ERISA and one or more proposed structures. The Center will disseminate the working paper to the Advisory Council and other experts and meet with Advisory Council members and seek input. After consultation, the Center will revise the

working paper to take into consideration suggestions and distribute the working paper through publications. If the proposal requires legislation, Center staff will meet with Congresspersons to draft legislation.

The second year will be devoted to implementing a pilot program. Center staff will meet with local stakeholders and establish a pilot program. The Center will develop program procedures, structure, and documents. The Center will train ERISA Special Masters on ERISA issues and their duties under the program. The pilot program will commence and, at appropriate intervals, the Center staff will meet with the Special Masters and the Advisory Council to review the program and make interim modifications.

By the third year of the pilot, the Advisory Council will evaluate the success of the program and make recommendations on the expansion of the program. It is anticipated that by the end of the third year, the program will be financially self-sufficient.

Possible Structure and Procedure for a Court-Annexed Program⁴⁴

The Advisory Council will ultimately decide the structure and procedure for a court-annexed program. However, preliminary thoughts on program structure and procedures are described below in order to explain the basic concept.

It is anticipated that federal and state courts will refer ERISA benefit cases to the National ERISA Center. When a case is referred to the Center, the director will evaluate the case and decide two issues. First, in keeping with the National ERISA Center's mission to provide "ready access" to ERISA decision-makers at an affordable cost, the first question to be decided is whether the case should be handled pro bono. Each ERISA Special Master, as a condition of placement on the roster of mediators, will be required to accept at least two pro bono cases per year.

The second issue will be whether the case can be decided on a motion to dismiss or a motion for summary judgment or whether a hearing is necessary. If the case can be decided on a motion (as is typically the case with respect to preemption and remedy issues), the case will be referred to an ERISA Special Master. If a hearing is necessary, the Center will advise the parties of possible alternatives to litigation and, if the parties agree, the Center will appoint a neutral to conduct a hearing.

The Center staff will make sure that the neutral (i.e., ERISA Special Master, mediator, arbitrator, or early neutral expert) does not have a conflict of interest and then will determine the availability of the neutral and forward the case file to the neutral.

The neutral will have 30 days from receipt of the file to facilitate settlement through the selected ADR procedure or to issue a proposed

order as a special master. If additional time is needed due to the complexity of the case, the neutral will request an extension, not to exceed an additional 60 days.

The neutral will conclude the case with a written document appropriate to the ADR process, indicating either settlement or no settlement and, if acting as a decision-maker, the neutral will issue a written decision which explains, in detail, the basis for his decision. He will forward the document or decision and the file to the Center, along with an invoice.

If the case has been heard by an ERISA Special Master, the program director will forward the proposed order and the complete file to the judge. The judge will review the case file and the proposed order. The judge may accept, reject, or modify the proposed order. In most cases, it is expected that the judge will accept the proposed order. Even if the court rejects the proposed order, the process will still save the judge considerable time in researching and reviewing the case.⁴⁵

If a neutral hears the case in an alternative dispute resolution proceeding, the program director will forward to the judge the written document specifying whether agreement was reached. Counsel for the parties will file the appropriate documents with the court.

The Center will forward the documents, along with an invoice to the parties. The invoice will be split between the parties.

Qualifications of the ERISA Special Masters and Neutrals

Once the program has been expanded nationally, the National ERISA Center will maintain a roster of at least fifty attorneys who have practiced ERISA for at least 10 years. The Center's director will be responsible for making sure that the attorneys meet the Center's requirements. Training will be provided at least once a year either immediately before or after the ABA Midwinter Meeting for the Section of Employee Benefits. Training will be provided free of cost.

Types of Cases to Be Referred

The primary focus of the program will be on employee benefit claims, however, other ERISA causes of action (such as fiduciary claims and delinquent contribution collection cases) and ancillary cases (such as subrogation and qualified domestic relations order cases) would be encouraged.

Application of Precedent

The ERISA Special Master will be required to decide the case based on existing mandatory precedent in the jurisdiction. The Special Master may not advocate for the expansion of remedies under ERISA.

Fees

Fees remain a complex issue. The National ERISA Center would establish fees, including an administrative fee, keeping in mind that the purpose of the Center is to facilitate the affordable and expeditious resolution of employee benefit disputes. This need for affordable services, however, must be balanced with the fact that ERISA Special Masters, with a minimum of 10 years of ERISA experience, should be well compensated. Therefore, it is anticipated that the hourly fees for the ERISA Special Master or neutral will be competitive. The savings will come from the reduced attorney's fees due to the relative speed with which the case will be handled.

CONCLUSION

Currently, ERISA is not meeting its mandate to provide "ready access to the federal courts."⁴⁶ Instead of resorting to ancient mythological references, it is proposed that a National ERISA Center be established where ERISA Special Masters can assist the courts on their heroic journeys through the ERISA decision-making process.

NOTES

1. This article was published previously in the *N.Y.U. Review of Employee Benefits and Compensation* (2007). Reprinted with permission.
2. I wish to thank Representative Robert Andrews for his concept of "special masters." In addition, I wish to thank Rep. Andrews and Rep. Chris Smith and their Congressional aides for their preliminary interest in this proposal.
3. *DiFelice v. Aetna U.S. Healthcare*, 346 F.3d 442, 453-454, 31 EB Cases (BNA) 1417 (3d Cir. 2003) (Becker, dissenting).
4. *Id.*
5. Wikipedia.com, Sargasso Sea, available at http://en.wikipedia.org/wiki/Sargasso_sea, visited Mar. 23, 2007.
6. *Travelers Ins. Co. v. Cuomo*, 14 F.3d 708, 717 (2d Cir. 1993).
7. *Eckelberry v. Reliastar Life Ins. Co.*, 402 F. Supp. 2d 704, 707, 36 EB Cases (BNA) 1449 (S.D. W. Va. 2005) (quoting Adam F. Scales, "Man, God, and the Serbonian Bog: The Evolution of Accidental Death Insurance," 86 Iowa L. Rev. 173, 191 (2000)). The court noted that
 In Greek mythology, the monster Scylla and the whirlpool Charybdis occupy opposite sides of a treacherous strait. Scylla has "twelve mis-shapen feet, and six necks of the most prodigious length; and at the end of each neck she has a frightful head with three rows of teeth in each, all set very close together, so that they would crunch anyone to death in a moment No ship ever yet got past her without losing some men, for she shoots out all her heads at once, and carries off a man in each mouth." Homer, *The Odyssey*, Book XII. Charybdis,

however, is such a powerful whirlpool that ships are forced to hug the side of the strait where Scylla lurks. *Id.* Ulysses himself lost his “six best men” to the dreadful monster. *Id.*

Id. at n.1.

8. Van Natta v. Sara Lee Corporation, 439 F. Supp. 2d 911, 941, 38 EB Cases (BNA) 2735 (N.D. Iowa 2006) (noting that “Sisyphus was a cruel king of Corinth who was doomed forever to roll a large boulder to a hilltop in Hades only to have it roll back. The American Heritage College Dictionary 1274 (3d ed. 1997). Thus, “Sisyphean” means “[e]ndlessly laborious or futile.” *Id.*).
9. Buce v. Allianz Life Ins. Co., 247 F.3d 1133, 1144, 25 EB Cases (BNA) 2441 (11th Cir. 2001) (quoting Equitable Life Assur. Soc. v. Hemenover, 100 Colo. 231, 67 P.2d 80, 81 (1937)).
10. Richard A. Posner, “How I Approach the Decision of an ERISA Case,” *N.Y.U. Review of Employee Benefits and Executive Compensation*, Chap. 14, at 14-1 (2002).
11. *Id.*
12. *Id.*
13. *Id.* Judge Posner claims that before ERISA was enacted, employers rarely exploited workers’ pensions; the Act was passed to curb the abuses of multiemployer plans, not single employers. *Id.* at 14-2. He argues that statutory vesting requirements have created more problems than they solved. *Id.* at 14-3-14-5.
14. *Id.* at 14-5.
15. *Id.*
16. *Id.* (footnote omitted).
17. *Id.* at 14-6.
18. *Id.* at 14-8.
19. *Id.* at 14-5.
20. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 453-54, 31 EB Cases (BNA) 1417 (3d Cir. 2003) (Becker, dissenting).
21. Allinder v. Inter-City Prods. Corp. (USA), 152 F.3d 544, 22 EB Cases (BNA) 2735 (6th Cir. 1998).
22. DiFelice v. Aetna U.S. Healthcare, 346 F.3d 442, 468, 31 EB Cases (BNA) 1417 (3d Cir. 2003) (Becker, dissenting). *See also* Miara v. First Allmerica Fin. Life Ins. Co., 379 F. Supp. 2d 20, 35 EB Cases (BNA) 1337 (D. Mass. 2005) (stating “ERISA was certainly not enacted with a *noli me tangere* [touch me not] proclamation imposed upon it for all eternity; rather, it is the responsibility of Congress to address any existing deficiencies.”).
23. Aetna Health Inc. v. Davila, 542 U.S. 200, 222, 32 EB Cases (BNA) 2569 (2004) (Ginsburg, dissenting) (noting that “fresh consideration of the availability of consequential damages under § 502(a)(3) is plainly in order”).
24. Wikipedia, Gordian Knot, available at http://en.wikipedia.org/wiki/Gordian_knot, visited Mar. 23, 2007.
25. Prudential Insurance Co. of Am. v. National Park Medical Center, Inc., 154 F.3d 812, 818, 22 EB Cases (BNA) 1785 (8th Cir. 1998). The court explained:

Gordius, King of Phrygia, tied his chariot to a hitching post before the temple of an oracle with an intricate knot, which, it was prophesied, none but the future ruler of all Asia could untie. *See, e.g.,* Funk and Wagnalls Standard Dictionary of Folklore, Mythology, and Legend 460 (Maria Leach, ed., Funk & Wagnalls, 1972); Bulfinch’s Mythology 44 (Richard

- P. Martin, ed., 1991). In the course of his conquests, Alexander the Great came to Phrygia, and, frustrated with his inability to untangle the “Gordian knot,” simply sliced through it with his sword. His subsequent success in his Asian campaign have been taken to mean that his solution to the “Gordian knot” fulfilled the prophesy.
26. Theoi.com, Palaimon, available at <http://www.theoi.com/Pontios/Palaimon.html>, visited Mar. 25, 2007 (stating that “The merchant seaman trusting in [Leukothea] shall have a fineweather voyage over the brine; Sailors shall accept [her son] Palaimon as guide for his coach of the sea.” (quoting Nonnus, *Dionysiaca* 9.59)).
 27. We can carve out an exemption for the Seventh Circuit, if Judge Posner prefers to continue to wrestle with the intellectual challenges of ERISA.
 28. Posner, at 14-7.
 29. Jayne Elizabeth Zanglein, “Ready Access to ERISA Neutrals: Are ERISA Neutrals the Solution to ERISA’s Backlog of Claims Appeals?,” 12 *J. Deferred Compensation* 4 (2007).
 30. Administrative Office of the U.S. Courts, Judicial Facts and Figures, Table C-5, U.S. District Courts—Median Time Intervals from Filing to Disposition of Civil Cases Terminated, by District and by Method of Disposition, During the 12-Month Period Ending June 30, 2005, available at <http://www.uscourts.gov/judicialfactsfigures/contents.html#tables>, visited January 21, 2007.
 31. Zanglein, *supra*, note 28.
 32. *Id.*
 33. 542 U.S. 200, 211 (2004).
 34. *Id.* at 205.
 35. *Roark v. Humana, Inc.*, 307 F.3d 298, 303 (5th Cir. 2002).
 36. *Id.*
 37. FDA Approves Vioxx, <http://arthritis.about.com/od/vioxx/la/vioxxapproved.htm>, visited Mar. 18, 2007.
 38. *Aetna Health Inc. v. Davila*, 542 U.S. 200, 211 (2004).
 39. Robert Wood Johnson Foundation State Coverage Initiatives, Why Are People Uninsured?, available at <http://statecoverage.net/coverage/why.htm>, visited Mar. 23, 2007.
 40. Administrative Office of the U.S. Courts, Judicial Facts and Figures, Table 4.4, Civil Cases Filed By Nature of Suit (circa 2006), available at <http://www.uscourts.gov/judicialfactsfigures/contents.html#tables>, visited January 21, 2007.
 41. The Department of Labor has estimated that about half of all ERISA suits involve a denial of benefits.
 42. In 2005, 335 labor cases were filed in the three districts of North Carolina plus the Northern District of Georgia. See Administrative Office, *supra* note 39, at Table C-3, U.S. District Courts—Civil Cases Commenced, by Nature of Suit and District, During the 12-Month Period Ending September 30, 2005 available at <http://www.uscourts.gov/judbus2005/appendices/c3.pdf>, visited Jan. 26, 2007.
 43. Civil cases are referred to arbitration or mediation in certain jurisdictions. According to available statistics, of the 252,962 cases pending in federal court in 2003, 3,187 cases (1.2%) were referred to arbitration. Meecham, Leonadis, *Judicial Business of the United States Courts*, at Tables C-2, S-11(2003), available at <http://www.uscourts.gov/judbususcjjudbus.html>, visited Jan. 1, 2005. An additional undetermined number were referred to mediation. The bulk (1,977)

of these cases referred to arbitration were in New Jersey, while the remainder were in New York (390), Pennsylvania (479), California (123), Oklahoma (209), and Florida (9). *Id.* at Table S-12. Although these numbers appear to be incomplete, perhaps due to underreporting, it is interesting to note that the majority of federal cases that were referred to arbitration were referred in the New Jersey tri-state area and California, indicating that these locations may be the best places to focus a pilot program.

44. Portions of this section are adapted from Zanglein, *supra*, note 28.
45. Judge Posner notes that most law schools do not devote enough attention to common law in the first year curriculum. As a result, law clerks are not adequately prepared to address common law issues and remedies—subjects that are essential to deciding ERISA cases. Richard A. Posner, “How I Approach the Decision of an ERISA Case,” *N.Y.U. Review of Employee Benefits and Executive Compensation*, Chap. 14, at 14-6 (2002).
46. ERISA Section 2(b).

