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Employee Benefits Committee Newsletter

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Richard Posner, ERISA, and Me

After a judicial career spanning more than 35 years, Richard Posner retired from the United States Court of Appeals on September 1, 2017. Posner is considered the most cited and most influential federal judge of all time; and during his judicial career, he issued thousands of rulings that have impacted nearly every area of the law. A full review of Judge Posner's jurisprudence is well beyond the scope of this article. Even a comprehensive discussion of the more than 100 ERISA cases Judge Posner heard, and the ERISA decisions he issued, would necessitate far more exertion than I am capable of providing while maintaining an active ongoing practice of law. Instead, with a few exceptions, I will focus on my own personal experiences arguing ERISA cases before Judge Posner. Before digressing into that discussion, I can state unequivocally that while Judge Posner caused me a great deal of frustration in oral argument and in reading his opinions, he also accounted for my two best days as a lawyer. Judge Posner's insistence on preparation, logic, and coherence also made me a better advocate and lawyer; and I will forever appreciate him for that.

ERISA Standards of Review

Judge Posner's first venture into the issue of ERISA standards of review came in *Van Boxel v. Journal Employees' Pension Trust*, 836 F.2d 1048 (7th Cir. 1988). In the body of the opinion, he expressed concern about the importation of the arbitrary and capricious standard from employer-union trust funds established under Taft-Hartley into ERISA:

> This standard was taken over for use in reviewing benefit denials under ERISA (which does not define the standard of judicial review of trustees' decisions on benefit claims), apparently without the courts' noticing that employers often held the whip hand in ERISA trusts as they did not with the joint employer-union trust funds authorized by Taft-Hartley.

836 F.2d at 1052. Posner further recognized that "pension rights are too important these days for most employees to want to place them at the mercy of a biased tribunal subject only to a narrow form of 'arbitrary and capricious' review, relying on the company's interest in its reputation to prevent it from acting on its bias." Writing one year prior to the Supreme Court's issuance of *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the seminal ruling on ERISA standards of review, Posner predicted that a "contractual perspective" may be inapt for adjudicating ERISA matters, and opined: "ERISA is paternalistic; and it seems incongruous therefore to deny disappointed pension claimants a meaningful degree of judicial review on the theory that they might be said to have implicitly waived it." *Id.* While he may have correctly predicted the Supreme Court would reject a contract-law approach to ERISA benefit claim litigation, his belief that ERISA's paternalism would protect

claimants turned out to have unfortunately been misguided.

Indeed, by the time *Rud v. Liberty Life Assur. Co. of Boston*, 438 F.3d 772 (7th Cir. 2006) was issued, Posner moved away from his prior position and asserted that any mitigation of the arbitrary and capricious standard of review "would destabilize large reaches of contract law, of which ERISA is, after all, a part, since it neither requires employers to establish welfare and pension plans nor prescribes the terms of such plans." *Id.* at 776. Once again, Posner presaged the Supreme Court. In 2008, the Court issued *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105 (2008), which held that even in the face of the plan administrator's structural conflict of interest, the standard of review remains unaltered.

Posner reacted to *Glenn in Marrs v. Motorola, Inc.*, 577 F.3d 783 (7th Cir. 2009), a case in which I represented the Plaintiff. The case involved a Motorola employee who was receiving disability benefits on account of a psychiatric condition. At the time the claimant qualified for benefits, the Motorola disability plan provided that Marrs would not only receive disability benefits until retirement age, but would also continue to accrue pension service credit and maintain his life insurance coverage while receiving disability payments. However, the plan was later amended to limit the duration of payments for psychiatric disability claims to a maximum of two years. Marrs was advised his disability benefits and all other benefits would cease 24 months after the date of the amendment. Marrs challenged the amendment, arguing the plan provided that no amendment "shall adversely affect the rights of any Participant to receive benefits with respect to periods of Disability prior to the adoption date of the [amendment]." Marrs maintained that "periods of Disability prior to the adoption date" applied to his claim because he had been receiving disability benefits continuously. The plan disagreed and argued the provision meant that once benefits were paid, they could not be clawed back. In an opinion authored by Judge Posner, the Seventh Circuit rejected Marrs's argument, finding:

> That is a forced reading. The reference in the plan to "periods" rather than "period" suggests the segmentation of a period of disability, with some segments ("periods") lying before and some after the amendment. It is true that the plan defines the term "Period of Disability" to mean "one or more periods of absence from Active Employment due to Disability," and if we substituted "Period of Disability prior to the plan" for "periods of Disability prior to the plan" we would come closer to Marrs's preferred interpretation. But the plan provides that only words, the initial letters of which are capitalized are defined terms, and so "periods of Disability" cannot be equated to "Period of Disability."

577 F.3d at 785. Thus, the outcome of the case turned on the capitalization of the "p" in the phrase "periods of disability."

The court found Motorola's interpretation reasonable; and in response to Marrs's argument that Motorola's conflict of interest should have triggered the application of the doctrine of *contra proferentem* (ambiguities are construed against the drafter). Posner struggled with the meaning of the Glenn ruling –

> There are two ways to read the majority opinion. One … makes the existence of a conflict of interest one factor out of many in determining reasonableness. That sounds like a balancing test in which unweighted factors mysteriously are weighed. Such a test is not conducive to providing guidance to courts or plan administrators.
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> The test can be made more directive, without contradicting the Court's opinion, by first recognizing that while a decision may *look* reasonable if one just reads the decision and the record, a decision that is "reasonable" rather than clearly correct is a decision that might just as well have gone the other way … If the

> circumstances indicate that probably the decision denying benefits was decisively influenced by the plan administrator's conflict of interest, it must be set aside, just as a decision by a judge who should have recused himself must be set aside even if he might well have reached the same decision had there been no basis for recusal.

577 F.3d at 788–89. Besides the conclusion, which really offered no guidance whatsoever on how to address conflicts of interest in future ERISA cases, what was particularly frustrating to me about this case is that despite my best efforts to argue that Marrs's position was supported by *Feifer v. Prudential Ins. Co. of Am.*, 306 F.3d 1202 (2d Cir. 2002) and other cases that had dealt with anti-amendment clauses in benefit plans, Judge Posner made it very clear in oral argument that he was not interested in what the Second Circuit or other courts did; and the opinion makes no mention of *Feifer*.

A far more satisfying experience for me, though, was in another case that involved ERISA standards of review, *Herzberger v. Standard Ins. Co.*, 205 F.3d 327 (7th Cir. 2000). That ruling put an end to a debate that had been raging as to whether a benefit plan that included language requiring "satisfactory proof" of disability constituted a sufficient reservation of discretion. Prior to *Herzberger*, two Seventh Circuit cases in particular had strongly suggested that such language was sufficient - *Donato v. Metropolitan Life Ins. Co.*, 19 F.3d 375, 379-80 (7th Cir. 1994) and *Bali v. Blue Cross & Blue Shield Ass'n*, 873 F.2d 1043, 1047 (7th Cir. 1989). *Herzberger* disagreed. Returning to the same principles that Judge Posner espoused in *Van Boxel*, Judge Posner made it clear that if a plan intends to reserve discretionary authority, it must do so unambiguously. Thus, the court developed the following safe harbor language it recommended to be included in plans if the plan sponsor intended deferential review: "Benefits under this plan will be paid only if the plan administrator decides in his discretion that the applicant is entitled to them." 205 F.3d at 331.

The opinion itself was extremely significant, but what was most memorable to me about the case was the oral argument. In the course of the argument, Judge Posner asked me point blank whether I could win without the court overturning *Bali* and *Donato*. In response, I offered a path to rejecting the "satisfactory proof" formulation without overturning precedent, but Judge Posner was clearly unpersuaded and suggested that either the court needs to overturn the two cases or I would necessarily lose, so he asked me which I preferred. I chose the obvious response and informed the court that if those were the only two choices, the court would need to overturn its prior rulings. Judge Posner then humorously asked, "What else should we reverse while we're at it?" I then looked down at the podium, shuffled my papers, looked back up, and said, "I'm sorry, but I left the list at the office." He laughed – but the reversal of those two cases had to await a later case I argued – *Diaz v. Prudential Ins. Co.*, 424 F.3d 635 (7th Cir. 2005). That morning was one of my best days as a lawyer.

Disability Benefits

Judge Posner has had more positive impact on Social Security cases than any other federal judge, living or dead. His rulings have exposed sloppiness and unfairness in the way in which disability claimants have been treated by the Social Security Administration. He has not received much recognition for that contribution outside of the Social Security legal community, but his impact on the Social Security Disability program will be felt for many years; and many thousands of Social Security disability benefit recipients will have Judge Posner to thank because he made it possible for them to achieve a just result in their cases.

Judge Posner has also had significant impact upon disability cases adjudicated under ERISA. His best-known case is probably *Hawkins v. First Union Corp. Long-Term Disability Plan*, 326 F.3d 914 (7th Cir. 2003). Although he accurately predicted that the Supreme Court would not give deference to opinions from treating doctors when it issued *Black & Decker Disability Plan v. Nord*, 538 U.S. 822 (2003), the *Hawkins* opinion stands out on a number of other issues. First, the court rejected the plan's argument that Hawkins could not be disabled because he had

been able to work for a number of years following his diagnosis with fibromyalgia, a condition that causes acute body-wide pain, noting:

> The plan's bad argument is that because Hawkins worked between 1993 and 2000 despite his fibromyalgia and there is no indication that his condition worsened over this period, he cannot be disabled. This would be correct were there a logical incompatibility between working full-time and being disabled from working full-time, but there is not. A desperate person might force himself to work despite an illness that everyone agreed was totally disabling. *Perlman v. Swiss Bank Corp. Comprehensive Disability Protection Plan*, 195 F.3d 975, 982–83 (7th Cir.1999); *Wilder v. Apfel*, 153 F.3d 799, 801 (7th Cir.1998); *Wilder v. Chater*, 64 F.3d 335, 337–38 (7th Cir.1995); *Jones v. Shalala*, 21 F.3d 191, 192–93 (7th Cir.1994). Yet even a desperate person might not be able to maintain the necessary level of effort indefinitely. Hawkins may have forced himself to continue in his job for years despite severe pain and fatigue and finally have found it too much and given it up even though his condition had not worsened. A disabled person should not be punished for heroic efforts to work by being held to have forfeited his entitlement to disability benefits should he stop working.

326 F.3d at 918. But the court was not done. The plan had hired a consultant who argued that Hawkins could not be disabled because the majority of people with fibromyalgia are able to work while suffering from that condition. The court responded with this observation: "The fact that the majority of individuals suffering from fibromyalgia can work is the weakest possible evidence that Hawkins can, especially since the size of the majority is not indicated; it could be 50.00001 percent." 326 F.3d at 919.

Judge Posner's resort to similar logic was also critical in another fibromyalgia case that I recently argued – *Kennedy v. Lilly Extended Disability Plan*, 856 F.3d 1136 (7th Cir. 2017). Although the decision did not break any new ground, the court pointed out that Eli Lilly & Company could hardly deny its employee's fibromyalgia claim since it markets a drug to treat that condition. The court also made it clear that fibromyalgia is no longer a controversial diagnosis; and at the end of the opinion, the court returned to the conflict of interest issue, pointing out: "By cutting off Kennedy's benefits the company has saved itself about $2.5 million. Big as Lilly is, that's not a trivial loss." 856 F.3d at 1140.

My favorite Posner disability case, though, was my first – *Ladd v. ITT Corporation*, 148 F.3d 753 (7th Cir. 1998). I argued that there was a conflict between MetLife's hiring of a representative to assist Rebecca Ladd in qualifying for disability benefits, and then turning around and terminating her long-term disability benefits after the insurer had financially benefited from the Social Security award. Based on coordination of provisions in the disability insurance policy, MetLife was able to reduce Ladd's disability insurance payments by the amount of her Social Security award and recoup payments from Social Security that covered the same period when disability insurance was paid. When MetLife's counsel stepped up during oral argument, Judge Posner asked him why MetLife should not be judicially estopped from terminating Ladd's benefits after arguing her disability to the Social Security Administration. The attorney asserted that I had not argued "judicial estoppel," to which Judge Posner responded, "if you don't like that term, how about if I suggest that your client committed fraud." That was another one of my best days as a lawyer. The Supreme Court also echoed the resulting opinion from the *Ladd* case in *Metro. Life v. Glenn, supra*.

Attorneys' Fees

Judge Posner established the test for attorney fee awards under ERISA in the Seventh Circuit in *Bittner v. Sadoff & Rudoy Industries*, 728 F.2d 820 (7th Cir. 1984), in which he suggested importing the "substantially justified" standard from the Equal Access to Justice Act, 28 U.S.C. § 2412. He recently revisited fee awards in one of my cases, *Prather v. Sun Life & Health Ins. Co.*, 852 F.3d 697 (7th Cir. 2017). After winning a reversal of a denial of accidental death insurance benefits, I petitioned for a fee award pursuant to 29 U.S.C. § 1132(g). The court

mostly granted my request, but I received a few dings in the process. The court utilized the so-called five-factor test -

> (1) the degree of the offending parties' culpability; (2) the degree of the ability of the offending parties to satisfy an award of attorneys' fees; (3) whether or not an award of attorneys' fees against the offending parties would deter other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the pension plan as a whole; and (5) the relative merits of the parties' positions. *Raybourne v. CIGNA Life Ins. Co. of New York*, 700 F.3d 1076, 1090 (7th Cir. 2012); see also *Jackman Financial Corp. v. Humana Ins. Co.*, 641 F.3d 860, 866 (7th Cir. 2011).

852 F.3d at 699. Although there was no information before the court concerning the fourth factor, the court found with respect to the other factors,

> The score is 4 to 0 in favor of the plaintiff. Prather's widow doesn't have the big pockets of the insurance company and would have to pay her lawyer out of whatever money she recovered from it. Even though she had a meritorious claim, the insurance company denied it without medical evidence and then put her through all the hoops of litigation. Fee-shifting under ERISA is entirely appropriate for situations like this..

The court reduced the fees in some minor respects and also reduced the hourly rate sought, finding a 5% increase in the hourly fee rate from the prior year excessive. The opinion also managed to both praise and criticize me in the same sentence when it modestly reduced my fees for oral argument preparation on the ground that an experienced practitioner should have spent less time.

ERISA § 510 Claims

Judge Posner also had occasion to write about cases brought under ERISA § 510 (29 U.S.C. § 1140) in *Feinberg v. RM Acquisition LLC*, 629 F.3d 671 (7th Cir. 2011), a case where I represented the plaintiffs. The case involved Rand McNally, a name that used to be synonymous with maps. Rand McNally failed to capitalize on digitization of maps for car-based GPS systems and the company has since faded away. But during its better days, Rand McNally created a non-qualified supplemental executive retirement plan for its top executives. The plan survived the company's first foray into bankruptcy, but when the company's assets, i.e., its maps, along with its liabilities were sold to a private equity investment company, one liability was retained by the remaining shell company – the SERP obligation – which the company lacked the ability to fund. We sued the acquiring company alleging the deal was structured with the purpose of avoiding plan funding, and based our claim on *Lessard v. Applied Risk Management, Inc.*, 307 F.3d 1020 (9th Cir. 2002), an opinion that cited a case authored by Judge Posner, *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420, 1425 (7th Cir. 1993), that addressed asset sales which were in essence a fraud on the creditors.

We lost the case in the district court based on the court's finding that § 510 claims only encompass situations that alter the employment relationship. The Seventh Circuit reversed, and recognized that § 510 potentially addresses any situation where a party interferes with an employee or former employee's right to benefits. The court still rejected the claim, however, without any mention of *Lessard or Cheveriat*, finding that there was no reason to assume the purchaser structured the asset purchase, leaving the top-hat plan as the sole remaining liability with Rand McNally, for the purpose of interfering with the participants' rights. A frustrating result.

Some Concluding Thoughts

I argued several other cases before panels on which Judge Posner was sitting, and each occasion was memorable. He never failed to vigorously participate in oral argument and challenge both sides with hypothetical questions, and his favorite question from the bench, "So what?"

Judge Posner may be retired, but he has taken on a new cause – the sorry treatment of pro se litigants by courts. In a recently self-published book entitled, "Reforming the Federal Judiciary," Judge Posner reflects on the empathy he has gained for the litigants before the court and their real-life problems. He commented that for most of his judicial career, he felt no empathy for litigants before the Court of Appeals, but now says, "I am embarrassed that it took me a long time to notice the mistreatment [of pro ses] by many different actors in the criminal justice system] … I don't know why it took a long time … But better late than never." Judge Posner is currently hard at work on a second edition of the book and he intends to devote himself to the protection of individual rights. He will assuredly make his mark in yet a new direction.

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