

ERISA & Employee Benefits Litigation

Trusted Counsel for Challenging Times

Since ERISA's enactment in 1974, Miller & Chevalier has represented insurance companies, employers, fiduciaries, plans and participant associations in complex ERISA litigation matters. The firm's experience in ERISA litigation runs the gamut, including breach of fiduciary duty and prohibited transaction claims, ERISA class action lawsuits, subrogation and reimbursement matters, challenges to benefits denials, litigation against both the U.S. Department of Labor (DOL) and Pension Benefit Guaranty Corporation (PBGC), and litigation arising in the intersection between ERISA and the Affordable Care Act (ACA). Additionally, we have represented our clients in a wide range of agency actions, including DOL investigations and audits, and appeals before the PBGC. Our team also has significant experience in the area of federal preemption of state laws under ERISA and the Federal Employees Health Benefits Act (FEHBA), the federal law that governs the health care of federal government workers.

Our team includes former DOL staff uniquely situated to understand the enforcement perspectives of that agency, as well as lawyers who began their career dedicated to ERISA litigation and trial lawyers who have developed extensive experience in ERISA matters. The litigation team also works hand-in-hand with our Employee Benefit group, which is widely recognized as being one of the most sophisticated groups in the country. Clients hire us for our deep experience, our ability to handle the most complicated matters and our record of achievement. They choose us because we are incisive strategists and devoted advocates seeking to solve their problems.

Welfare/ACA-Related Litigation

Miller & Chevalier has a well-deserved reputation for representing clients in high-stakes ERISA litigation involving novel health-benefits issues. The firm's experience in this area dates back to 1959, when it began representing Blue Cross and Blue Shield entities. Over the past decade the firm has been involved in some of the most significant ERISA health-benefits cases in the federal Courts of Appeals and before the U.S. Supreme Court. Led by [Anthony Shelley](#), we have been a key player in the implementation of the ACA (as incorporated into ERISA) for many of the nation's largest health insurers, and in defending companies in the litigation that is arising under ERISA over application of the ACA.

Fiduciary/Pension Litigation

Our team has significant experience in litigating large-scale matters in connection with ERISA-covered retirement plans, including 401(k) plans, 403(b) plans, employee stock ownership plans (ESOPs) and defined benefit plans, including defending plan sponsors, administrators and service providers in complex fiduciary and prohibited transaction litigation. The team draws on a wealth of substantive knowledge in the field (the firm's Employee Benefits department was recently recognized as the *Legal 500* Employee Benefits & Executive Compensation Team of the Year), combining that substantive knowledge with extensive litigation experience involving class-action and other large-scale ERISA litigation matters.

Regulatory/Enforcement Experience

[Tess Gee](#), one of our senior ERISA attorneys, served for nearly 15 years with DOL's Office of the Solicitor, both in the National and Regional Offices, most recently as a Deputy Associate Solicitor in Washington, DC in the division responsible for ERISA litigation and advice. Tess has represented the government in investigations and cases involving breaches of fiduciary duty and prohibited transactions in connection with the value of company stock, corporate fraud, excessive fees, health plans and plan investments, as well as funding and other issues under Title IV of ERISA. Tess not only has a deep understanding of ERISA, but also unique insight into DOL's internal operations and decision-making process at both the national and regional levels.

Appellate Litigation

Appellate advocacy is itself an area of concentration that places a premium on written and oral advocacy skills. These skills are particularly important in ERISA, one of the most complex areas of the law. Our ERISA litigators have the demonstrated experience to translate highly technical subject matter into language and concepts that a non-specialist can understand.

In addition to full-scale representation with briefing and argument in the U.S. Supreme Court and U.S. Courts of Appeals, we provide advisory litigation services, including strategic guidance at the early stages of a case by shaping important statutory issues with an eye to subsequent appellate considerations. We have also been asked to revise appellate briefs prepared by other counsel and to provide expert advice on Supreme Court or appellate strategy and procedure in important cases.

Experience in Related Substantive Areas

FEHBA

Miller & Chevalier was instrumental in the drafting and enactment of FEHBA, a close cousin to ERISA which governs health benefits provided to federal employees and retirees. Since FEHBA was enacted, we have been national litigation counsel for the Blue Cross and Blue Shield entities that administer and underwrite the largest FEHBA plan, known as the Service Benefit Plan. The Service Benefit Plan has nearly five million participants and is the largest health benefits plan in the world. For nearly five decades we have served as national litigation counsel for this plan, handling matters at all levels of the federal and state courts, including a landmark case in the Supreme Court in 2006, appeals in nearly every U.S. Court of Appeals and hundreds of U.S. District Court and state court matters. These representations have involved all of the most sophisticated disputes and issues that arise in the context of health benefits plans, such as preemption, federal jurisdiction, benefits controversies, subrogation disputes, Racketeering Influenced and Corrupt Organizations (RICO) allegations, class actions and multi-district litigation.

PBGC

The team also has significant experience in handling matters involving the PBGC and litigation arising under Title IV of ERISA. Roughly 22,000 ongoing private-sector defined benefit pension plans are covered by Title IV's provisions, and the PBGC's actions affect both the employers who sponsor those plans, and their current and former employees. Additionally, the PBGC serves as a fiduciary trustee, holding more than \$60 billion in assets that it will distribute to plan participants over time. Our team has been involved with appeals before, and litigation against, the PBGC arising out of some of the largest plan terminations in the agency's history. We offer our clients counsel on all aspects of the PBGC's operations.

REPRESENTATIVE ENGAGEMENTS

U.S. Supreme Court

- *Gobeille v. Liberty Mutual Insurance Co.* (136 S. Ct. 936 2016) (Represented *amicus* Blue Cross and Blue Shield Association in arguing that the Court should uphold the Second Circuit's decision finding Vermont's all-payer database collection law is preempted by ERISA).
- *Blue Cross Blue Shield of Michigan v. Hi-Lex Controls, Inc.* (Supreme Court Case No. 14-168). (Represented *amici* Blue Cross and Blue Shield Association, America's Health Insurance Plans, and Pharmaceutical Care Management Association in arguing that the Court should grant *certiorari* to address uncertainty created by the Sixth Circuit's decision for liability for third-party administrators of ERISA plans).
- *Hillman v. Maretta* (133 S. Ct. 1943 2013) (Represented *amicus* Association of Federal Health Organizations in merits briefing, arguing that the Court should uphold the Virginia Supreme Court's judgment that Virginia state law was preempted by the

Federal Employees' Group Life Insurance Act of 1954).

- *Fossen v. Blue Cross and Blue Shield of Montana, Inc.* (132 S. Ct. 2780 2012) (Represented health insurer in successfully opposing *certiorari* in case of first impression involving the relationship between ERISA and state laws implementing HIPAA).
- *Cal. Physicians' Serv. dba Blue Shield of Cal. v. Harlick* (Supreme Court Case No. 12-457) (Represented *amicus* Blue Cross and Blue Shield Association in arguing that the Court should grant *certiorari* to resolve a circuit split on whether an ERISA plan administrator waives the right to invoke a basis for denial of benefits not raised during the administrative review process).
- *Health Care Serv. Corp. v. Pollitt*, 558 F.3d 615 (7th Cir. 2009), petition for *cert.* granted, No. 09-38 (U.S. 2010), *voluntarily dismissed*, 130 S. Ct. 1574 (U.S. 2010). (Represented federal employee health benefits plan in a suit involving issues of federal jurisdiction and preemption over state court claims challenging eligibility and benefits determinations).
- *Metro. Life Ins. Co. v. Glenn*, 128 S. Ct. 2343 (2008). Represented the Blue Cross and Blue Shield Association in an *amicus* filing on issue of appropriate standard of review in ERISA benefits cases if same entity is responsible for both deciding claims and paying benefits. Our brief was cited with approval in the Supreme Court's decision in the case.
- *Louisiana Health Service & Indem. Co. v. Rapides Healthcare Sys.*, 549 U.S. 1279 (2007). (Represented America's Health Insurance Plans, Inc. (AHIP) and Blue Cross and Blue Shield entities in an *amicus* filing supporting *certiorari* petition on issue of whether ERISA preempts state laws requiring health benefits plans to honor patient assignments to providers).
- *Sereboff v. Mid Atlantic Medical Servs., Inc.*, 547 U.S. 356 (2006). (Represented the Blue Cross and Blue Shield Association in an *amicus* filing on issue of whether ERISA plans can sue under ERISA Section 502(a)(3) for reimbursement (subrogation) of earlier paid benefits, where the beneficiary has also received a duplicative recovery from a third-party. The Supreme Court ultimately held in favor of the side that our *amicus* brief supported).
- *Empire HealthChoice Assurance, Inc. v. McVeigh*, 547 U.S. 677 (2006). (Represented a Blue Cross and Blue Shield entity in the U.S. Supreme Court, both in successfully petitioning for *certiorari* and then in briefing and arguing on the merits, a case raising issues of federal vs. state court jurisdiction in connection with FEHBA subrogation disputes).

Federal Courts of Appeals

- *Pa. Chiropractic Ass'n v. Indep. Hosp. Indem. Plan, Inc.*, 802 F.3d 926 (7th Cir. 2015) (Represented defendant health insurer in appeal before Seventh Circuit, obtaining a reversal of trial court's novel holding that plaintiffs, who are in-network healthcare providers, are ERISA "beneficiaries" entitled to ERISA's notice and appeal rights and the ability to bring suit under § 502 of ERISA).
- *Hunter v. Berkshire Hathaway Inc.* (5th Cir. No. 15-10854) (Represent defendants in ongoing appeal before the Fifth Circuit in which the plaintiff challenges the district court's dismissal of putative ERISA class action suit challenging defendants' rights to make alterations to defined benefit and defined contribution pension plans and alleging fiduciary breaches by the defendants).
- *Helfrich v. Blue Cross Blue Shield Association*, 804 F.3d 1090 (10th Cir. 2015) (Represented plan administrators in appeal before Tenth Circuit, in which the Court of Appeals affirmed the district court's decision in our client's favor that FEHBA preempted Kansas's anti-subrogation statute).
- *Norvell v. OPM*, (9th Cir. No. 15-35783) (Represented defendant health insurance carriers in plaintiff's appeal of district court's dismissal of lawsuit challenging carriers' alleged failures to make information disclosures regarding the carriers' products, including ERISA plans. The Ninth Circuit summarily affirmed the district court's decision in defendants' favor).
- *Vanderhorst v. Blue Cross Blue Shield Ass'n*, No. 15-5174, 2015 U.S. App. LEXIS 21125 (DC Cir. Dec. 4, 2015) (Represented defendant in appeal before DC Circuit, obtaining summary affirmance of district court's order dismissing plaintiff's lawsuit, which alleged breaches of fiduciary duty in disclosures to plan participants of drug copayment obligations).
- *DB Healthcare, LLC, et al. v. Blue Cross Blue Shield of Arizona* (9th Cir. 14-16518) (Represent defendant health insurer in appeal

before Ninth Circuit in which plaintiffs are challenging district court's dismissal of lawsuit filed by various healthcare providers alleging claims under ERISA and the Affordable Care Act).

- *In re Payment Card Interchange Fee and Merchant Discount Antitrust Litig.* (2d Cir. Case No. 12-4671) (Represent large group of health insurers in ongoing appeal before Second Circuit of district court's Rule 23(b)(2) class certification and settlement of antitrust class action, with our clients' objection highlighting specific concerns of settlement to insurance companies in light of their unique obligations under the Affordable Care Act).
- *Fossen v. Caring for Montanans, Inc.*, 617 Fed. Appx. 737 (9th Cir. 2015) (Represented health insurer in plaintiffs' appeal of district court decision finding that plaintiffs' putative class action lawsuit alleging discriminatory pricing among different employers was preempted by ERISA).
- *Omega Hosp., L.L.C. v. La. Health Serv. & Indem. Co.*, 592 F. App'x 268 (5th Cir. 2014) (Represented defendant health insurer in appeal before the Fifth Circuit of attorney's fee award, in which the Court reversed the district court's award of fees, holding that the defendant had an objectively reasonable basis to remove case to federal court under the federal officer removal statute).
- *Feldman's Medical Center Pharmacy, Inc. v. CareFirst, Inc.*, 541 Fed. Appx. 322 (4th Cir. 2013) (Successfully represented health insurer in appeal before the Fourth Circuit where medical provider sought payment for services to ERISA-plan participants).
- *Jacks v. Meridian Resource Co., LLC*, 701 F.3d 1224 (8th Cir.2012) (Successfully represented health insurer and national subrogation company defendants in appeal of this putative class-action before Eighth Circuit, in which the Court vacated the district court's judgment in plaintiff's favor).

Federal District Courts

- *Hunter v. Berkshire Hathaway, Inc.*, No. 4:14-cv-663-Y, 2015 U.S. Dist. LEXIS 136613 (N.D. Tex. Aug. 5, 2015) (Represent defendants in putative ERISA class action suit challenging their rights to make alterations to defined benefit and defined contribution pension plans and alleging fiduciary breaches by the defendants. The district court granted the defendants' motion to dismiss and the case is now on appeal to the Fifth Circuit).
- *DB Healthcare, LLC, et al. v. Blue Cross Blue Shield of Arizona* (9th Cir. 14-16518) (Represented defendant health insurer in district court proceedings and subsequent appeal before Ninth Circuit in which plaintiffs challenged the district court's dismissal of a lawsuit filed by healthcare providers alleging claims under ERISA and the Affordable Care Act. The Ninth Circuit affirmed the district court's dismissal, holding that medical providers are not ERISA beneficiaries and can only bring ERISA lawsuits in a derivative capacity. The court found that the providers in this case lacked derivative standing because the assignment forms they received from ERISA plan beneficiaries were not legally valid, due to anti-assignment provisions in the plans. This decision is the fifth in a series of federal appeals decisions from the Third, Sixth, Seventh, and Eleventh circuits, all of which ruled that medical providers do not qualify as ERISA beneficiaries. Miller & Chevalier also represented the prevailing Blue Cross Blue Shield Plan in the Seventh Circuit case).
- *Helfrich v. Blue Cross & Blue Shield Ass'n*, 36 F. Supp. 3d 1056 (D. Kan. 2014) (Represented plan administrators in FEHBA action alleging that the plan's subrogation rights were invalid in light of a state law prohibiting subrogation. The district court granted defendant's motion for judgment on the pleadings, holding that the state's anti-subrogation law was preempted by FEHBA, with the Tenth Circuit upholding the court's determination).
- *Bell v. Blue Cross & Blue Shield of Okla.*, No. 5:14-cv-05046, 2014 U.S. Dist. LEXIS 155723 (W.D. Ark. Nov. 3, 2014) (Represented defendant health insurers in subrogation action, obtaining judgment on the pleadings).
- *Black, et al. v. PBGC, et al.* (E.D. Mich. No. 2:09-cv-13616) (Represent association of Delphi retirees in ongoing litigation challenging the PBGC's termination in 2009 of their supposedly distressed pension plan. In connection with litigation, prevailed on numerous discovery disputes. See, e.g., *United States Dep't of the Treasury v. Pension Benefit Guar. Corp.*, 301 F.R.D. 20 (requiring U.S. Treasury Dept. to produce relevant documents from its Auto Task Force concerning the Delphi pension plan);

- Black v. Pension Ben. Guar. Corp.*, 2013 U.S. Dist. LEXIS 190082 (E.D. Mich. Aug. 21, 2013) (order holding that PBGC waived right to assert privileges or protections for more than 30,000 improperly withheld documents); *In re Pension Benefit Guar. Corp.*, 2014 U.S. App. LEXIS 24953 (denying PBGC's mandamus petition challenging waiver order).
- *Lewis v. PBGC*, Case 14-3838 (D.DC No. 1:15-cv-01328) (Represent association of retired pilots of Delta Airlines in ongoing litigation against the PBGC arising from the PBGC's alleged failings and fiduciary breaches as statutory trustee of the Delta Pilots' pension plan).
 - *Sleep & Wellness Medical Associates, LLC v. Horizon Healthcare Services, Inc.* (D. N.J. No. 2:14-cv-6640). Represent defendant health insurer in ERISA lawsuit brought by a healthcare provider arising from disputes regarding the client's recoupment and prepayment review procedures.
 - *Norvell v. OPM*, No. 1:14-cv-00421-BLW, 2015 U.S. Dist. LEXIS 127791 (D. Idaho Sep. 23, 2015) (Represented defendant health insurance carriers in a lawsuit seeking injunctive relief and penalties for alleged failures to make information disclosures regarding the carriers' products, including ERISA plans. The district court granted the defendants' motion to dismiss, which holding was summarily affirmed by the Ninth Circuit).
 - *Smith, et al., v. Davidson, et al.*, Case No. 3:11cv189 (E.D. Va.). Representation of trustees of health and pension funds in ERISA § 502(a)(3) lawsuit by plan participants, alleging that trustees' amendment of plan documents exceeded their authority under governing plan terms.
 - *Genetic Counseling & Research, Inc. v. CareFirst of Md., Inc., et al.*, No. 1:10-cv-03583-WDQ (D. Md.) Representation of national association of Blue Cross and Blue Shield Plans on ERISA and other claims brought by provider of medical services for autism, who asserts that insurers impermissibly denied benefits nationwide for autism claims. The suit raised ERISA jurisdiction and preemption issues, and the plaintiff ultimately dismissed the action.
 - *Thomas v. Blue Cross and Blue Shield Association*, No. 03-21296 (S.D. Fla.) (dismissed in 2008); *Solomon v. Blue Cross and Blue Shield Association*, No. 03-22935 (S.D. Fla.) (dismissed in 2007). Defended the Blue Cross and Blue Shield Association in multi-district litigation involving putative classes of potentially all U.S. physicians and non-physician medical practitioners, with the allegations being that Blue Cross and Blue Shield entities purportedly engaged in RICO violations in their payment of benefits for ERISA, FEHBA and Medicare plans.
 - *In re ULLICO Inc.*, No. 1:03-cv-01556 (D.DC). Representation of ERISA qualified and non-qualified plans in breach of fiduciary duty action against former plan fiduciaries. Case was settled and dismissed. Litigated issues in the case include plan amendments, benefit eligibility and ability of plan and company to offset benefits against other debts owed by former fiduciaries.

GOVERNMENT EXPERIENCE

- Deputy Associate Solicitor, Office of the Solicitor, U.S. Department of Labor
- Chief, Special Litigation Division, Public Defender Service for the District of Columbia
- Assistant Federal Public Defender, Las Vegas, Nevada
- Appellate Deputy Public Defender, Nevada State Public Defender's Office
- Senior Trial Attorney, Office of the Solicitor, U.S. Department of Labor
- ERISA Counsel, Regional Office of the Solicitor, U.S. Department of Labor
- ERISA Trial Attorney, Regional Office of the Solicitor, U.S. Department of Labor
- Staff Attorney, Appellate Division, Public Defender Service for the District of Columbia

RANKINGS AND RECOGNITION

- *Chambers USA*: ERISA Litigation (Nationwide), 2015 - 2020
- *Chambers USA*: Employees Benefits & Executive Compensation Team of the Year, 2015
- *Chambers USA*: Employees Benefits & Executive Compensation (Nationwide), 2015 - 2020
- *Chambers USA*: Employees Benefits & Executive Compensation (District of Columbia), 2008 - 2020
- *Legal 500*: Employee Benefits & Executive Compensation Team of the Year (U.S.), 2015
- *Legal 500*: Labor & Employment: ERISA Litigation (U.S.), 2012 - 2020
- *Legal 500*: Labor & Employment: Employee Benefits, Executive Compensation, and Retirement Plans – Design, 2010 - 2020
- *U.S. News - Best Lawyers*[®] "Best Law Firms": Litigation - ERISA (National), 2013 - 2021
- *U.S. News - Best Lawyers*[®] "Best Law Firms": Litigation - ERISA (District of Columbia), 2011 - 2021