Boomers on the Brink, ERISA Litigation on the Rise: 
*Practical Advice to Avoid Becoming a Defendant*
What is on the Horizon: The “Perfect Storm” of ERISA Litigation

Doug Hinson, Pat DiCarlo, David Godofsky, Mike Monnolly and Tod Sawicki
LaRue v. DeWolff

- Substantially expands circumstances in which individuals can sue for breach of fiduciary duty
- Leaves open question of whether such claims must go through administrative process
Prior Law - Background

- Three types of claims participants can make under ERISA
  - Claim for benefits (ERISA § 502(a)(1)(B))
  - Claim for fiduciary breach (ERISA § 502(a)(2))
  - Claim for “other appropriate equitable” relief (ERISA § 502(a)(3))
Prior Law - Russell

- Fiduciary breach provision consistently references harm “to the plan”
- Supreme Court holds in *Russell* that a claim for breach of fiduciary duty must be brought on behalf of the plan
- Usually class actions or representative litigation
Post Russell Decisions

- Lower courts consistently threw out fiduciary breach claims not brought on behalf of plan
- Individuals could get equitable relief, but not money
- Created situations where obvious fiduciary breach, but no available remedy
LaRue Facts

- LaRue alleged employer breached fiduciary duty by failing to follow his investment elections in 401(k) plan
- Alleged breach cost him $150,000
- No harm to any other participant
LaRue Holding

- Court said “entire plan” reference in *Russell* applies to defined benefit plans, but not defined contribution plans.
- For DC plans, individuals can sue “for fiduciary breaches that impair the value of plan assets in a participant’s individual account.”
Roberts Concurrence

- Roberts wants claims like LaRue to be brought as claims for benefits
- He thinks an advantage to this is that exhaustion is clearly required
- Not clear if exhaustion is required for fiduciary breach claims
LaRue argued that there was no money in a claim for benefits.

Claims for benefits have to be based on the terms of the Plan.

Not clear whether claim like LaRue’s would be viable as claim for benefits.
Harm alleged by LaRue was harm to plan (whether 1% of assets or 100%)

Represents smallest change to law

Significant in stock drop context – there some participants make money
Jury Trials and ERISA – Competing Views

- Traditionally unavailable in ERISA actions, based on the reasoning that ERISA remedies are equitable as opposed to legal.

- In *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002), the Court defined the remedies available in a § 502(a)(3) breach of fiduciary duty action as “those categories of relief typically available in equity (such as injunction, mandamus, and restitution, but not *compensatory damages*)”

- Parties desiring a jury are attempting to turn this distinction into a right to jury trials in both §§ 502(a)(1)(B) and (a)(2) causes of action.
Jury Trials and ERISA – Competing Views

  - DOL sued under § 502(a)(2), alleging defendants received improper payments from plan
  - According to the court, the DOL sought to hold defendants personally liable for losses they caused to the plan and sought compensatory relief
  - Relying on *Knudson*, the court held this was a “legal remedy” and defendants were entitled to jury trial

- Plaintiffs sued under § 502(a)(2), alleging defendants paid excessive fees to plan service providers
- Plaintiffs sought restitution on behalf of the plan
- Rejecting an argument similar to that accepted in Meixner, court held “plaintiffs’ claim under Section 502(a)(2) is an equitable one for which there is no constitutional right to a jury trial”
- Court reasoned that Knudson “does not suggest (much less hold) that a claim for restitution by a plan fiduciary for breach of fiduciary duty is a legal rather than equitable claim”
401(k) Fee Litigation

Pat DiCarlo

ALSTON + BIRD LLP
Key Fee Allegations

- Fees are “excessive” if they exceed the actual cost of providing a service plus a “reasonable” profit.
- Fiduciaries did not use purchasing power to reduce fees (e.g., buy institutional shares or pooled investments).
- Excessive fees are prohibited transactions.
Boeckman v. A.G. Edwards

- Sponsor allegedly failed to use status as large investor to secure lower prices
- Purchased retail rather than institutional shares
- Court expressed skepticism, but refused to dismiss
Boeckman (cont’d)

- On summary judgment, court dismissed prohibited transaction claim, but not fiduciary breach claim
- PT claim would “effectively eviscerate the statutory exemption of mutual funds from the prohibited transaction rules”
Boeckman (cont’d)

- Whether a fiduciary acted prudently is fact question not appropriate for resolution on summary judgment
- Reserved ruling on motion to add 404(c) defense pending *Lively v. Dynegy* appeal
Hecker v. Deere

- Deere agreed to limit investment options to Fidelity products and open brokerage window.
- Fidelity Research shared revenue with Fidelity Management.
- Defendants allegedly charged or received excessive fees and failed to disclose revenue sharing payments to participants.
Hecker v. Deere
Disclosure Allegations

- Statute and regulations do not require more detail than prospectus and annual report.
- Proposed regulations demonstrate that existing regulations do not require more detailed disclosure.
- General fiduciary duties do not impose additional disclosure requirements
- Details of how costs are distributed among service providers is not material to participants
Hecker v. Deere
Imprudence Allegations

- 404(c) safe harbor protects fiduciaries from losses caused by participant directions.
- Participants could invest in over 2500 funds with costs set by market.
- Therefore, any losses resulted from participant directions.
The Fidelity Defendants were plan fiduciaries only for the limited purposes described in agreement.

They had no fiduciary authority or responsibility for selecting investment options.
Haddock v. Nationwide

- Trustees sued Nationwide as plan service provider
- Nationwide allegedly received payments for including certain funds on preferred list
- Court found Nationwide was a fiduciary with discretion over investments
Revenue sharing payments can be plan assets (broad definition)

Even if not plan assets, can still be prohibited transactions

Prohibited transactions need only “relate to” plan assets
Subprime ERISA Litigation

- Several stock drop suits against industry players
- Some suits based on mutual fund investments in mortgage-backed securities
Prudential v. State Street

- Alleges State Street breached its fiduciary duties as Investment Manager by investing in mortgage-backed securities through bond fund
- Prudential as a service provider seeks to recover on behalf of its plan clients
Unisystem v. State Street

- Putative class of all plans that invested in certain bond fund(s)
- Bond fund is collective trust – exempt from ’40 Act – so ERISA exemptions inapplicable
- Represents shift in focus from fees to performance
ERISA 401(k) Stock Drop Litigation

Doug Hinson
Presentation Overview

- Motion to Dismiss Decisions – The Tide Has Turned to Some Extent
- Trial Judgments and Post-Trial Appeals – So Far, Mostly Good
- What Can You Do?
Motion to Dismiss Decisions

- **Edgar v. Avaya**, 503 F.3d 340 (3d Cir. 2007)
  (affirming 2006 WL 1084087 (D.N.J. Apr. 25, 2006) (granting motion to dismiss))

- **Duty of Prudence**
  - *Moench* applies to non-ESOP EIAPs.
  - *Moench* analysis is appropriate at motion to dismiss stage.
  - Applying *Moench*, held that the situation was not so dire as to require the fiduciaries to disobey the terms of the plan and divest the plan of company stock.

- **Duty of Disclosure**
  - Held that the plan documents sufficiently “warn[ed] participants [of the] particular risks associated with investing in a non-diversified fund”.
  - No duty to “give investment advice” or “to opine on” the stock's condition.
  - ERISA fiduciaries cannot use insider information, and earlier disclosure would not have avoided the drop in price, so no harm – no foul.
Motion to Dismiss Decisions


- **Duty of Prudence**
  - The Court applied the *Moench* presumption, after determining that the prudence claim was masquerading as a “failure to investigate” claim.
  - After applying the *Moench* standard, the Court found that the company was not on the brink of collapse, and therefore, the presumption was not rebutted (agreeing with *Edgar* decision).

- **Duty to Monitor**
  - Because the prudence claim failed, so did the monitoring claim.
Motion to Dismiss Decisions


- **Duty of Prudence**
  - Agreed with Wright that § 404(a)(2) exemption precluded prudence claim; plan mandated investment in company stock.
  - Even though Moench presumption is at odds with § 404(a)(2) exemption, if 11th Circuit adopted Moench, no impending collapse and stock rebounded, so claim was dismissed.

- **Duty of Disclosure**
  - Press releases, SEC filings, information posted on ChoicePoint’s web site, and communications to investors were held not to be “intentionally connected” to or related to benefits under the plan, and thus not fiduciary in nature.
  - Held no “general fiduciary duty of disclosure under ERISA” but even if such a duty existed, “the securities laws provide for relief, which is available to the Plan and Plan participants.”

- **Duty to Monitor and Duty of Loyalty**
  - Derivative of prudence claim; failed to state a claim under either theory.
Motion to Dismiss Decisions

  - Affirms dismissal with prejudice – follows *Moench*
  - No Fiduciary Duty to Investigate – No “Red Flags”
  - Stock price drops / impact of alleged wrongdoing insufficient

  - Dismissal denied on *LaRue* grounds (individual accounts do not preclude claim under § 502(a)(2))
  - However, 7th Circuit blatantly pontificates in *dicta* regarding lack of merit in underlying claim
    - temporary price inflation insufficient
    - no duty to “outsmart the stock market”
    - fiduciaries cannot trade on insider information
Motion to Dismiss Decisions

- Defendants are not winning them all – for example:

- Usually, Courts refusing to dismiss ignore the *Moench* presumption or find that it is satisfied for limited purposes of a motion to dismiss.

- Allegations of actual fraud, inaccurate public filings, and/or illegal activity are hard to overcome on a motion to dismiss.

- Decisions often contain language that fiduciaries have broad duty to disclose, that ERISA is not “inconsistent with” or “preempted” by the securities laws and refuse to decide parameters of duty on motion to dismiss.
Judgments and Post-Trial Appeals

- *DiFelice v. US Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007) (appeal after bench trial; affirming district court opinion at 436 F. Supp. 2d 756 (E.D. Va. 2006)).

- Prudence and Loyalty inquiries focused on fiduciaries’ investigation into removal of company stock from plan.
- Factors the Court considered to uphold fiduciaries' actions:
  - diversified array of investment options in addition to employer stock
  - participants' freedom to transfer assets freely among the options
  - notification to participants in plan literature of the risks associated with non-diversified investments such as employer stock
  - consideration (on four occasions) of retention of employer stock as an investment option
  - obtaining opinions from outside counsel on whether to eliminate the employer stock fund
  - retaining an independent fiduciary to manage the employer stock fund and, if necessary, to terminate the fund
Judgments and Post-Trial Appeals

- **Nelson v. IPALCO Enters., Inc.**, 480 F. Supp. 2d 1061 (S.D. Ind. 2007) (trial judgment for defendants).

  - Five general rulings by court, emphasizing it was evaluating facts/plaintiffs’ claims “without the benefit of hindsight”:
    - (1) the transaction and investments in AES stock appeared “reasonable, prudent and consistent with the Thrift Plan itself at the time”;
    - (2) the defendants did not have any “negative inside information” about AES or the prospects of AES stock;
    - (3) the defendants “made competent and appropriate investment advice readily available” to plan participants;
    - (4) the defendants complied with all disclosure obligations under the federal securities laws regarding their own sales of IPALCO stock and the risks associated with investments in AES stock; and
    - (5) ERISA did not require the defendants to make additional or special disclosures to plan participants.
Judgments and Post-Trial Appeals

  - Affirms trial court in *IPALCO*
  - Only issue on appeal was duty to disclose – sales by fiduciaries
  - 7th Circuit acknowledged such sales not material information
    - But instead of declaring no duty to disclose, found any such duty satisfied by public disclosure and role of Merrill Lynch – investment advisor to participants
Judgments and Post-Trial Appeals

- *In Re Synkor*, 516 F.3d 1095 (9th Cir., Feb. 19, 2008).

  - District Court entered summary judgment in favor of defendants, despite prior notice that parties had reached settlement.
  - In support of overturning summary judgment, on merits 9th Circuit found issues of fact precluded summary judgment for defendants.
  - §404(a)(2) did not preclude claims per *Wright*.
    - Rather, applied “prudent man standard” on fiduciaries.
    - Under this standard, knowledge of price inflation due to internal scandal enough to raise issues of fact.
      - Financial viability (i.e., *Moench*) not required to be at risk.
What Can You Do?

- If Plan has employer stock – mandate
- Separate your SPD from your Prospectus
  - Do NOT incorporate public filings by reference in SPD
- Consider removing Board from role of appointing fiduciaries
  - Who do you want to be sued?
- Consider who should be your fiduciary – on your Committee
  - Do you have / want insiders?
  - Hire independent fiduciary for employer stock?
- Consider matching in cash – allocation per other contributions/instructions
What Can You Do?

- Consider providing access to investment advice, in addition to investment education
- Tell Participants stock is the riskiest of investment options
  - Consider special notice to those heavily invested in stock
- Procedural Prudence
  - meet regularly
  - consider stock as all other options
  - documentation
- If trouble hits – hire help
  - legal counsel
  - financial advisor
  - independent fiduciary
Defined Benefit Plan Litigation
The Time Value of Money Is Not Age Discrimination:
Why Cash Balance Plans are Withstanding Scrutiny
Nancy Pridgen
Cash Balance Plans

- DB plan that looks like a DC plan
- Account balance (in lump sum form): pay credits (% of pay) and interest credits.
- Cash balance plans are popular among plan sponsors because they are usually less expensive and among employees because the employees understand their benefits.
- So what’s the problem?
Cash Balance Plans

1\textsuperscript{st} … IBM seemed to try to convince employees that a cost saving change was a benefit increase. (Annuity vs. lump sum.)

- This strategy worked for other employers, but IBM’s workforce was more mathematically inclined.

2\textsuperscript{nd} … Plaintiff’s lawyer discovered ERISA § 204(b)(1)(H)

- A plan violates this section (and is illegal) “if, under the plan, an employee’s benefit accrual is ceased, or the rate of an employee’s benefit accrual is reduced, because of the attainment of any age.”

- Key phrase “rate of benefit accrual”
Cash Balance Plans
Formula for Trouble?

- According to Plaintiffs, defined benefit plan “rate of benefit accrual” is measured by the annuity at age 65
- Annuity for younger employee would include more years of interest credits than the annuity for an older employee
- Example: Hire two engineers, one age 25, one age 55. Though similarly situated, the annuity at age 65 will be smaller for the 55 year old (with 10 years interest) than for the 25 year old (with 40 years interest).
In essence, the plaintiffs’ argument was that, *if* a younger employee leaves his account in the plan for a longer period of time, he will receive more interest, and therefore the older employee is receiving less.

What happened? A lot of plan sponsors were sued … and are still being sued. (IBM, AT&T, Bank of America, AXA Equitable, FleetBoston, Boeing, WaMu, etc.)
Cash Balance Plans
Formula for Trouble?

- Most courts rejected the age discrimination challenge.

- However, one Court, in East St. Louis, Illinois, bought the argument vs. IBM. Judgment for $6 billion.
  - IBM settled the case for $300 million

- A few district courts in Second Circuit have bought it
Cash Balance Plans
Seventh Circuit Weighs In: Cooper v. IBM

- Seventh Circuit soundly rejected the theory (Aug. 2006)
  - The district court’s “approach treats the time value of money as age discrimination,” and “[t]reating the time value of money as a form of discrimination is not sensible.”
  - “The phrase ‘benefit accrual’ reads most naturally as a reference to what the employer puts in (either in absolute terms or as a rate of change), while the defined phrase ‘accrued benefit’ refers to outputs after compounding.”
  - Common sense – treat cash balance plans like their close relatives, defined contribution plans
Cash Balance Plans
One-Sided Battle in the Circuits?

- Third & Sixth Circuits agree with Seventh: Register v. PNC (3d Cir. Jan. 2007); Drutis v. Rand McNally (6th Cir. Aug. 2007)
- Other cases are still pending in the Second and Ninth Circuits (one wonders what is taking so long)
Cash Balance Plans
Pension Protection Act

- Section 701 of the Pension Protection Act of 2006 resolves the dispute, but only prospectively:
  - Age discrimination: protects hybrid plans against challenges under age discrimination rules so long as their vesting schedules and interest-crediting rates meet specific standards.
  - Calculation of lump-sum distributions: allows the plan to distribute just the participant's hypothetical account balance (eliminates so-called "whipsaw" calculation)
Cash Balance Plans
Why is there still litigation being filed?

- PPA – “No inference” as to legality of Cash Balance plans before PPA
- Lawsuits are still being filed
  - Newly filed in the E.D. Wis. (Alliant Energy, JohnsonDiversey)
- *Do cash balance plans finally have the green light? Sadly, no.*
Issues Only an Actuary Can Love—Cutbacks, Equivalence and Calculation Claims

David Godofsky
Backloading: IRC § 411(b)(1)(A), (B) and (C)

- An inevitable element in any class action pension litigation
- The purpose of backloading rules is to make the vesting rules enforceable
- However, the mathematical rules are poorly designed for the purpose, and lead to confusion (hence, litigation).
- Three mathematical tests have been designed to prevent backloading
- Each plan has to pass only one test, not all three
- The tests (as you will see) prohibit the most normal, non-abusive, benefit formulas, while permitting the most egregious ones.
- Common sense is your enemy if you are trying to understand backloading.
- Many problems in backloading may be solved by Rev. Rul. 2008-7.
• If benefits have to be vested after 5 years of service, that does no good if the benefit itself is negligible until retirement age.

The graph below shows a benefit formula that fails the backloading tests if NRA is 65, but (amazingly) passes if the NRA is 64. (Don’t try this at home!)
Backloading Tests

- **3% test** – at each date, accrued benefit is at least 3% of normal retirement benefit (NRB) x YOS
  
  - Example: 1% x FAP x YOS for 20 years, then increase to 30% x FAP
Backloading Tests

- **Fractional Rule** – accrued benefit no less than NRB multiplied by YOS / YOS at NRD
  - Example: Traditional benefit, then cash balance benefit
Backloading Tests

- **133-1/3% Rule**: Benefit accrual in any future year (20xx) cannot exceed 133.33% of accrual in any year before 20xx. (Example of failure):

![Graph showing accrued benefit over years]
Backloading – Key Problem Areas

- Multiple formulas (A+B or Greater of A and B)
- Offset formulas (such as social security offset)
- Plans with permitted disparity
- Wear away (as in cash balance conversions before PPA)
- Springing benefits
  - For example, benefits for which you are eligible after 10 or 20 years of service
- Cash balance plans with increasing pay credits
- Cash balance plans with market rate of interest
- Plans amended to increase or decrease benefits
Backloading – Key Defenses

- Plaintiff must demonstrate plan fails all three tests
- Can use different backloading rules for different participants
- May violate backloading in theory, but not with respect to real participants
- Formula may not “seem” backloaded, based on the purpose of the backloading rules (judges like this defense; plaintiffs hate it)
- Multiple formulas (A+B; A or B) can be tested separately under Rev. Rul. 2008-7
- Wear-away is ok under the “plan amendment” rule
Lump Sum Claims

- Basic claim: lump sum offered is less than the present value of the accrued benefit (IRC § 417(e)(3))

- Lump sum is calculated using pre-retirement mortality (ignores the value of the death benefit)
  - Problematic rulings in Seventh Circuit

- Cash balance plans, whipsaw – the account balance is worth more than the account balance (huh?)
  - The right to earn future interest has value, must be added to account balance
  - Safe harbor rates. Note controversy over what is a safe harbor rate. (Example: greater of 30 year treasury rate or 4%.)

- Plan has COLAs or other increases; lump sum excludes value of the COLA.
Cutback Claims

- Already popular, cutback claims are likely to be aggravated by PPA because it has so many exceptions permitting cutbacks; litigation will ensue over whether the plan qualified for the exception.

- Cutback claims generally allege that certain portions of the benefit formula are part of the accrued benefit:
  - Example: future increases resulting from indexing
  - Is the accrued benefit a number, or a formula?
  - COLA cases: COLAs are included in the accrued benefit
  - New area: death benefits

- Actuarial equivalence definition. PPA requires change; often cutback. An exception is provided but there may be many cases where plaintiff alleges the plan did not qualify for the exception; or the regulation/ruling granting the exception was arbitrary.

- PPA / recent regulations also permit elimination of certain benefit forms. Forecast is cloudy with chance of litigation.
Age Discrimination: ERISA § 204(b)(1)(H)

- Cash balance, largely solved.
- New problem – the “two person theory”
- Many if not most traditional pension plans fail the two person theory of age discrimination.
- Actual statutory provision: may not reduce rate of benefit accrual on account of attainment of any age.
- Two person theory: cannot provide a lesser benefit than would be given to a similarly situated younger employee.
- Problem: social security solvency legislation provides for lower benefits to younger employees. Many plans compensate by providing younger employees with bigger benefits (permitted disparity).
  - PPA provides a generally useless exception
Health and Welfare Plan Litigation: What Will the Plaintiffs’ Bar Think of Next?
Retiree Benefit Terminations – What Can You Do Within the Law?

Mike Monnolly
Changing Retiree Medical Coverage

- The legal problem - it’s a perception problem.
- Retirees think post retirement medical benefits are vested - like their pensions.
- Sources of this belief:
  - Employer communications
  - ERISA vesting rules: the “yard man” problem
Changing Retiree Medical Coverage

- Unilateral contract theory.
- “We worked until retirement therefore you can’t change our post retirement coverage.”
- ERISA applies unilateral contract theory to require pension vesting but not medical plan vesting.
- ERISA requires medical plans to have documents enforceable in federal court.
Changing Retiree Medical Coverage

- ERISA prohibits fiduciaries from misrepresenting plan terms.
- Not surprisingly, legal challenges to retiree medical changes are asserted under:
  - Contract claims
  - Misrepresentation claims
- The retirees make sympathetic plaintiffs.
Changing Retiree Medical Coverage

- Contract claims
  - Focus is on the documents. The court reviews for:
    - Internal consistency
      - Amendment/termination clause
      - Vesting language: “Lifetime”
    - External consistency
  - If a conflict exists, extrinsic evidence can be considered.
Changing Retiree Medical Coverage

- Extrinsic evidence includes:
  - Letters, brochures, benefit summaries, etc.
  - Oral representations/promises concerning vested coverage.
- Historical consistency can also be an issue.
Changing Retiree Medical Coverage

- Misrepresentation claims:
  - *Howe v. Varity Corp.*: Lying is a breach of fiduciary duty.
  - Other courts have applied the rule to accidental misrepresentations.

- Preventive measures
  - Legal review of documents
  - Adequacy of amendment/termination clause
  - Durational language
Changing Retiree Medical Coverage

- Preventive measures
  - Conflicting documents.
  - Make the SPD the plan document.
  - Use a “wraparound” document.
  - Be sure amendment procedures are being followed.
Changing Retiree Medical Coverage

- Preventive Measures
  - Misrepresentation claims
  - Carefully monitor extrinsic communications for consistency with the plan.
  - Include a short sentence stating benefits are subject to change.
  - Designate one party/department to answer questions in the SPD.
  - Maintain a phone log of all retiree inquiries. Recording work if retained for a sufficient period of time.
  - Use e-mail to receive and answer questions.
Claims Handling – Top 10 Mistakes to Avoid

Sean McMahan
Why It Matters

- Failure to comply with claims procedures could result in any of the following:
  - Loss of deferential standard of review
  - Remand for reconsideration
  - Reinstatement of benefits
  - Expanded discovery
  - Precluded from raising exhaustion or limitations defenses
Claim Handling Requirements

- ERISA Section 503 requires all plans to provide “adequate notice” of denial, setting forth “specific reasons”
- Following denial, plan must provide an administrative appeal process that affords a “full and fair review” of the claim
- DOL Regulation 29 C.F.R. § 2560.503-1 contains detailed discussion of benefit claim procedures
Plan Design Errors

- Plan lacks language granting the administrator discretion to interpret plan terms and decide a claim
  - To obtain deferential review, plan must grant discretion to reviewing fiduciary
  - No ‘magic language,’ but must be clear grant of discretion
Claim Handling Mistakes

- Plan grants discretion to the administrator, but entity making final decision is not the one granted discretion
  - For example, if plan grants discretion to “plan administrator,” you can’t have TPA make the decision on final appeal
Claim Handling Mistakes

- Failing to explain specific reason for denial or reference specific plan provision on which decision is based
  - Explaining “specific reason” permits claimant to perfect claim on appeal
  - Reason for denial should not change on final appeal decision
  - Referencing specific plan provision permits claimant to review plan and perfect claim
Claim Handling Mistakes

- Failing to describe the information or evidence needed to perfect claim
  - Canned statements such as “submit any evidence you have” do NOT comply
  - Instead, denial letter should identify specific evidence missing – x-rays, physical examinations, etc.
  - Added importance if denying disability claims based on lack of objective evidence
Claim Handling Mistakes

- Rubber-stamping the initial decision
  - Entity reviewing appeal should take a fresh look at all the evidence
  - Deference to initial decision often means failure to exercise discretion
Claim Handling Mistakes

- Failing to consult an appropriate medical expert
  - If decision is based, “in whole or part,” on medical judgment, then decision-maker must consult with medical expert
  - Expert should have “appropriate training and experience” in the field of medicine in question
  - Consulting RN is okay in certain cases, but better (or “safer”) practice is to consult physician specializing in field
Claim Handling Mistakes

- Failing to apply expert’s conclusions to the claimant’s evidence:
  - Must provide explanation of the medical judgment and apply terms of plan to claimant’s circumstances
  - Or, provide a statement that such explanation will be provided
Claim Handling Mistakes

- Applying a restriction or limitation that is not contained in the plan
  - For example, can’t require objective evidence of disability if plan doesn’t contain that requirement
Claim Handling Mistakes

- Issuing an untimely decision or failing to request an extension before the time to respond expires
- Courts often allow some leeway for untimely responses, but administrator can lose the deferential standard of review in such instances