Western District NEWS

NEWSLETTER OF THE

WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

Volume 12, Number 1 March 2003

# Chief Judge Joel M. Flaum Headlines Western District's Annual Meeting

## FLAUM WILL DELIVER THE KEYNOTE SPEECH AT THE LUNCHEON AND WILL LEAD OFF THE AFTERNOON CLE PROGRAM ON APRIL 24, 2003

Judge Joel M. Flaum

Seventh Circuit Court of Appeals Chief Judge Joel M. Flaum will be the featured guest speaker at the Annual Meeting on Thursday, April 24, 2003. A reservation form is enclosed in this Newsletter and the event is open to both members and non-members.

President Ronald W. Reagan appointed Joel M. Flaum to the Seventh Circuit Court of Appeals in May, 1983. He became Chief Judge on August 1, 2000. Previously, he had been appointed a United States District Judge for Northern District of Illinois by President Gerald R. Ford in December 1974 and served there until his elevation to the Court of Appeals in June, 1983. He is a member of the Executive Committee of the Judicial Conference of the United States, chairs the Judicial Council of the Seventh Circuit and by designation of the Chief Justice has served on the United States Court of Appeals for the Armed Forces.

Chief Judge Flaum will address the luncheon attendees on the topic of "Challenges In Judicial Adminstration." He will also head up the Continuing Legal Program at 1:30 p.m. with the subject of "Practicing Before The Seventh Circuit Court of Appeals."

"Employment Litigation Update—Recent Developments in State and Federal Employment Law" is the next CLE presentation which will start at 2:15 p.m. A noted employment law speaker, Michael R. Fox of Fox & Fox, S.C. will present the plaintiff's perspective on this aspect of the employment law. Michael Modl, a WDBA officer and a partner in the Madison firm of Axley Brynelson, LLP, will give the defense view on the subject.

The CLE program continues with a 3:15 p.m. offering on ERISA and the Federal Court Practitioner. Donald L. Romundson, a member of the firm of LaFollette, Godfrey & Kahn, will give an overview of ERISA Remedies and Standards of Review. Russell T. Golla of Anderson, O'Brien, Bertz, Skrenes & Golla, will speak on ERISA subrogation, an equitable remedy. Golla is a former law clerk to the then Wisconsin Supreme Court Justice John L. Coffey who now serves on the United States Seventh Circuit Court of Appeals.

Following the ERISA presentation is the judges panel and discussion with Chief Judge Barbara B. Crabb, District Judge John C. Shabaz, Magistrate Judge Stephen L. Crocker, and Magistrate Judge and Clerk of Court Joseph W. Skupniewitz. The judges panel is a great opportunity for members of the bar to ask questions regarding procedures directly with the judges. The judges panel is well received and is a highlight of the annual meeting. Following the panel is a reception.

The WDBA will apply for 3 Wisconsin CLE credits and 2.75 Minnesota CLE credits for the program. The presentation is free to WDBA members and $50 for non-members. WDBA membership dues for 2003-2004 are only $35 and dues may be submitted along with the reservation form. The cost for the lunch is $15 for all participants. Payment by check should be made in advance accompanied by the reservation form.

## Western District of Wisconsin Bar Association 2002-2003

**Website: www.wisbar.org/bars/west/**

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# WDBA Website Continues to Grow

The Western District of Wisconsin Bar Association Web Site has been up and running for nearly six months and has proved a useful resource for practice in the Western District. In addition to providing quick and easy access to Local Rules, the Website Committee has recently added a "Federal Links" section to provide handy reference to web sites maintained by the Western District Court and the 7th Circuit. A link to the 7th Circuit Bar Association is also provided. As additional groups come on-line, the Committee will continue to add those links in an effort to ensure our website is the preeminent resource for practice in the Western District.

In addition to acting as a practice aid, the website has become a beneficial instrument of communication for the WDBA. Detailed contact information has been listed for each member of the Executive Committee and Board of Governors. The Web Site Committee will continue to create a database of past newsletters. The organizations bylaws have been posted in a manner which allows quick, precise access to any article. Most recently, the Website Committee has added the organization's calendar of events. The calendar will be updated on a regular basis to ensure members will always be aware of opportunities to participate.

The committee has plans for several new additions to the website. Soon committees will submit detailed statements of their goals and activities. These statements will help members keep up-to-date on the goals and activities of the WDBA as well as provide contact references on particular issues. Past CLE material will also be posted in a manner to provide convenient access.

The website has been made possible by the hard work and guidance of Jeff Hershberger, Web Producer for the State Bar of Wisconsin. Jeff has been tireless is answering questions, providing invaluable advice, and editing the site itself. After the committee reaches a decision on additions or amendments to the site it notifies Jeff. Always before days end, many times within the hour, Jeff makes the changes, and the site continues toward perfection. The committee recognizes that without Jeff's assistance, the website project would not have been possible.

WDBA members should recognize that with such open and immediate access to this expertise, almost anything is possible on our site. The committee has discussed many possibilities, but requires your continued input to accurately assess the needs of the bar. It is the committee's goal to create a website that satisfies the needs of WDBA members. In order to accomplish that goal, the committee needs input. Members should always feel free to contact committee members with any and all suggestions.

# The President's Corner

By
Leslie K. Herje
President

As my term as President of the Western District of Wisconsin ("WDBA") comes to a close, I feel very fortunate to have been afforded the opportunity to work with such a remarkable group of committed attorneys over the past several years. An impressive group of WDBA Officers, Governors, and Committee Chairs dedicate their time to fulfilling the mission of the organization. To that end, I am pleased to report that our membership has remained constant throughout my tenure with the WDBA.

Over the past year, the WDBA created a website to provide its members convenient access to past newsletters, CLE materials, a calendar of events, local rules, practice expectations of the Judges, and links to useful websites. Over the next year, we anticipate adding a resource section for WDBA members that includes sample jury instructions, motions, and other documents. We encourage members to bookmark the website, which is found at www.wisbar.org/bars/west, and to submit any suggestions on ways we can improve the site. I would like to extend my sincere appreciation to Brian Hodgkiss, Chair of the Website Committee, as well as Todd Smith and Greg Everts for their work on the committee this past year.

In addition, we are beginning the WDBA's efforts to establish an early neutral evaluator program. The concept would involve WDBA members with subject matter expertise volunteering their time to serve as early neutral evaluators for cases pending in the district. I hope to have more information about the viability of this program available at the Annual Meeting.

Finally, I am encouraging WDBA members to volunteer to serve on at least one of our Standing Committees this next year. Committees usually meet one to three times each year and only involve a minimal time commitment. Greater committee participation by the WDBA membership will help improve and strengthen the organization. Prior to the annual meeting, please take a moment to review the mission of each Committee on the WDBA's website and choose a committee to serve on when renewing your membership. The mission of each committee will also be provided in the CLE Program materials.

While there is still much work to do on behalf of the WDBA over the next two months, I am pleased that Todd Smith will be taking over as President of the organization. Todd and I have worked closely on many projects over the past several years and his commitment to the WDBA is commendable. The WDBA will be extremely fortunate to benefit from his leadership over the next year.

I look forward to seeing many of you at the Annual Meeting and CLE Program on April 24, 2003. While it is often difficult to get away from the office for an entire day, I encourage each member to attend all or a portion of the CLE Program and/or other events scheduled throughout the day.

## WDBA Celebrates 10th Anniversary

In July 2002, the WDBA celebrated its 10th Anniversary as an association. To recognize this achievement, the WDBA will honor at this year's annual luncheon the leadership, dedication, and service of its first ten presidents. Please join us in recognizing the significant contributions of the following past WDBA Presidents:

John S. Skilton, 1992-1993
Jenny R. Armstrong, 1993-1994
Linda M. Zech, 1994-1995
Paul R. Norman, 1995-1996
Patience D. Roggensack, 1996-1997
Michael R. Fitzpatrick, 1997-1998
Mark A. Cameli, 1998-1999
Catherine M. Rottier, 1999-2000
Paul L. Barnett, 2000-2001
Thomas W. Bertz, 2001-2002

# Seventh Circuit Settlement Conferences

By Jennifer Sloan Lattis
Wisconsin Department of Justice

You've worked hard and had a little luck, plus some facts and law on your side, and now you've won your case in the district court. You aren't too disturbed when the other side appeals because you think you'll be able to defend the judgment, but then you get the notice in the mail. Your case has been selected for participation in the Seventh Circuit's mediation process. What should you expect? What should you tell your clients about this?

Since 1994, the Seventh Circuit has had a program devoted to helping parties reach settlements before a case is briefed and argued to the Court. Three attorneys, Joel Shapiro, Rocco Spagna and Roger Wenthe staff the office. Eligible cases include all fully counseled civil appeals with no serious jurisdictional defects, except for inmate civil matters, social security disability claims, immigration, and habeas corpus cases. Mr. Shapiro, the lead counsel, reviews all eligible cases and sets approximately 70% of them for participation. A case is less likely to be selected if it presents a policy or statutory question that one or both sides appear determined for the court to decide.

Rule 33 of the Federal Rules of Civil Procedure authorizes pre-argument settlement conferences by the court. The seventh circuit's local rule 33 contemplates that such conferences may be conducted, but does not prescribe the format or ground rules. Parties should look to the conference notice and the accompanying green information sheet that is provided for information regarding how to proceed.

Parties seem the most reluctant to participate in a settlement conference when they have prevailed below. "Why," you may ask, "Should I start talking about settlement when I won?" Because, we reply, the settlement conference attorneys successfully mediate 45% of the cases that come before them. Moreover, unlike trial level mediations, which can be stressful daylong negotiating sessions with expensive mediators, the seventh circuit settlement conference process begins with a two to three hour initial conference and is free to litigants. The conferences are almost always held by telephone for out-of-town litigants, so no travel is required.

There are a few things that you need to do to prepare for your mediation session. You should arrange to have your client or a representative present at the mediation. The notice always requires that clients be at least available by telephone, but it can be advantageous to have the client representative participating in the call. If your client is a large organization, the in-house counsel may be the right representative, but you will know best. The process goes much more smoothly if your representative has settlement authority, although the conference attorneys understand that individuals with ultimate authority may not always be available.

While it is not required, I recommend that you write a confidential letter to the mediator laying out your side of the case, indicating whether or not you'd be willing to settle and, if so, what the parameters of settlement might be. The mediators don't have the record at their fingertips, and may be unable to prepare sufficiently for the case if you don't provide them the information they need. They always read the court's dispositive order, but if your case resulted in a trial verdict, that may not mean a lot. The conference attorneys may send a letter requesting more information if they think they need it, but you can help by providing, in as few words as will do the job, some background and explanation of the strengths (and weaknesses?) of your position.

When the time comes for your conference, you should block out several hours of time. Don't forget to use the "facilities" before your conference begins. Usually, the mediator starts out by asking each of you to make a short statement about your case, and then puts one party on hold while he talks to the other. If your client and you are in the same room during the session, you should both plan on having other matters to occupy yourselves while you are on hold—often for a long time. If there really is no way that you would agree to settle, then you should be reasonable, but firm with the mediator about your client's position. Keep an open mind though, you never know what might develop.

In my office, we have seen several cases settle for little or no money, when we would have thought no settlement was possible. The seventh circuit mediators are skilled, if you've given them the information, in getting to the heart of the case, and are often creative in proposing solutions that no one has considered, or been willing to voice. They also stick with the case. A party may not be willing to accept a settlement proposal during one afternoon of negotiations, but we've seen mediators stick with a case for many weeks and eventually reach resolution.

So relax. Your case has been selected for a settlement conference. That conference might just result in the best possible resolution for both sides.

# WDBA

## Western District of Wisconsin Bar Association

### AGENDA
### ANNUAL MEETING AND
### CONTINUING LEGAL EDUCATION PROGRAM
### APRIL 24, 2003

| | |
|---|---|
| **10:30 a.m.** | **Annual Business Meeting - United States Courthouse, Room 250** |
| **12:00 p.m.** | **Luncheon - White Horse Inn**<br>**Keynote Speaker: Hon. Joel M. Flaum, Chief Judge, U.S. Court of Appeals for the Seventh Circuit: *Challenges in Judicial Administration.*** |
| **1:30 p.m. - 1:35 p.m.** | **Welcome and Opening Remarks** |
| **1:35 p.m. - 2:15 p.m.** | **Practicing Before the Seventh Circuit Court of Appeals,** Hon. Joel M. Flaum, Chief Judge, U.S. Court of Appeals for the Seventh Circuit. |
| **2:15 p.m. -3:00 p.m.** | **Employment Litigation Update – Recent Developments in State and Federal Employment Law**<br><br>Plaintiff perspective: Michael R. Fox, Fox & Fox, S.C.<br>Defense perspective: Michael J. Modl, Axley Brynelson, LLP |
| **3:00 p.m. - 3:15 p.m.** | **Break** |
| **3:15 p.m. - 4:00 p.m.** | **ERISA and the Federal Court Practitioner**<br><br>*Introduction to ERISA Remedies and Standards of Review*, Don Romundson, LaFollette, Godfrey & Kahn<br>*Fundamentals of ERISA Subrogation*, Russell T. Golla, Anderson, O'Brien, Bertz, Skrenes & Golla |
| **4:00 p.m. - 4:30 p.m.** | **Judges' Panel and Discussion**<br>Chief Judge Barbara B. Crabb<br>District Judge John C. Shabaz<br>Magistrate Judge Stephen L. Crocker<br>Magistrate Judge and Clerk of Court, Joseph Skupniewitz |
| **4:30 p.m.** | **Reception (beverages and hors d'oeuvres)** |

# WESTERN DISTRICT OF WISCONSIN BAR ASSOCIATION

ANNUAL MEETING RESERVATION FORM
Thursday, April 24, 2003

Name: _____

Firm: _____

Address: _____

_____

Phone: _____ Email Address: _____

I will be attending:
- ❑ 10:30 a.m. Business Meeting
- ❑ 12:00 p.m. Luncheon
- ❑ 1:30 p.m. CLE Program
- ❑ 4:30 p.m. Reception

Luncheon Menu Selection ($15.00 includes tax & gratuity)

❑ Beef Portabella ❑ Chicken ❑ Vegetarian Linguini Primavera

Please enclose a check to the Western District Bar Association to cover the following expenses:

Lunch ($15.00) _____

Membership dues for 2002 - 2003 ($35) _____

Cost of CLE Program ($50 for non-members; Free for members) _____

TOTAL: _____

Please return this form with your check by April 18, 2003 to:

Western District Bar Association
Post Office Box 44578
Madison, WI 53744-4578

**Please sign me up for the following WDBA Committee(s):**

- ❑ Alternative Dispute Resolution
- ❑ Communications
- ❑ Court Rules, Practice and Procedure
- ❑ Courthouse Equipment and Facilities
- ❑ Membership
- ❑ Pro Se/Pro Bono
- ❑ Website

❑ Please add me to the list to take pro bono assignments

❑ Please add me to the list to serve as an "Early Neutral Evaluator"

Describe area of expertise _____

_____

_____

## ERISA LITIGATION

# Ten Things You Always Wanted to Know - But Were Afraid to Ask

By Robert E. Shumaker

A LEXIS search for "ERISA" in decisions of the District Court for the Western District of Wisconsin identified 29 cases. Perusal of those cases suggests that ERISA litigation in the Western District has included a variety of types of ERISA cases.

Yet many attorneys, including many who frequently practice in the Western District, have limited familiarity with ERISA litigation. The purpose of this article is to respond to 10 of the most basic questions one might have about ERISA litigation.

**1. What is ERISA and why should I care?**

ERISA is the acronym for the Employee Retirement Security Act of 1974, as amended. ERISA is the core of employee benefits law. ERISA, however, is also a fundamental component of other specialized fields.

One can hardly practice tax law without knowing ERISA, because many of ERISA's requirements are found in the Internal Revenue Code. One can hardly practice corporate law without knowing ERISA because a corporation's most significant obligations often relate to pension or retirement plans or to employee welfare plans such as health plans.

Personal injury law practice is influenced by ERISA because an appropriately drafted subrogation clause in an ERISA health plan trumps state law which otherwise would require an injured party to be "made whole" before a health insurance company would have a right to subrogation.

An attorney representing a debtor-in-possession needs some knowledge of ERISA. For example, the debtor may owe duties not only to the creditors and shareholders, but also, as an ERISA fiduciary, may owe duties to participants or beneficiaries of an employee benefit plan.

ERISA is even more fundamental to employment-labor law and litigation in the employment-labor field because a third or more of employee compensation packages are typically governed by ERISA.

**2. What is the scope of ERISA?**

ERISA covers every "employee benefit plan" unless there is a specific exemption. An "employee benefit plan" means any "employee pension benefit plan" or "employee welfare plan."

An employee "pension benefit plan" is any "plan, fund, or program" established by an employer, union or both, to the extent that, by its express terms or as a result of the surrounding circumstances, it "provides for retirement income" or results in "deferral of income" to termination of employment or beyond.

An "employee welfare benefit plan" is "any plan, fund, or program" established by an employer or union or both to the extent that it is established for the purpose of providing for its participants or their beneficiaries (through insurance or otherwise) for medical, sickness, accident, disability, death or unemployment or vacation benefits, or apprenticeship or training programs, or day care centers, scholarship funds, or prepaid legal service, or any benefit allowed by Taft-Harley Act § 302(c) (other than pensions).

In summary, if there is a program for the delivery of an employee benefit other than wages, then presumptively there is an ERISA plan unless an exemption can be found. If the plan defers income, it is a pension plan. Otherwise, it is a welfare plan. Either way it is covered by ERISA unless expressly exempted. (Exemptions, for example, exist for government plans and church plans.)

ERISA preempts state law as it relates to employee benefit plans. Because ERISA is so broad in scope and preempts most state law relating to employment benefits, there is federal court subject matter jurisdiction for virtually all private sector employee benefits litigation.

**3. What are the common ERISA claims?**

Litigation under ERISA most frequently will involve one or more of the following types of claims:

- **Claims by participants or beneficiaries for benefits.** Participants or beneficiaries often bring claims to recover benefits. These cases, for example, involve disputes about health care benefits or retirement or pension plan benefits to which an employee is entitled.
- **Misrepresentation/estoppel types of claims.** A misrepresentation or estoppel type claim may allege, for example, an oral statement by a plan representative, or a written statement (sometimes in the summary plan description, or "SPD," when the SPD differs from the plan document itself). The participant will argue that the plan should be estopped from asserting a portion which differs from the representations that were made.
- **Contribution, funding, and withdrawal liability**

**claims.** Actions affecting funding or contributions to a plan usually involve multiemployer plans, where contributions are governed by collective bargaining agreements, or where "withdrawal" from an underfunded multiemployer plan triggers "withdrawal liability" in lieu of ongoing contributions.

• **Actions involving challenges to voluntary plan terminations of overfunded plans and asset reversions.** Litigation frequently involves challenges to voluntary termination of overfunded plans, asset reversions of surplus, and similar issues.

• **Actions involving plan terminations of underfunded plans.** Considerable litigation has involved underfunded pension plans seeking termination.

• **Welfare plan termination/modification, restrictive interpretations.** There has been much litigation, over attempts to eliminate or modify retiree medical insurance plans. Cases vary from a flat holding that a medical plan is a benefit that "vests" upon retirement to other decisions giving effect to "reservation of rights" clauses in the plan or summary plan description, allowing the employer to amend or terminate the plan.

• **Fiduciary litigation.** A variety of persons or entities can be a "fiduciary" under ERISA. These include the plan sponsor, plan administrator, trustees, and others. The basic fiduciary requirements of ERISA are (1) a duty of loyalty by the fiduciary to the plan and its participants, (2) a duty of care, skill, prudence, and diligence, (3) a duty of diversification (unless inappropriate), (4) a duty to follow the governing documents if consistent with the law, and (5) a duty to engage in prohibited transactions. These fiduciary requirements, however, only apply when, and to the extent, a person who is a fiduciary is acting as a fiduciary (not, for example, when a fiduciary is acting in a non-fiduciary capacity).

• **Tax litigation**. Tax litigation may involve plan qualification or plan design, or excise taxes on prohibited transactions or excise taxes for failing to meet minimum funding standards.

**4. What remedies are available in ERISA litigation?**

The remedies available under ERISA targeted at enforcing different ERISA rights include:

• A plan participant or beneficiary may bring suit against a plan administrator to recover a statutory penalty for the administrator's failure to comply with a request for certain plan information.

• A plan participant or beneficiary may bring an action to recover benefits due under the terms of a plan, to enforce rights under the terms of a plan, or to clarify rights to future plan benefits.

• The Secretary of Labor or a plan participant, beneficiary, or fiduciary may sue to recover "appropriate relief" from any fiduciary to a plan who breaches the fiduciary obligations placed upon him or her by ERISA.

• Plan participants, beneficiaries, and fiduciaries may bring civil actions to enforce any provision of ERISA or the plan, to enjoin any practice which violates any provision of ERISA or the plan, and to obtain other "appropriate" relief to redress such violations.

• The Secretary of Labor, a participant, or beneficiary may seek a remedy for violation of the requirement that plan administrators furnish participants with certain information contained in Internal Revenue registration statements.

• The Secretary of Labor may bring an action to enforce any provision of ERISA or the terms of the plan, or to enjoin any practice which violates ERISA or the terms of the plan.

• The Secretary of Labor may sue to collect certain civil penalties.

• A State may sue to enforce compliance with a qualified medical child support order.

• The Secretary of Labor, an employer or other person, may sue to enjoin, or to obtain relief for violation of the requirement that any entity which possesses information necessary for an employer, multiemployer plan or other plan sponsor provide that information.

**5. What are the common pretrial motions in ERISA litigation?**

Frequent motions before trial include motions to (1) strike the jury demand, (2) to strike a demand for punitive damages, (3) to strike or dismiss preempted causes of action, and (4) to stay or dismiss for failure to exhaust plaintiff's administrative remedies, including motions to stay pending arbitration.

**6. What are the standards of review in ERISA litigation?**

There has been much litigation as to the standard of review that a court will apply to a plan administrator's decisions. In 1989, the Supreme Court, in a case known as Firestone, purported to resolve the controversy by rejecting the old "arbitrary and capricious" standard and replacing it with de novo review. The Supreme Court said, however, that an exception existed if the plan documents provided the fiduciary with "discretionary authority." Thus, since Firestone, many plan documents contain language purporting to provide discretion, which is

given "deference" and reviewed by a court only to see if there was an "abuse of discretion."

**7. What is the statute of limitation for ERISA claims?**

Different statutes of limitations apply depending on the nature of the plaintiff's claim. For actions based on defendant's alleged breach of fiduciary duty, ERISA provides that no action may be commenced for a fiduciary's breach of any responsibility, duty, or obligation after the earlier of:

(1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation; or

(2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation; except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

For actions that do not involve a fiduciary breach (for example, a suit to recover benefits) there is no specific statute of limitations under ERISA. Courts, therefore, will look to the most analogous state law statute of limitations. In actions for recovery of benefits, this usually means applying the state statute of limitations period for breach of contract.

**8. Is there a right to a jury trial in ERISA cases?**

Probably not. The Seventh Amendment to the United States Constitution guarantees a jury trial in actions "in Suits at common law." The Supreme Court has held that "legal" relief gives rise to a jury trial right; "equitable" relief, however, does not.

An argument could be made that an action to recover benefits under an ERISA plan is legal in nature, such that there would be a right to a jury trial for such claims, but that a suit against a fiduciary has its roots in trust law (which was within the exclusive jurisdiction of courts of equity), such that there would be no right to a jury trial in such cases. However, most courts, including the Court of Appeals for the Seventh Circuit and the Western District, have not recognized a right to a jury trial in any ERISA case.

**9. Are attorneys' fees recoverable in ERISA litigation?**

Sometimes. ERISA provides that in any suit brought by a participant, beneficiary, or fiduciary (other than a suit to collect delinquent contributions to a multiemployer plan), the "court in its discretion may allow a reasonable attorney's fee and costs of action to either party."

Most courts have applied the following factors in exercising its discretion: (1) the degree of the offending party's culpability or bad faith; (2) the ability of the offending party to personally satisfy an award of attorneys' fees, (3) whether an award of attorney's fees against the offending party would defer other persons acting under similar circumstances; (4) the amount of benefit conferred on members of the plan as a whole; and (5) the relative merits of the parties' positions.

There is a split among the circuits as to whether there is a presumption that a plan participant or beneficiary who prevails in litigation should recover attorneys' fees. The Seventh Circuit applies a "mild" presumption.

A court has discretion to award attorneys' fees to a prevailing defendant, but such an award is rare in the absence of bad faith or frivolousness. The Seventh Circuit, however, has upheld the award of at least a small amount of attorneys' fees to a prevailing defendant and against an unsuccessful plan participant.

**10. How can I learn more about ERISA litigation?**

There are a number of annual national seminars devoted exclusively to ERISA litigation. The sources for this article include course outlines for the annual ALI-ABA Employee Benefits Litigation and annual ABA ERISA Litigation seminars.

Lee T. Polk's three-volume treatise, ERISA Practice and Litigation, published by the West Group is another comprehensive source.

Finally, the Western District Bar Association Annual Meeting, on April 24, 2003, will include a CLE program on "ERISA and the Federal Court Practioner." Don Romundson, of LaFollette, Godfrey & Kahn, will speak on "Introduction to ERISA Remedies and Standards of Review." Russell T. Golla, of Anderson, O'Brien, Bertz, Skrenes & Golla, will talk about "Fundamentals of ERISA Subrogation."

*The author of this article, Robert E. Shumaker, is a member of the Western District of Wisconsin Bar Association Board of Governors. He is Co-chair of the DeWitt Ross & Stevens S.C. Litigation Practice Group and a member of his firm's Employee Benefits and Labor and Employment Relations Practice Groups. His practice includes ERISA litigation on behalf of employers and fiduciaries as well as participants and beneficiaries.*

Western District News

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