

ERISA Litigation ADVISORY

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The Circuits Are Split: Does *MetLife v. Glenn*'s "Structural Conflict" Holding Apply When Employee Benefits Are Funded from a Trust?**By Nancy Pridgen**

Subsequent to the Supreme Court's decision in *MetLife v. Glenn*, 128 S.Ct. 2343 (2008), federal courts around the country have attempted to reconcile *Glenn*'s holding – that a structural conflict of interest exists when an employer “both funds the [employee benefit] plan and evaluates the claims” – with prior circuit court precedent holding that no conflict of interest exists when employee benefits are funded from a trust. With the Fifth Circuit's recent decision in *Holland v. International Paper Company Retirement Plan*, ___ F.3d ___, 2009 WL 2050688, *5 (5th Cir., July 16, 2009), a circuit split now exists that may soon percolate up to the Supreme Court. Thus far, five circuits have weighed in on this issue: the Third, Fourth, Fifth, Ninth and Eleventh.

As is fitting for what could have been the tie-breaker, the Fifth Circuit essentially decided to “split the baby.” Noting that the employer both determines eligibility for benefits and funds the trust (which funds the benefits), the Fifth Circuit held *Glenn* dictated that a structural conflict exists: “International Paper's contribution to the trust will necessarily increase if the total amount due on awarded claims exceeds the actuarially anticipated amounts.” However, the Fifth Circuit found that the conflict was “not a significant factor” because “International Paper's contributions are irrevocable and non-reversionary and the Plan's assets are not International Paper's assets. Thus, a decision to pay benefits does not directly affect International Paper's bottom-line. In effect, the creation of the trust diminishes, but does not entirely negate, the impact of that conflict.”

The Fourth and Eleventh Circuits have found that *Glenn* does not upset prior precedent holding that no structural conflict exists when employee benefits are funded from a trust. For example, in *Lance v. Retirement Plan of Int'l Paper Co.*, No. 08-1295, 2009 WL 1497493, *4 (4th Cir., May 29, 2009), the Fourth Circuit found that “the plan at issue does not operate under a conflict of interest as contemplated by *Glenn*, ... [b]ecause the Plan's benefits are funded by a separate trust to which International Paper does not have access for its own purposes, the Plan does not have significant incentives to benefit itself by denying benefits. ... To the extent this type of plan structure creates any conflict of interest on the part of its administrator, that conflict may be deemed of such little importance as to recede ‘to the vanishing point.’” In *White v. Coca-Cola Co.*, 542 F.3d 848, 858 (11th Cir. 2008) (*cert denied* April 6, 2009) the Eleventh Circuit found that a committee making claim determinations

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“does not operate under a conflict of interest where benefits are paid from a trust that is funded through periodic [nonreversionary] contributions so that the provider incurs no immediate expense as a result of paying benefits.” *Accord, Townsend v. Delta Family-Care Disability and Survivorship Plan*, No. 08-11340, 2008 WL 4507571, *3-4 & n.1 (11th Cir., Oct. 8, 2008) (“The payments into the benefits trust, however, were periodic and non-reversionary. The Committee incurs no direct expense as a result of granting benefits nor does it profit from the denial or discontinuation of benefits, and therefore does not operate under a conflict of interest.”).

In contrast, the Third and Ninth Circuits have found that *Glenn* dictates that a structural conflict does in fact exist, regardless of whether the employer has set up a trust to fund the benefits, or funds them directly out of corporate assets/operating funds. In *Burke v. Pitney Bowes Inc. Long Term Disability Plan*, 544 F.3d 1016, 1026 (9th Cir. 2008), the Ninth Circuit held that “even when a plan’s benefits are paid out of a trust, a structural conflict of interest exists that must be considered as a factor in determining whether there was an abuse of discretion. We reach this conclusion because, even though benefits are not paid directly by Pitney, Pitney obviously still has a financial incentive to keep claims’ experience under the Plan as low as possible—the less the Trust pays out as benefits, the less Pitney will ultimately need to contribute to the Trust to maintain its solvency. Thus, although the impact may be less direct, there is nonetheless a close relationship between benefits paid by the Trust and the money Pitney must provide from its general assets to fund the Trust. ... Although this impact is indirect, and therefore a less significant conflict compared to plans with benefits paid directly by employers, a structural conflict of interest does exist. Thus, the structural conflict of interest must be considered as a factor in evaluating whether the Plan abused its discretion.” Similarly, the Third Circuit in *Michaels v. The Equitable Life Assurance Society*, 305 Fed. Appx. 896, 902-03 (3d Cir. 2009), acknowledged that the benefits were funded from a trust established by the employer and that Aetna (*not* the employer) made the eligibility determinations, but nonetheless found that a conflict existed. The Third Circuit noted that *Glenn* “provided guidance as to how courts should approach potential conflicts of interest ... [it does] not give rise to a heightened version of the arbitrary and capricious standard.” Notably, however, neither the Third nor Ninth Circuit holdings, post-*Glenn*, were stark departures from prior precedent in those circuits.

While the Fifth Circuit’s decision in *Holland* strikes a bit of a balance between the disparate camps, it is also somewhat of a chameleon and is likely to be touted as a victory by both participants and employers alike, since it both acknowledges a conflict and minimizes it all in the same breath. Until the Supreme Court holds differently, however, employers should continue to take refuge in circuit precedent holding that funding benefits through a trust is one way effectively to distance benefits determinations from a conflict of interest analysis, and any potential impact such an analysis might have on the ultimate outcome of the dispute.

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