BENEFITS INSIDER
A Member Exclusive Publication

Volume 42, July 2008

WEB's ***Benefits Insider*** is a member exclusive publication providing the latest developments from the Nation's Capital on matters of interest to benefits professionals. The content of this newsletter is being provided as a result of a partnership with the American Benefits Council, a premier benefits advocacy organization, which provides its core content, and is edited by Corinne M. Tyler, Employee Benefits attorney and Partner in the Cleveland Office of Baker & Hostetler LLP; ctyler@bakerlaw.com.

Articles in this Edition

RECENT LEGISLATIVE ACTIVITY

Medicare Legislation

The Senate offices have been urged to reconsider two provisions of the Medicare Improvements and Patients and Providers Act of 2008 (H.R. 6331). The House passed H.R. 6331 by a vote of 355-59 in June and the full Senate is expected take up the measure rather than a previously considered compromise measure.

The Senators were urged to reconsider those portions of H.R. 6331 that "impair the Medicare Advantage program, which has been shown to be extremely helpful to retired American workers who are eligible to participate in the Medicare program." Funding cuts to the Medicare Advantage program would then be used to pay for other program improvements such as prevention of a 10.6 percent physician payment cut held July 1. A second measure of concern noted would "codify the inclusion of certain therapeutic classes of drugs in the Medicare Part D benefit." This would mandate coverage of all drugs in a class notwithstanding a determination of their effectiveness or safety and also require an act of Congress to alter this coverage mandate rather than allow the Centers for Medicare and Medicaid Services (CMS), or the plans that Medicare authorizes, to address these issues.

Strong support was also shown for the inclusion of electronic prescribing provisions in H.R. 6331. "Our member companies support the e-prescribing provision because we believe it will increase utilization of this technology, prevent medical errors, increase patient safety and provider efficiency and help control costs - a goal that we know you share," the senators were told.

President Bush subsequently vetoed the Medicare legislation due to what he termed "inappropriate reductions in Medicare Advantage (MA) payments." However, it appears that the Senate may have sufficient votes to overwhelmingly overturn that veto.

PPA Technical Corrections Bill Containing Smoothing Provision Introduced in the House

Representatives Charles Rangel (D-NY) and George Miller (D-CA), respectively the chairs of the Committee on Ways and Means and Committee on Education and Labor, recently introduced the Pension Protection Technical Corrections Act of 2008 (H.R. 6382). The House subsequently passed the Act on July 9, 2008.

Much of the bill is the same as the technical corrections legislation passed by the House earlier this year as H.R. 3361. However, the new Rangel/Miller bill includes a provision that clarifies Congress' intent to preserve 24 month asset smoothing in the calculation of the value of pension plan assets. The smoothing provision is the same as that adopted by the Senate, in the Pension Protection Technical Corrections Act (S. 1974) passed in December 2007. In addition, several other provisions have been added to the Rangel/Miller legislation including a provision easing the interest rate used to calculate the benefits under certain small defined benefit pension plans, a modification to the interest rate calculation with respect to the market rate of return requirements for certain governmental plans, a clarification of the tax treatment of health plan reimbursements from certain governmental plans and a rollover provision (to Roth IRAs) for qualified airlines in bankruptcy.

Ways and Means Subcommittee on Select Revenue Measures Holds Hearing on IRA and the Retirement System

The House Ways and Means Subcommittee on Select Revenue Measures recently held a hearing on individual retirement arrangements (IRAs) and their role in the U.S. retirement system. In conjunction with the hearing, the Joint Committee on Taxation also released a document entitled Present Law and Analysis Relating to Individual Retirement Arrangements that provided background information on the current status of IRAs and the two legislative proposals addressed by the hearing's witnesses.

Primary focus of the hearing's testimony was the Automatic IRA Act of 2007 (H.R. 2167), providing for mandates regarding payroll deduction IRAs, sponsored by Subcommittee Chairman Richard Neal (D-MA) and Ranking Member Philip English (R-PA) and a second bill, the Small Businesses Add Value for Employees (SAVE) Act of 2008 (H.R. 5160) sponsored by Representatives Ron Kind (D-WI) and Kenny Hulshof (R-MO), which provides for a discretionary (rather than mandatory) payroll deduction IRA and improvements to SIMPLE IRAs.

Several members of the subcommittee and witnesses in attendance urged caution in any expansion of IRA incentives or plan designs so as not undermine employer incentives to adopt and maintain qualified retirement plans. Significant discussion also highlighted concerns about existing IRA tax incentives, the particular types of taxpayers who may benefit from such incentives, and whether changes are needed to current IRA contribution or income eligibility limits or to the Saver's Credit. Neither H.R. 2167 or H.R. 5160 are expected to be voted upon by the full Ways and Means Committee this summer.

House Passes Disability Law Expansion That Could Affect Employer Plans

The House of Representatives recently approved by a vote of 402 to 17 the ADA Amendments Act of 2008 (H.R. 3195). This legislation eases standards by which a disability is defined to those that "materially restrict" a major life activity and would allow for a wider scope of physical and mental impairments to be covered under the Americans with Disabilities Act (ADA). This same expansion would also require employers to review their disability plans to accommodate the greater number of applicable cases. There is concern that language in H.R. 3195 would hold plan sponsors to broader standard of liability than current law requires. The House-passed bill is currently before the Senate for its consideration, but a time table for that debate has not yet been announced.

House Subcommittee Passes Health Information Technology Legislation

The House Energy and Commerce Committee's Health Subcommittee recently passed by voice vote the Protecting Records, Optimizing Treatment, and Easing Communication Through Healthcare Technology Act of 2008 - The PRO (TECH)T Act of 2008 (H.R. 6357). The legislation was introduced by Energy and Commerce Committee Chairman John Dingell (D-MI), Committee Ranking Member Joe Barton (R-TX), Health Subcommittee Chairman Frank Pallone (D-NJ), and Health Subcommittee Ranking Member Nathan Deal (R-GA). H.R. 6357 includes provisions intended to strengthen the quality of healthcare services and reduce medical errors and costs by encouraging the adoption of health information technology. The subcommittee also prepared a section-by-section analysis of the passed legislation.

H.R. 6357 is comparable, though not identical, to the Wired for Health Care Quality Act (S. 1693). Sponsored by Senators Edward Kennedy (D-MA), Michael Enzi (R-WY), Hillary Rodham Clinton (D-NY), and Orrin Hatch (R-UT), S. 1693 was approved by the Senate Health, Education, Labor & Pensions Committee in August 2007. The Senate bill is awaiting floor consideration while outstanding issues are being resolved.

Other HIT bills have been introduced since then, including the Technologies for Restoring Users' Security and Trust (TRUST) in Health Information Act (H.R. 5442), sponsored by Representatives Edward Markey (D-MA) (a member of the Energy and Commerce Committee) and Rahm Emanuel (D-IL), the Promoting Health Information Technology Act (H.R. 3800), sponsored by committee members Anna Eshoo (D-CA) and Michael J. Rogers (R-MI), and the

Promoting Health Information Technology Act (H.R. 6179), sponsored by Representative Dave Camp (R-MI).

The Health Subcommittee will continue to work with the various stakeholders to make modifications to the draft language. The timing for introduction of legislation based on the draft and next steps for consideration of the Senate bill are unclear.

Senate Homeland Security and Governmental Affairs Hearing Focuses on Proposals to Prohibit Pension Investment in Some Types of Commodities

The Senate Committee on Homeland Security and Governmental Affairs recently held a hearing to consider three proposals intended to curb speculation in the commodity markets, but that may instead have a detrimental impact on the ability of pension funds and large institutional investors to invest in some types of commodities and commodity market index funds. Recently released by Committee Chairman Joe Lieberman (D-CT) and Ranking Minority Member Susan Collins (R-ME), the draft proposals are primarily intended to curb excessive speculation in these markets by institutional investors as it is alleged this practice is one of the leading causes of the current high cost of food and energy.

The most aggressive of the discussion proposals would prohibit pension funds and governmental entities (with more than $500 million in assets) from investing in agricultural and energy commodities and prohibit large institutional investors (with more than $500 million in assets) from investing in commodity market index funds. During a recent hearing Senator Collins expressed during a June hearing some concern with this proposal. A second measure could cap the amount of overall market share in any one commodity that can be held by financial speculators. The third proposal would close the so-called "swaps" loophole by (1) requiring the Commodity Futures Trading Commission to impose individual speculative position limits and (2) clarifying that such limits apply to any position not related to *bona fide* hedging activities.

Senator Lieberman stated that the hearing was an opportunity to air the proposals and hear from both opponents and supporters because he and Senator Collins plan to introduce comprehensive legislation to Congress soon. Senator Lieberman also expressed hope that the Senate would be able to agree in a bipartisan manner to devote time for the full Senate to debate to the issue before Congress takes a recess in the fall. Most of the hearing's witnesses expressed strong reservations about the proposal to prohibit pension funds from investing in certain commodities, arguing that there are legitimate reasons for participation by these funds in these markets.

Retiree Health Legislation Introduced in House

Representative John McHugh (R-NY), along with several fellow New York Republicans, has introduced the Retiree Health Account Act (H.R. 6288), which establishes private, tax-favored accounts to help individuals save money now for health care in retirement. Representatives Randy Kuhl (R-NY), Jim Walsh (R-NY) and Peter King (R-NY) are cosponsors of the bill. “Health care costs for retirees have reached record levels, with individuals incurring enormous financial expenses. Currently, there are no tax incentives for individuals who wish to save money specifically to cover health care costs in their retirement,” McHugh said in an introductory statement.

Specifically, the legislation would create two separate savings accounts for individuals to utilize when saving for the health care costs they will incur in retirement. The first account, the Retiree Health Account (RHA), allows individuals to contribute up to the 401(k) contribution maximum per year in pre-tax earnings as well as additional “catch-up” deferrals of up to $5,000 per year after age 50. Once an RHA account holder reached age 55, he or she would be able to withdraw monies tax-free for qualified expenses such as medical care, health insurance, longterm care services, and prescription drugs. Early withdrawal would be subject to ordinary income taxes and a 10 percent penalty, unless the individual is disabled, facing medical hardship, or the money was used to purchase health insurance during a period of unemployment.

The second account created by Congressman McHugh's legislation, the Individual Health Account, would be structured similarly to an Individual Retirement Account (IRA). This would allow eligible individuals to contribute up to $5,000 a year in pre-tax money, with individuals 50 and older contributing up to $6000 a year. Similar to the RHA account, funds could be withdrawn tax-free if used for qualifying medical expenses after age 55 or if the individual faces disability, unemployment, or extraordinary medical expenses.

The legislation also includes a refundable tax credit of up to $1,000 for individuals who take advantage of the opportunity to contribute to RHAs and IHAs, up to a maximum of $5,000 in a lifetime.

H.R. 6288 was referred to the House Committee on Ways and Means for consideration, but the legislation is unlikely to be considered during this Congress. The bill does, however, serve as a counterpoint to efforts to mandate existing retiree health benefit programs and highlights the challenge of funding for retiree health expenses without tax benefits.

Senate Continues to Negotiate Tax Extenders Legislation, Including Offshore Compensation Provision and ISO Correction

U.S. Senate leaders continue to negotiate the status of the Energy and Tax Extenders Act (H.R. 6049), legislation to renew expiring tax provisions and provide tax incentives for investment in alternative energy. The bill also includes a revenue-raising provision affecting offshore nonqualified deferred compensation as well as the long-sought tax credit for incentive stock options (ISOs). The House of Representatives passed H.R. 6049 in May 2008.

Twice the Senate has failed to garner enough votes to bring debate on the measure to a close (with 60 votes needed for passage): Only 50 Senators voted affirmatively in the first vote and only 52 Senators did so in a second. Senate Finance Committee Chairman Max Baucus (D-MT) has prepared a substitute amendment that differs from the House-passed legislation in that it contains relief from the Alternative Minimum Tax and is only partially offset by revenue-raising provisions. The Senate, however, has not yet acted on the substitute.

H.R. 6049 and the Baucus substitute include the "offshore" provision, which would revise the tax treatment of offshore nonqualified deferred compensation, aimed primarily at hedge fund managers. Under this provision, nonqualified deferred compensation paid by certain types of foreign corporations and partnerships will become taxable as soon as the amounts are no longer subject to substantial risk of forfeiture. A new section (457A) would be added to the Internal Revenue Code (Code), closely mirroring the treatment of deferred compensation from tax-exempt employers. The proposal is estimated to raise more than $24 billion over ten years. This measure has been opposed and updated talking points on the provision have been issued, noting that the impact of the proposal would be much broader than just hedge fund managers, affecting equity compensation, performance-based compensation and other compensation practices as well. This proposal is estimated to raise approximately $24 billion over 10 years.

Both measures also includes an extension and modification of the alternative minimum tax (AMT) credit for ISOs. This provision, identical to the AMT Credit Fairness and Relief Act (H.R.3861/S. 2389), would resolve the unintended application of the AMT tax as applied to ISOs.

401(k) Fee Disclosure Legislation Indefinitely Postponed

Legislation to expand disclosure of 401(k) plan fees will be tabled in the House of Representatives for the remainder of the year, according to reports from Capitol Hill.

As previously reported, the House of Representatives Committee on Education and Labor previously approved Committee Chairman George Miller's (D-CA) 401(k) Fair Disclosure for Retirement Security Act (H.R. 3185), while House Ways and Means Committee member Richard Neal (D-MA) introduced a separate version of the legislation, the Defined Contribution Plan Fee Transparency Act (H.R. 3765). When the two committees discussed these matters at length, they determined that there were substantial differences between the two approaches. Since it had also become unclear whether the Senate would be willing or able to act on legislation before the end of the year, House Democrats have made a decision not to pursue legislation on the issue in 2008. It is likely that advocates of fee legislation in Congress will seek to address the topic again in 2009.

In testimony and written statements to both House committees, noted was the importance of transparency so that plan sponsors and participants understand the fees related to their plans, while warning of unintended consequences to plan sponsors and participants.

The committee leadership will now have more time to evaluate these issues. The Department of Labor (DOL) is soon expected to issue proposed regulations on 401(k) fee disclosure to participants, which could also influence future debate on the subject.

Senate Committee Examines Supreme Court Decisions on Preemption, Discrimination

The Senate Judiciary Committee recently held a hearing, Short-change for Consumers and Short-shrift for Congress? The Supreme Court's Treatment of Laws that Protect Americans' Health, Safety, Jobs and Retirement, to examine the effects of the high court's decisions on a variety of landmark cases.

Committee Chairman Patrick Leahy (D-VT), in his opening statement, criticized recent court decisions with employee benefit implications, including the Ledbetter pay discrimination case and cases involving ERISA preemption of state law for causes of action. "ERISA provides no relief for individual participants," Leahy said. He also noted that "Congress never intended to preempt existing state law," though agreement on that point has not been fully established.

The panel heard from a variety of witnesses, including individuals with medical problems, law professors and attorneys with expertise in government regulation, all of whom generally agreed with Leahy's thesis. One attorney suggested the consideration of a no-fault compensation system similar to the one for compensation for victims of adverse effects of childhood vaccines. A professor of law for the University of Texas School of Law, suggested that there should be an interpretive rule so that cases like those of the two victims would be resolved in favor of consumer interest.

Only one individual, an attorney, testified on behalf of the U.S. Chamber of Commerce, and provided the perspective of employer plan sponsors who rely on ERISA preemption to offer consistent, uniform benefits to employees.

Senator Orrin Hatch (R-UT) was sympathetic to the individuals' plight but also expressed his desire to encourage employer-sponsored health care benefits rather than discourage them.

IRS Hearing on Proposed Hybrid Plan Regulations

At a recent IRS hearing on proposed guidance for hybrid defined benefit retirement plans, the agency was urged to provide clarity on a number of issues for hybrid plan sponsors.

Testimony was provided that emphasized the critical importance of flexibility for plan administration. Employers have a number of concerns with the proposed regulations. The testimony described several of these concerns, including:

- *A reasonable interpretation standard:* The regulations are proposed to be effective for plan years beginning on or after January 1, 2009. The Treasury and IRS are strongly urged to clarify that, prior to such regulatory effective date, a plan will be treated as having complied with the law if the plan complies with a reasonable interpretation of the applicable statutory provisions. Otherwise, the proposed regulations will function effectively as temporary regulations since they would provide the only clearly acceptable means of compliance before the issuance of the final regulations.

- *Market rate of return:* Under the PPA, an "applicable defined benefit plan" is treated as failing to satisfy the applicable age discrimination rules unless the plan provides that any interest credit (or an equivalent amount) shall not exceed a market rate of return. The issues regarding what constitutes a market rate of return are critical issues for hybrid plans.

- *The age discrimination safe harbor:* The new safe harbor applies differently based on the type of benefit formula used by the plan. The Treasury and IRS are urged to clarify how the pre-existing age discrimination rule applies in various contingencies.

- *Applicability of the conversion rule:* In the case of an applicable plan amendment adopted after June 29, 2005, the PPA deems the amendment to be age discriminatory unless the accrued benefit is at least a minimum amount. The Treasury and IRS are requested to clarify what constitutes an applicable plan amendment, particularly in cases where participants are given a choice of coverage under the old or new formula.

Other witnesses represented a variety of employer and participant organizations, including AARP, the College of Pension Actuaries and the American Society of Pension Professionals & Actuaries.

During the question-and-answer period, the Treasury and IRS panelists focused on the market rate of return issue. The officials expressed skepticism but appeared to consider allowing a cumulative floor for equity-based rate of return rather than an annual floor, without requiring a reduction (or "haircut") of the rate of return.

House Committee Discusses Bankruptcy Legislation

The House of Representatives Judiciary Committee's Commercial and Administrative Law Subcommittee recently held a hearing on the Protecting Employees and Retirees in Business Bankruptcies Act (H.R. 3652), a bill to improve protections for employees and retirees' pension plan funds in business bankruptcies. H.R. 3652 is sponsored by full House Judiciary Committee Chairman John Conyers (D-MI). A section-by-section summary of the bill is now available.

Most notably, the legislation would:

- Raise the priority of worker benefit claims in bankruptcy litigation, enabling active workers and retirees whose benefits are not fully insured by the PBGC to file a claim against the plan sponsor in bankruptcy court for the full amount;

- Make it more difficult to change existing collective bargaining agreements when a company is in bankruptcy; and

- Strictly limit executive compensation in situations where qualified plans have been terminated.

A companion bill, S. 2092, has been introduced in the Senate, sponsored by Senator Dick Durbin (D-IL). Senator Barack Obama (D-IL) is a cosponsor of the bill and has included bankruptcy reform as part of his presidential platform.

There is concern that elements of the bill could have a significant impact on existing benefits programs and some plan sponsors' willingness to maintain retirement and retiree health plans.

RECENT REGULATORY ACTIVITY

IRS Releases Additional Guidance on HSAs in New Question and Answer Format

The Treasury and IRS recently released Notice 2008-59 that provides additional guidance on health savings accounts (HSAs) in a question and answer format. The Treasury and IRS have used a question and answer format for prior HSA guidance issued in 2004 (Notice 2004-50 and Notice 2004-2). Notice 2008-59 includes 40 new frequently asked questions and answers regarding a wide range of topics including eligibility, high deductible health plans, HSA contributions and distributions, prohibited transactions, establishing an HSA and plan administration.

Although much of Notice 2008-59 restates prior guidance, there are several areas where it provides new or expanded guidance for employers and employees. These include HSA eligibility of individuals who have access to an employer's on-site health center providing health care that is free or at a cost below market value. According to Q&A-10, an otherwise eligible employee is eligible to contribute to an HSA if the employer's on-site health clinic does not provide "significant benefits in the nature of medical care" in addition to preventative care or other coverage that is disregarded under the federal tax law for purposes of determining HSA eligibility. Two accompanying examples clarify that an employer's on-site clinic that provides free physicals, immunizations, allergy injections, over-the-counter pain relievers and treatment for job-related accidents would not be considered "significant benefits in the nature of medical care." A hospital, however, that permits its employees to receive care at its facilities "for all their medical needs" at no charge would be providing "significant benefits in the nature of medical care" that would make the employees ineligible to make HSA contributions.

The guidance also includes several questions related to employer contributions to employees' HSAs. Employer contributions to employees' HSAs may be allocated to a prior tax year (Q&A-21). An employer may seek to recover its contributions to an account of an employee who was never an eligible individual (Q&A-23). However, employers who contribute to an HSA of an employee who ceases to be an eligible individual during the year may not recoup amounts that the employer contributed after the point the employee ceased to be eligible (Q&A-25).

Employers who make HSA contributions in amounts that exceed the statutory maximum annual contribution may recoup the excess amounts (Q&A-24). If the employer does not recover the excess amounts, the amounts must be included as gross income and wages on the employee's Form W-2.

Determining when an HSA is established is clarified by Q&As 38-41. This is a particular concern for an account owner, since HSA distributions are tax-favored only for qualified medical expenses incurred after the HSA is established. According to the guidance, an HSA is a tax exempt trust, and state trust law determines when an HSA is established. Most state trust laws require that a trust be funded to be established. State law may also require an account beneficiary's signature to establish the trust. According to the guidance, an HSA trustee may not treat an HSA as being established before the date of establishment under state law, such as by using the effective date of high deductible health plan coverage.

IRS Issues Guidance on Contributions to, and Distributions from, HSAs

The IRS has released two additional notices of guidance relating to HSAs:

Notice 2008-51 provides for distributions from an individual retirement account (IRA) or Roth IRA to an HSA, as permitted under the Health Opportunity Patient Empowerment Act of 2006. The IRS notice states that the qualified HSA funding distribution is a one-time transfer from an individual's IRA to an HSA and generally is excluded from gross income and is not subject to the 10 percent additional tax under the tax code. Any qualified HSA funding distribution from an IRA or Roth IRA must be less than or equal to the IRA account owner's maximum annual HSA contribution. The amount contributed to the HSA through such a funding distribution is not allowed as a deduction and counts against the individual's maximum annual HSA contribution for the taxable year of the distribution.

Notice 2008-52 provides additional guidance on contributions to HSAs, specifically with regard to the repeal of the high deductible health plan deductible limit on annual HSA contributions under the Health Opportunity Patient Empowerment Act of 2006. The IRS notice sets forth the formula for calculating annual HSA contribution limits for 2007 and later years. The notice clarifies the "full contribution rule," which establishes eligibility for individuals who wish to make a full contribution to an HSA. A testing period applies to the full contribution rule. The guidance also affirms a 6 percent excise tax for each taxable year on HSA contributions in excess of the maximum contribution limit for the year.

Treasury/IRS Issue Proposed Rules for Cash Balance Plans and "Greater-of" Formulas

The Treasury and IRS have released proposed regulations providing guidance for cash balance defined benefit plans and the application of the accrual rule under "greater-of" formulas, under which an individual's plan benefits are determined on the basis of the greatest of two or more separate formulas. IRS Revenue Ruling 2008-7 formally addressed the application of accrual rules for pension plans under Internal Revenue Code Section 411(b)(1) (commonly referred to as the "backloading" rules).

The proposed regulations set forth the rules for a typical "greater of" transition from a final average pay traditional pension plan to a cash balance plan. The regulations essentially state that plan sponsors do not need to aggregate the prior and new formulas in such cases, since the formulas use a different basis to determine benefits and each formula can be tested separately for satisfaction with the 133-percent test of the accrual rules.

The proposed regulation also announces that a public hearing will be held on the proposed regulations on October 15, 2008.

IRS Releases Guidance on ESOP Dividends

The IRS has released Announcement 2008-56, governing the reporting of dividends on employer securities that are distributed from an employee stock ownership plan (ESOP). Beginning with distributions in 2009, the reporting of ESOP dividends must be provided on a Form 1099-R that does not report any other distributions.

The IRS released final regulations on ESOP dividend deductions in August 2006.

RECENT JUDICIAL ACTIVITY

Supreme Court Rules for Participant in ERISA "Conflict of Interest" Case

In a recent decision, the U.S. Supreme Court ruled in favor of a plan participant in *MetLife v. Glenn*, which addresses whether benefit decisions made by claims administrators who also fund the plan are tainted by a conflict of interest and therefore subject its claims determinations to heightened judicial review. The decision upholds a ruling by the U.S. Appeals Court for the Sixth Circuit.

The Sixth Circuit had ruled – overturning a decision in district court – that MetLife, which served as claims administrator and funding agent for a disability plan, was engaged in a conflict of interest when it rejected a participant's eligibility for disability benefits. Writing for the Supreme Court's majority opinion, Justice Stephen Breyer agreed, noting that federal law imposes a special standard of care on insurers requiring full and fair review of claim denials.

The America's Health Insurance Plans and the U.S. Chamber of Commerce previously filed an amicus ("friend of the court") brief in the case, arguing that ERISA's framework permitting a single entity to perform fiduciary and non-fiduciary functions has historically operated effectively and fairly, since many plans rely on a single entity for both fiduciary and funding purposes and market incentives and ERISA regulations ensure that funding entities provide proper fiduciary service. The brief also asserted that benefit determination by an entity that also funds the plan should not be presumptively subject to heightened judicial review, particularly in the absence of evidence that the decision was improper, since such scrutiny would clearly undermine ERISA and adversely affect benefit plans.

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