INTERLOCUTORY APPEALS

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Program Overview

Topics being addressed:

- **28 U.S.C. § 1292(b) certification** – controlling question of law with substantial ground for difference of opinion.
- **Rule 23(f) appeal** – interlocutory appeal of class rulings.
- **Rule 54(b) appeal** – partial final judgment on discrete claims or parties, and district court certifies no just reason for delay.
- **Mandamus** – extraordinary relief.
- **Injunctions** – under 28 U.S.C. § 1292(a)(1) can immediately appeal orders granting, denying or modifying an injunction.

Program Overview

Three aspects of program:

- First aspect is technical, to understand the controlling standards and procedures.
- Second aspect is to illustrate, in the ERISA context, the types of cases and issues that may be ripe for interlocutory appeals.
- Third aspect is strategic: To think about what serves your parties' interests. *E.g.*, do you want or need to get to the circuit court quickly?

§ 1292(b) Certification of Controlling and Disputed Question of Law

Controlling Standards and Procedures

- Procedure:
  - District court must certify the order containing the controlling question for appeal, and then appellate court has to agree to accept it.
  - No set time limit to move in district court, but need to move promptly if want to have best chance for certification.
  - If certified, must apply to appellate court within 10 days of the order certifying the question.
  - If granted, appellate court has jurisdiction over the order and any issue fairly included or inextricably intertwined with the order.

Controlling Standards and Procedures

- 29 U.S.C. § 1292(b) standards:
  - Issue involves "a controlling question of law."
  - For which there is a substantial ground for difference of opinion on its resolution.
  - And its resolution will materially advance the ultimate termination of the litigation.

- Piecemeal appeals in federal court are disfavored. § 1292(b) certification is not used routinely, rather limited to "exceptional situations in which allowing an interlocutory appeal would avoid protracted and expensive litigation." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1981).

Recent ERISA Example – Church Plan Litigation

- Cases challenged whether non-churches could establish and maintain an ERISA-exempt "church plan"
- Medina v. Catholic Health Initiatives, 2014 WL 12741156(D. Colo. Oct. 27, 2014): Denied 1292(b) motion because determination of church plan exemption would not terminate the litigation.
- Kaplan v. St. Peter's Healthcare System, 2014 WL 4678059 (D.N.J. Sept. 19, 2014): certified question of whether a non-profit healthcare corporation can establish and maintain a church plan under ERISA.
- Rollins v. Dignity Health, refused to certified question after motion to dismiss, 2014 WL 1048637 (N.D. Cal. Mar. 17, 2014), but certified question after granted summary judgment for plaintiffs, 2014 WL 6693891, at *1 (N.D. Cal. Nov. 26, 2014)
- After those rulings the Supremes granted certiorari and decided issue in *Advocate Health Care v. Stapleton*, 137 S. Ct. 1652 (2017).

Recent ERISA Example – Tolling Agreements

- Sec., U.S. Dept. of Lab. v. Preston, 873 F.3d 877 (11th Cir. 2017)
  - Key issue: whether 6 year limitations under ERISA 413(1), the six-year time limit, is waivable by tolling agreement.
  - District courts, including within 11th Cir, had reached different results

- Eleventh Circuit accepted interlocutory appeal and ruled in Department's favor.

Other Recent ERISA Examples

- Peterson v. UnitedHealth Group Inc., 242 F. Supp. 3d 834, 850 (D. Minn. 2017)
  - Certified novel issue whether insurer's cross-plan offsetting practice for out-of-network providers was allowed under the plan.

- Santomenno v. Transamerica Life Ins. Co.,2016 WL 2851289, at *9 (C.D. Cal. May 13, 2016)
  - Certified question whether service provider is a fiduciary with respect to its own compensation.

Rule 23(f) Interlocutory Appeal of Class Rulings.

Background on Reason for Rule

- Class ruling often of critical practical importance for defendants and plaintiffs.
  - For defendants – often create great pressure to settle rather then risk a class judgment.
  - For plaintiffs – may not make economic sense to pursue case if class is not certified.
    - ERISA § 502(a)(2) actions on behalf of the plan may provide an alternative vehicle for broad relief.
- In light of these concerns, in 1998 the federal courts amended Rule 23 to add Rule 23(f) permitting requests for interlocutory appeals of orders granting or denying certification.

Controlling Standards and Procedures

- Procedure:
  - No need for district court certification. Petition for appeal must be filed with 14 days of order granting or denying class certification. FRCP 23(f); FRAP 5.

- Standards:
  - Appellate courts have broad discretion, like Supreme Court decision to grant certiorari.
  - Standards vary and purposefully have not been clearly defined by the circuit courts, but key factors include whether:
    - The class ruling is a “death knell” to plaintiffs or defendants.
    - The ruling involves a novel and important question of law.
    - The certification decision is manifestly erroneous.

Variances in Circuits

- Circuits have varied greatly in how amenable they are to granting Rule 23(f) petitions. Over time average grant rate has decreased.

- For example, from 2012 through first half of 2014:
  - Average grant rate was 23%
  - Wide variances in the circuits: highest grant rate (Fifth) was 67%, lowest grant rate (First) was 8%.

ERISA Example Langbecker v EDS

- Langbecker v. Elec. Data Sys. Corp., 476 F.3d 299, 304 (5th Cir. 2007): Reversed certification on Rule 23(f):
  - ERISA employer stock case consolidated with securities fraud class action.
  - Unsettled questions as to nature of ERISA stock-drop claim for 401(k) plan

- Johnson v. Meriter Health Services Employee Ret. Plan, 702 F.3d 364 (7th Cir. 2012) – affirmed certification on Rule 23(f):
  - claims for monetary relief were incidental to injunctive or declaratory relief; and
  - conflicts of interest between class members were too hypothetical

Rule 54(b) Appeal on Partial Final Judgment on Discrete Claims or Parties & No Just Reason for Delay

Controlling Standards and Procedures

- Rulings that do not resolve all claims against all parties are not appealable "judgments."
- Rule 54(b) provides an exception when there are either
  - (1) multiple claims
  - (2) multiple parties
- District court can direct entry of a judgment as to that claim or party if there is "no just reason for delay."
  - An immediate appeal would avoid some risk of hardship or injustice to a party.
  - An immediate appeal may avoid a second trial if the district court is reversed.
- Typically denied where dismissed claim intertwined with remaining claims or would again be subject to review in a later appeal.

ERISA Examples

- *Hans v. Tharaldson* (D. N.D.)
  - Court dismissed former employee plaintiffs who had cashed out based on lack of standing, but case proceed for those who still had accounts
- *Martin v. State of Washington* (Wash. Sup. Ct.)
  - Parties agreed to settle all claims, except for ongoing dispute about future application of specific policy
  - To finalize class action settlement, entered final approval of settlement pursuant to Rule 54(b)
- *Severstal Wheeling v. WPN* (SDNY)
  - Court dismissed claims against one defendant, but not others; no Rule 54(b) sought;

Extraordinary Relief of Mandamus

Controlling Standards and Procedures

- Parties seeking the writ of mandamus face a high burden. When determining whether to grant mandamus relief, the appellate courts consider, *e.g.*, whether:
  - The party seeking mandamus has no other means, such as a direct appeal, to obtain the requested relief.
  - The party is damaged or prejudiced in a manner not correctable on appeal.

    E.g., In re Lott, 424 F.3d 446, 449 (6th Cir. 2005)

Mandamus and Venue Transfers Under Plan Forum Selection Clauses

- A number of cases have used mandamus to challenge a district court's decision to grant or deny venue. A ruling enforcing or refusing to enforce an ERISA plan's forum selection clause can be a good candidate:
  - There is no other practical way to achieve relief and the party may be harmed in a way not correctable in a later appeal.
  - Transfer turns on important, unresolved legal question: Whether ERISA's venue provision precludes plans from excluding venues permitted by ERISA?

§ 1292(a)(1) Immediate Appeal of Orders Granting, Denying or Modifying an Injunction

Controlling Standards and Procedures

- 28 U.S.C. § 1292(a)(1) grants a party the right to immediately appeal district court orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"
- Interlocutory appeal of an injunction is permissive, not mandatory. Not waive, though issue may be mooted.
  - Plaintiff can consider tactical advantages of early appeal by way frame complaint and push request for a preliminary injunction.

- Although this is an appeal as "of right," to limit piecemeal appeals, appellate courts sometimes construe statute narrowly to interlocutory orders threatening serious, perhaps irreparable injury.

ACA

- Preliminary Injunction appeals often happen in cases involving challenges to regulations that are effective and therefore may cause irreparable harm.
  - "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. NRDC,* 129 S.Ct. 365 (2008)

- Example: Recent Interim Final Rules (IFRs) concerning contraceptive coverage under ACA.
  - First the regulation had a more limited exception for churches and their auxiliaries but required church-affiliated entities to cover FDA-approved contraceptives unless they use an accommodation.

ACA

- Long history on challenges to this regulation, including from private parties in *Hobby Lobby* and religious organizations in *Zubik*.
  - In *Zubik*, the Supreme Court took the case and remanded based on further guidance from the parties.

- Most recently: after *Zubik*, the Government issued a new IFR that exempted most entities with a religious or moral objection from the contraceptive coverage mandate without using the accommodation.
  - At this point, several states and non-profit groups sued in several forums, representing the interests of employees.
  - The states sought preliminary injunctions and succeeded in California and in Pennsylvania.
  - After the court granted the injunctions against the Government, several religious organizations who intervened in the case appealed the decision. The Government also appealed the decisions.