American Conference Institute’s Premier Forum on Defending and Managing ERISA Litigation
Expert defense strategies for leading outside counsel and in-house counsel on litigating today’s key issues involving benefit plans and fiduciaries

October 19-20, 2009 – The Helmsley Park Lane Hotel – New York City

Faculty includes 28 experienced in-house counsel from:

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Senior in-house counsel, top outside defense litigators and renowned jurists will provide you with up-to-the minute practical information on:

» Using the claims review process to set up, control and strengthen the defense
» Addressing evidence outside the administrative record, standards of review, conflicts of interest & discovery
» ERISA fiduciary litigation: Newest plaintiffs’ liability theories and substantive defenses, and trends in defense pleadings and motions
» Employer stock in light of the economic downturn: Defending against stock drop suits, 401(k) fee cases and other defined contribution plan claims
» Communication with the Judge: Explaining a plan and the ERISA statute to the court
» Service provider relationships: Defending and managing litigation that arises between plans and providers
» Analyzing plan remedies and the scope of equitable remedies to achieve realistic settlement expectations
» ERISA preemption – the procedural and substantive aspects of the defense
» Welfare benefit cases and retiree health benefit litigation post-MetLife v. Glenn
» Defending against age-based and other “recessionary economy” ERISA claims: Cash balance plans, early retirement, reductions in force, and beyond
» Devising procedural strategies in ERISA class actions
» Overcoming the vexing ethical issues that arise with the attorney-client privilege

21 federal judges from district courts located in 8 circuits will help you convey ERISA complexities to a court.

HEAR FROM:
Hon. Janet Bond Arterton
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The premier ERISA litigation conference devoted entirely to the defense of claims, led by an unparalleled faculty of 28 in-house counsel, 21 federal judges, and the top outside counsel defense litigators and firms.

The volume of ERISA litigation has greatly increased. The cases are complex and the stakes involved for defendants are exceptionally high. There are huge variations in the types of cases that arise under ERISA, as well as substantive differences involved in defending against the various claims. The best plaintiff attorneys are getting into these cases because, among other things, they can recover attorney fees. As a result, the defense bar is seeing more and more class actions, with the top ten settlements for ERISA-related class action cases topping $17 billion in 2008.

Throw in the current ERISA “environment” (including a recessionary economy and growing ranks of retirement-age demographic) and it's entirely evident that in defending and managing these complex claims, counsel for companies, plan fiduciaries, sponsors, administrators, advisors and insurers face a distinct uphill battle, including:

• ERISA is a very complex law, making a detailed and thorough knowledge of its nuances absolutely necessary to be successful in litigation
• The relatively scant legal precedent and frequent legislative developments have made this knowledge difficult to obtain
• ERISA lawsuits often involve novel and untested legal theories (potentially creating new responsibilities and liabilities), making it even more important for those involved to know the law to craft a creative and effective case
• Educating the judge with respect to the technical/complicated issues involved with plans and the ERISA statute
• A failure of plan professionals, sponsors or administrators to have written procedures, follow those procedures, or document what they did to follow them
• Organized, well-connected, and effective plaintiff attorneys filing large numbers of lawsuits/theories and seeing what sticks, with the sheer volume of cases alone placing a huge burden on defense resources
• Sympathy for plaintiffs in today's landscape and juror bias against defendant companies

As a result of this uphill battle, there is simply no room for error in the defense of these claims. In response, American Conference Institute is proud to introduce its premiere installment of the essential advanced defense forum that will shape the future of ERISA strategies for leading litigators and in-house counsel: Defending and Managing ERISA Litigation. Through a faculty of distinguished outside defense counsel, 28 in-house counsel, and 21 renowned federal jurists, this conference will provide even the most seasoned ERISA litigators with clarity and certainty with respect to today's key issues crucial to mounting a rigorous and complete defense.

Our employment litigation events, including our annual Wage & Hour and EPLI conferences, offer unique opportunities for law firm litigators to learn from some of the best in the industry and for in-house counsel to gain expertise in evaluating litigation tactics and approaches and providing valuable input to the team. They offer tremendous networking opportunities.

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Who You Will Meet
✓ Attorneys handling litigation for:
  • employee benefit plans
  • benefit plan sponsors
  • ERISA fiduciaries
  • ERISA service providers
✓ Attorneys for insurers who write policies for ERISA related risks
✓ Employee pension and benefits attorneys
✓ Executives and decision makers whose actions could result in employee benefits litigation

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ACI has a dedicated team which processes requests for state approval. Please note that event accreditation varies by state and ACI will make every effort to process your request.

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Preventive Measures to Eliminate or Mitigate ERISA Exposure

- Internal compliance assessment and making sure your ERISA house is in order – Knowing the plans, fiduciary roles, insurance coverage issues, and contracts well before a lawsuit is filed

The Administrative Record

- Proper/complete plan documentation: Developing a complete, well reasoned administrative record
- How to avoid inconsistent plan language that can significantly weaken defensible claims
- State of the record upon which a decision was based: Anticipating claims when making the decision and preparing to defend it before the decision is made
- Ensuring proper judicial review
- Ensuring a thorough investigative and decisional process to dispel conflict of interest concerns
- The Claims Administrator: making sure he/she conducts a thorough investigation
- The role of collective bargaining in the mix, including the interaction of ERISA and NLRA

Costs

- Managing outside counsel through realistic and accurate budgets
- Do flat fees really exist? What alternative billing arrangements are being used successfully?

Expertise and Coordination

- How is the decision made with respect to selection of outside counsel?
- Handling the defense more efficiently and effectively through national/regional counsel
Once a Suit is Filed for Benefits Under an ERISA Plan, How to Address Evidence Outside the Administrative Record, Standards of Review, Conflicts of Interest & Discovery

**Evidence Before the Court**
- Dealing with the case as it is handed to you following a poorly handled administrative process
- Defending the adequacy of administrative claims review
- Limiting the evidence that plaintiff attorneys can present regarding the claim

**Standard of Review and Its Impact on the Level of Deference post-MetLife v. Glenn**
- Judicial review of claims decisions after MetLife v. Glenn
- What deference, if any, should a court give a plan administrator’s decision denying a claim for benefits, after Lautre v. DeWitt, Bubley and Associates?
- Establishing express discretionary authority and an arbitrary and capricious standard of review, thereby limiting discovery and evidence to the administrative record
- The arbitrary and capricious standard – is it still the benefit it once was?

**Conflict of Interest and the Scope of Discovery**
- The vitality of deferential review and scope of related discovery - what is the scope of permissible discovery in claims in which the administrator’s decision is subject to arbitrary and capricious review?
- How to counter the plaintiff counsel’s use of Glenn to open up discovery in simple claims for benefits, requiring enormous expenditures by plans in defending their denials and forcing some plans to capitulate or settle matters for more than their real settlement value
- Scope of discovery in benefit claims and conflict of interest after Glenn – limiting discovery so as to conform to the ERISA statute’s purpose of expeditious and inexpensive claims handling
- Navigating the question of whether discovery is to be allowed in denial of benefit cases post-Glenn
- 1132(a)(1)(B): discovery limits in 1132(a)(1)(B) case; discovery issues in cases involving benefit claims under 1132 (a)(1)(B)
- The advent of open door to discovery and other items to increase the costs of litigation: defending against overbroad discovery and determining just how far e-discovery will go in ERISA cases
- Objecting to plaintiff’s discovery requests that sweep beyond the administrative record
- Dealing with the impact of actual or potential/alleged conflicts on the standard of review in the wake of Lalute, and the resulting discovery issues
- How to “stop the bleeding” once a court allows extensive conflict of interest discovery
- Addressing conflict of interest-based attacks on the level of deference to accord the plan administrator’s decision – knowing who the plan administrator is and the connection between it and the plan sponsor

12:00 ERISA Fiduciary Litigation: Newest Plaintiffs’ Liability Theories and Substantive Defenses, and Trends in Defense Pleadings and Motions

**Determining Fiduciary Status and What Qualifies as Fiduciary Activity**
- Who the ERISA plan fiduciaries are: Determining when company, sponsor, officers and directors are fiduciaries
- After identifying, what were the fiduciaries’ obligations?
- Countering plaintiff bar’s success in fostering the idea that there are two paths to fiduciary status – one being to fit within the definition in section 3(21) and the other being to fit within the definition of “named fiduciary,” as well as the concerted effort by class action plaintiff counsel to expand ERISA fiduciary duties beyond the plan to which fiduciary duties are owed by statute
- Successfully arguing that your client is either not an ERISA fiduciary at all or, at least, not a fiduciary for the purpose alleged in the complaint
- Convincing employee-plaintiffs, and sometimes the court, that certain named parties (such as TPAs) are not ERISA fiduciaries and thus not proper defendants
- Differentiating between general and limited fiduciaries
- Are corporate officers who perform corporate duties plan fiduciaries?

**Liability and Damage Theories for Breach of Fiduciary Duties**
- Procedural prudence and the record - how well do your fiduciaries’ procedures and documents support your fiduciary position?
- Independent Fiduciary – Making intelligent, proactive use of the independent fiduciary mechanism; managing the process in a way that both preserves the independence and keeps him/her/them from overspending/overworking the assignment
- Determine factually exactly what the fiduciary did (or did not do) in exercising the duty of prudence and whether or not such conduct satisfied the fiduciary’s duty of prudence under caselaw
- Conflicts of interest: Managing the potential conflicts between the sponsor and fiduciary
- Dealing with disclosure issues and convincing the court that ERISA’s fiduciary duties do not create a duty to disclose beyond that established in Section 104 under most circumstances
- Defending fiduciaries on asset management questions
- Investment activity, disclosing investment advice, and explaining why persons with fiduciary duties, i.e., an investment committee, have never received training about fiduciary responsibilities
- Remedies and damages - countering the view that uncertainty in fixing damages must be resolved against the fiduciary, & that the measure of damages must be that which is most advantageous to participants - the legal uncertainties over whether and when damages arising from a breach of fiduciary duty may be recovered by an individual participant

§ 404(c)
- How the courts are currently interpreting its requirements
- Liability protection and 404(c) indemnification
- Use of the section 404(c) defense after the Seventh Circuit’s Hecker v. Deere/Fiduciary decision

**Potential Liability of Directed Trustees**
- The current legal status of directed trustees and fiduciaries
- What are the duties of directed trustees and what triggers those duties?
- Examination of recent plaintiff’s theories against directed trustees

**Department of Labor**
- The impact of DOL regulation on your defense
- Mastering the new issues that come into play when the DOL is involved, including the extent to which the DOL’s goals are consistent or inconsistent with the goals of your client(s)

**Nuances with Fiduciary Insurance Coverage**
- Determining what is covered (and excluded) in litigation against fiduciaries
- Decisions that have to be made in litigating & settling a case when fiduciary insurance is involved
- Typical policy provisions and the issues they raise, & strategic considerations that arise as a result

1:00 Networking Luncheon for Speakers and Delegates

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1:50 Employer Stock in Light of the Economic Downturn: Defending Against Stock Drop Suits, 401(k) Fee Cases and Other Defined Contribution Plan Claims

- Demonstrating procedural prudence
- Getting unfounded cases dismissed at the pleading stage by showing plan interpretations that support a presumption of prudence (such as a requirement or expectation that the plan will invest in company stock), properly characterizing the financial prospects and performance of the company, and demonstrating that the disclosure claims are foreclosed under ERISA
- Conflicts of interest, particularly where a member of the fiduciary committee was also involved in alleged misconduct at the company
- Whether plan sponsors are entitled to a presumption that company stock investments in defined contribution plans were prudent (even when the plan documents appear to provide some discretion over whether such a fund should be offered) and whether that presumption may be asserted on 12(b)(6)
- Establishing the prudence of investments in company stock in the absence of the Moench presumption
- Can a "failure to disclose" count in a "stock drop" case be certified as a class action claim? How do you prevent certification of misrepresentation and non-disclosure claims?
- ERISA and Parallel Securities Cases – carefully managing the cases together, including the legal claims and the factual predicate, minimizing duplicative discovery (including end-runs around PSLRA stay), and intelligently allocating legal fees/costs for insurance purposes
- Drafting plan documents and structuring fiduciary procedures to minimize the risk of successful lawsuit
- Effective use of fiduciary and financial experts
- Attacking the plaintiff - do they have standing and are they adequate class reps?

401(k) Fee Litigation
- The explosion of litigation challenging the fees in individual account 401(k) plans, including the evolving theories of liability and the recent decisions
- Establishing procedural prudence by the plan's investment/administrative committees
- What is the limit of plan sponsors' responsibilities for service provider fee arrangements in defined contribution plans?
- The 404(c) defense
- When may a service provider qualify as an ERISA fiduciary
- When do fees stop being plan assets for purposes of the prohibited transaction rules?
- Class certification issues in the service provider fee cases
- Drafting plan documents and structuring fiduciary procedures to minimize the risk of successful lawsuit

Other Defined Contribution Plan Claims
- Non-stock drop claims involving defined contribution plans relating to declining asset value, including risk/diversification cases, private company ESOPs and securities lending and collateral pool litigation
- Madoff and other "ponzi scheme" matters, including "clawback" issues

2:50 Service Provider Relationships: Defending and Managing Litigation That Arises Between Plans and Providers

- Assessing fiduciary status of third-party service providers: litigating cases involving retention, monitoring, and termination of providers of service to employee benefit plans
- Countering claims involving fiduciary duties in selection and monitoring service providers
- Defending litigation between plans/plans sponsors and service providers, including cases concerning the fiduciary status of providers
- Determining whether claims that service providers received secret or excess fees state a breach of fiduciary duty claim under ERISA
- TPAs - issues surrounding third-party administrators and getting information from third-party service providers
- Conflicts of interest when TPAs are used, & protecting against conflict of interest claims
- Consideration of tendering

3:50 Afternoon Refreshment Break

4:00 Analyzing Plan Remedies and the Scope of Equitable Remedies to Achieve Realistic Settlement Expectations

- ERISA remedies after LaRue and Achmea – how courts are now analyzing remedies under 502(a)(2) and 502(a)(3)
- Determining whether a claim falls within the confines of Section 502 of ERISA, and whether it's actually "equitable relief" under (a)(3)
- 502(a)(2): what happens to the different approaches suggested by the fractured opinions in LaRue?
- Having a clear understanding of the nature of the ERISA claim and associating it with the proper type of remedies (legal or equitable) – examining the significant differences between claims under Section 502(a)(1)(B), 502(a)(2), and 502(a)(3)
- ERISA remedy limitations

5:00 ERISA Preemption: Countering Plaintiff Counsel's Attempts to Run from the Procedural and Substantive Aspects of the Defense

- The latest developments and litigation trends in ERISA preemption
- The preemption analysis: What is and is not an ERISA plan?
- Plaintiff counsel's attempts to change the complexion of the litigation: what claims are not preempted; what claims are ultimately expanding the universe of available remedies?
- Adequately raising and/or pleading both complete and ordinary preemption
- Determining whether substantive preemption (under 514) is required for complete preemption and removal (under 502)
- Determining whether a case filed in state court can be removed to federal court on the grounds of federal question jurisdiction
- Getting an ERISA benefits case into federal court on complete preemption grounds and then proceeding on defensive preemption
- Managing preemption and linkage to other statutes
- Preemption of state laws that relate to employee benefit plans and new nuances with regard to removal from state DOL administrative hearing processes
- Disputes between medical providers, TPAs and employers – how can the provider avoid ERISA preemption?
- What you need to know about 514: Pay or play preemption
- Avoiding traps for the unwary on removal, including joinder in removal when there are multiple defendants and the "first served" rule

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### DAY TWO: October 20, 2009

#### 8:00 View From the Bench: Federal District & Magistrate Judges Speak out on How to Convey Complexities to a Court (including a Plan and the ERISA Statute), Effective Theories/Defenses, Evidentiary Approaches, Statute of Limitations, Deciding Cases Early, Discovery, Forum Shopping and More

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<th>Panel 1</th>
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<td>8:00-9:30</td>
<td>9:30-11:00 (morning coffee break from 11:00-11:10)</td>
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| **Hon. Janet Bond Arterton**  
U.S. Dist. Ct., D. Conn. | **Hon. Larry J. McKinney**  
U.S. Dist. Ct., S.D. Ind. | **Hon. Raymond L. Erickson**  
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U.S. Dist. Ct., D. Md. | **Hon. Viktor V. Pohorelsky**  
U.S. Dist. Ct., E.D.N.Y. |
| **Moderator:**  
Miriam (Dusty) M. Burke  
Vinson & Elkins L.L.P.  
(Austin, TX) | **Moderator:**  
Dirk W. de Roos  
Faegre & Benson LLP  
(Denver, CO) | **Moderator:**  
Kay Kyungsun Yu  
Pepper Hamilton LLP  
(Philadelphia, PA) |

- Early defense considerations (motions to dismiss, preemption, summary judgment practice)
- Novel approaches to case management
- Making the decision to allow or not allow extensive conflict of interest discovery
- Discovery limits
- Jury demands, motions to strike, motions to sever non-ERISA claims from ERISA claims
- Conveying the complex to the court, including the technical aspects of the ERISA statute or of the procedural differences in ERISA cases
  - how to enhance the court’s knowledge of ERISA application, including the standards on recovery and discovery, scope of review issues, and procedural nuances such as exhaustion, preemption, privilege issues and the like
  - explaining a plan and ERISA to the court in a simple and clear fashion – how to get the judge in your case up to speed on the terms of the ERISA plan and record and the basis for the denial of a claim for benefits
- how to explain to the court that certain named parties (such as TPAs) are not ERISA fiduciaries and thus not proper defendants
- Procedural and legal interpretative inconsistencies related to venue across the federal circuits – how to handle inconsistent precedent throughout the Circuit Courts and lack of uniformity and significant forum shopping
- When the ERISA limitations period begins to accrue
- Settlement, particularly after losing a decision on a 12(b)(6) motion
- Whether and when to remand the matter to the administrator for further proceedings
- Judicial “pet peeves”

#### 12:40 Networking Luncheon for Speakers and Delegates

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**Michael Felden**  
Senior Business Development Executive | American Conference Institute  
Tel: 212-352-3220 x260 | Fax: 212-220-4281 | m.felden@AmericanConference.com
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<td>Disability and Health Claims in the Wake of MetLife v. Glenn: A Focus on Defending Welfare Benefit Cases and Retiree Health Benefit Litigation</td>
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<td>Benesch (Cleveland, OH)</td>
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<td>Defending Against Age-Based and Other “Recessionary Economy” ERISA Claims: Cash Balance Plans, Early Retirement, Reductions in Force, and Beyond</td>
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<td>Devising Procedural Strategies in ERISA Class Actions</td>
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<td>Overcoming the Vexing Ethical Issues that Arise Vis-à-vis the Attorney-Client Privilege and ERISA Litigation Practice</td>
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Expert defense strategies for leading outside counsel and in-house counsel on litigating today’s key issues involving benefit plans and fiduciaries

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