II. EMPLOYEE BENEFIT PLANS IN ARBITRATION OF HEALTH AND MEDICAL ISSUES

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A. Introduction

The topic assigned to me is "Employee Benefit Plans in Arbitration of Health and Medical Issues." Too many benefit plans, particularly in smaller plants, are sketchy at best. The typical vignette surrounding the negotiations of benefit plans is orchestrated something like this: The union wants a benefit plan or existing benefits increased; agreement is reached, with details to be "worked out later," usually between the company and the insurance carrier.

The thesis statement succinctly stated is: Employee benefit plans should be written in prose of Pulitzer Prize stature with unquestionable potential as Nobel Peace Prize recipients.

The thesis statement in greater length is found in one of James Thurber's fables[1] entitled "What Happened to Charles":

> "A farm horse named Charles was led to town one day by his owner to be shod. He would have been shod and brought back home without incident if it hadn't been for Eva, a duck, who was always hanging about the kitchen door of the farmhouse, eavesdropping, and never got anything quite right. Her farmmates said of her that she had two mouths but only one ear.
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> "On the day that Charles was led away, Eva went quacking about the farm, excitedly telling the other animals that Charles had been taken to town to be shot. 'They're executing an innocent horse!' cried Eva. 'He's a hero! He's a martyr! He died to make us free!'
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> " 'He was the greatest horse in the world,' sobbed a sentimental hen.
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> " 'He just seemed like old Charley to me,' said a realistic cow. 'Let's not get into a moony mood.'
>
> " 'He was wonderful!' cried a gullible goose.
>
> " 'What did he ever do?' asked a goat.
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> "Eva, who was as inventive as she was inaccurate, turned on her lively imagination. 'It was butchers who led him off to be shot!' she shrieked. 'They would have cut our throats while we slept if it hadn't been for Charles!'
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> " 'I didn't see any butchers, and I can see a burnt-out firefly on

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[1] James Thurber, Further Fables for Our Time (1956).

a moonless night,' said a barn owl. 'I didn't hear any butchers, and I can hear a mouse walk across moss!'

" 'We must build a memorial to Charles the Great, who saved our lives,' quacked Eva. And all the birds and beasts in the barnyard except the wise owl, the skeptical goat, and the realistic cow set about building a memorial.

"Just then the farmer appeared, leading Charles, whose new shoes glinted in the sunlight.

"It was lucky that Charles was not alone, for the memorial-builders might have set upon him with clubs and stones for replacing their hero with plain old Charley. It was lucky, too, that they could not reach the barn owl, who quickly perched upon the weathervane of the barn, for none is so exasperating as he who is right. The sentimental hen and the gullible goose were the ones who finally called attention to the true culprit—Eva, the one-eared duck with two mouths. The others set upon her and tarred and unfeathered her, for none is more unpopular than the bearer of sad tidings that turn out to be false.

"*MORAL: Get it right or let it alone. The conclusion you jump to may be your own.*"

So get your employee benefit plans right or let them alone, for the conclusion the arbitrator draws may not be your own.

Naturally, employee benefit plans will no longer present problems if you follow our advice, rework all your current plans and contracts, and say 100 Hail Mary's each day. It's really so very simple, and Lewis Carroll said it best in *Alice's Adventures in Wonderland:*[2]

"The Hatter opened his eyes very wide on hearing this, but all he said was, 'Why is a raven like a writing desk?'

" 'Come, we shall have some fun now!' thought Alice. 'I'm so glad they've begun asking riddles—I believe I can guess them,' she said aloud.

" 'Do you mean that you think you can find out the answer to it?' said the March Hare.

" 'Exactly so,' said Alice.

" 'Then you should say what you mean,' the March Hare went on.

" 'I do,' Alice replied, 'at least I mean what I say—that's the same thing, you know.'

" 'Not the same thing a bit!' said the Hatter. 'Why, you might just as well say that "I see what I eat" is the same thing as "I eat what I see!" '

" 'You might just as well say,' added the Dormouse, who seemed

[2]Lewis Carroll, Alice's Adventures in Wonderland and Through the Looking Glass (1963).

to be talking in his sleep, 'that "I breathe when I sleep" is the same thing as "I sleep when I breathe." ' "

So, negotiators of plans, don't you be in an Alice-in-Wonderland, "Catch-22" situation. *Say what you mean and mean what you say.*

B. 32 Commandments on Employee Benefit Plans

In his *Benefit Plans, Disputes: Arbitration Case Stories,*[3] Morris Stone has listed some 59 horror stories. I have interpolated and borrowed extensively some of the issues from those cases; only the sentence structures have been changed to protect the guilty and the undersigned from damage claims. So on to the Sermon on the Mount and the new revised St. Segal's version of employee-benefit-plan commandments.[4]

Commandment I.

Any dispute arising under the employee benefit plan should be subject to grievance and arbitration under the collective bargaining agreement or the plan itself.

It is trouble-begging not to state specifically in the employee benefit plan that any dispute arising under the plan will be grievable and arbitrable under the collective bargaining agreement or plan.

In its crudest and cruelest form, the basic question is, should the employee have the right to grieve, or should the sole remedy for an alleged violation of the plan be a lawsuit by the employee against the company or the insurance carrier? I say, emphatically, that there should be the right to grieve. How many employees can afford to take such action for what is usually a relatively small claim, assuming *arguendo* that a lawyer can be retained?

Aside from the difficulties that an employee faces if the grievance procedure is not available, there is certainly a potential problem both to the union and to the company involving duty of fair representation. Might not a claim be mounted that the union is violating its duty of fair representation if an employee's right to grieve is not protected where there is an alleged viola-

[3]Morris Stone, Benefit Plans, Disputes: Arbitration Case Stories (1976).
[4]We are not considering here any ERISA implications.

tion of the benefit plan? With the ever-widening range of duty of fair representation claims and theories, this potential should not be summarily discounted.[5]

ERISA requires a review procedure, but not mandatory arbitration. The American Arbitration Association has prepared a pamphlet entitled "Two Dispute Resolution Services Sponsored by the International Foundation of Employee Benefit Plans for Employee Benefit Plan Claims and Impartial Umpire Procedures for Arbitration of Impasses Between Trustees of Joint Trust and Pension Funds," which I suggest you obtain as it could be helpful.

Commandment II.

> *The employer should guarantee coverage and payment of benefits if the prerequisite conditions are met and not merely guarantee the payment of premiums.*

Whether the employer agreed to pay only the premium for certain coverage or guaranteed the payment of benefits if the policy requirements are met should never be an issue.

It should be the responsibility of the union to protect the employees it represents not only by negotiating a benefit-plan package, but by insuring those employees that the package is delivered to the covered employees. To argue that this is a matter between the employee and the insurance carrier is patently unfair because, among other reasons, the insurance carrier is not a party to the collective bargaining agreement. In most cases, the employer chooses the insurance carrier, creating a line of responsibility even if not a legal "agency" relationship. In any event, it should not be the problem of the employee or the union if a dispute exists between the company and the insurance carrier over whether benefits are to be paid. It is of little solace to the employee to hear that the company feels that the benefits should be paid, but the carrier refuses.

The collective bargaining agreement or the benefit plan should provide that the employer is responsible for the payment

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[5]Subjecting benefit-plan disputes to the grievance mechanism does not automatically preclude an employee from seeking state court action to recover benefits allegedly due him; however, it may create the necessity to exhaust his right to grieve before a state court assumes jurisdiction. *Heck* v. *Hormel,* 97 LRRM 2678 (1977).

of benefits and that the denial of same is subject to the grievance and arbitration procedure, with the arbitrator determining whether or not the relief requested in the grievance should be sustained.

Commandment III.

The plan must clearly define who is eligible for benefits. If retirement benefits are involved, a provision should cover a situation where the employee never reaches retirement age solely because the company ceases operation.

Again, ERISA aside, this situation arose when an agreement included a retirement/separation-pay plan which gave a lump-sum payment to employees who had reached legal retirement age and who had 15 years of service. A number of employees had worked 15 years but could not reach retirement age because the company ceased operations.

Commandment IV.

If an employee is receiving benefits during a disability leave and is laid off, the plan should provide that benefits continue until a condition subsequent occurs.

A collective bargaining agreement provided that if an employee were receiving workers' compensation benefits, he would receive the difference between compensation benefits and the wages he would have earned had he been working. The employee was injured at work, but was later laid off for lack of work. While on layoff, the employee continued to receive workers' compensation benefits, but the company discontinued its payments to him.

Commandment V.

The plan should address itself to whether or not laid-off employees who retain seniority are eligible for full welfare and insurance benefits.

The real question here is whether an employee who is laid off, but retains seniority, remains an employee under the collective bargaining agreement and is therefore entitled to contractual fringe benefits if, while on layoff, he sustains an illness or injury.

Commandment VI.

The plan should clearly state whether benefit payments are payable from the commencement of employment or after the probationary period is served.

The issue here is whether payments are to be made to all employees from the first hour of employment or only to employees who have survived the probationary period.

Commandment VII.

There should be only one procedure for resolving disputes that arise from either the collective bargaining agreement or the benefit plan.

A collective bargaining agreement set specific time limits for the filing of grievances. There was also a pension agreement which had a different time period for resolving disputes. Which clause prevails?

Commandment VIII.

Whether or not an employee's benefits remain constant or increase through subsequent new collective bargaining contracts should be spelled out in the plan.

This issue arises where the current collective bargaining agreement expires and increases in the benefit plan are negotiated. The new collective bargaining agreement should explicitly provide what benefits are to be increased and if the increases in benefits are retroactive.

Commandment IX.

To cover situations where an employee is receiving benefits prior to the commencement of a strike, the plan should clearly provide whether or not those benefits continue during the strike.

An injured employee was receiving disability benefits under the state workers' compensation law and supplemental disability benefits from the employer. When a strike began, the employer discontinued its payments. This situation should be covered by the plan.

Commandment X.

The benefit plan and the collective bargaining agreement must not have inconsistent provisions.

One provision of a benefit plan provided that benefits commence from the first day of a compensable injury. Another clause in the collective bargaining agreement referred to payment of benefits when the employee became eligible for compensation benefits under the state law, which had a seven-day waiting period.

If new provisions are added to a long-standing agreement, reexamine both documents to be certain that no contractual inconsistencies have been created.

Commandment XI.

The plan should make clear who pays for expenses incurred by an employee on medical leave in his efforts to obtain medical approval of his ability to return to work.

Where an employee's family doctor finds the employee able to return to work, but the company doctor disagrees and the company demands that the employee seek the opinion of a specialist, who should bear the out-of-pocket expenses, including traveling expenses, in securing this third opinion?

Commandment XII.

The plan should provide whether or not retired employees' life-insurance benefits increase if additional life-insurance coverage is negotiated into a new contract.

This issue arises when the collective bargaining agreement provides that retired employees maintain certain life-insurance benefits. Subsequently, the parties agree to increase life-insurance benefits to employees. The issue in arbitration is whether or not the increase applies only to active employees and not to retirees.

Commandment XIII.

The plan must contain specific provisions covering compulsory retirement and under what circumstances, if any, exceptions can be made deferring retirement if no benefits are forthcoming to the retiree.

As you know, Congress has just raised the minimum compulsory retirement age to 70,[6] but an issue still exists where a

[6] The amendment provides for staggered effective dates.

company maintains a compulsory retirement age but also a policy whereby it allows employees who have reached retirement age to continue working, even though they are not eligible for retirement benefits.

Commandment XIV.

In these days of moonlighting, the plan must make clear whether or not the claimed disability must have a causal connection with the primary job.

This issue arises where an employee works at a primary and secondary job and develops a specific disability due to the secondary job that makes it impossible for him to continue at his primary job. Is he entitled to benefits under the plan at his primary job?

Commandment XV.

The plan should provide the standard of proof required to establish total and permanent disability.

Most disability-benefit plans contain language relating to the degree of disability necessary for an employee to be eligible for benefits—usually "total and permanent disability." The standard of proof necessary to prove total and permanent disability should be defined. The parties should agree as to whether or not the standard for proof or evidence must be beyond a reasonable doubt or the preponderance of evidence.

Commandment XVI.

A supplemental-unemployment-benefit plan should cover inclement-weather situations, particularly where public officials urge employees not to work even though there may be work in the plant.

If a collective bargaining agreement contains supplemental-unemployment-benefit provisions that guarantee employees who are laid off a sum of money in addition to what the state may pay in unemployment compensation, the agreement or plan should address itself to what happens if employees are unable to work because of severe weather conditions or if government officials urge employees not to go to work because of the weather. Is this a compensable layoff or a constructive layoff?

Commandment XVII.

Where both a husband and wife work for the same employer and there is a choice of more than one insurance plan, the plan should make clear whether the couple must choose one plan or whether each employee has an independent choice.

A collective bargaining agreement may provide that each employee has a choice of benefit plans. A question can arise as to whether spouses employed by the company must choose one plan or have an individual choice.

Commandment XVIII.

The plan should clearly state whether employee contributions are based upon hours paid or hours actually worked.

Where a collective bargaining agreement provides that the employer shall contribute a specified amount "per hour for each hour worked" or "for hours paid for," a question may arise as to whether the employer must make contributions for vacation time.

Commandment XIX.

The plan must specifically cover the situation when an employee on medical leave dies and the amount of the death benefits increased between the date his leave started and the date of death.

An employee went on medical leave in August 1977 and died in November 1977, while still on leave. The collective bargaining agreement in effect when the employee's leave began provided for $3,000 life insurance. On October 1, 1977, however, a new agreement increased the insurance coverage to $5,000. Does the beneficiary receive $3,000 or $5,000?

Commandment XX.

The plan must define specifically what is an accident and what is a sickness, particularly where the two overlap and duplicating waiting periods become an issue.

A collective bargaining agreement provided that payment of sick-and-accident benefits begin from the first day of total disability resulting from an accident, but on the eighth day of disability resulting from sickness. An employee suffered an accident while at home; he was off for several days and received benefits for each day. The employee then returned to work, but

he fell ill again and the doctor ordered him home. Is there an additional waiting period for benefits?

Commandment XXI.

The plan should contain an explicit clause as to the liability of the company if it voluntarily goes out of business or is forced out of business because of bankruptcy, condemnation, or an act of God.

In this situation, the collective bargaining agreement contained a severance-pay clause that stated that certain sums were to be paid to each employee if the company voluntarily and permanently closed its operation. The company lost its lease and closed. At the arbitration, the company argued that the agreement referred only to voluntary cessation and did not cover involuntary plant closings. Is losing a lease voluntary?

Commandment XXII.

The collective bargaining agreement or plan must make clear which employees are eligible for "good health" bonuses resulting from unused sick-leave days payable at the end of each contract year.

Assume that every member of a bargaining unit is contractually entitled to a specific number of days of paid sick leave per year. Those employees who did not use all or any part of their sick leaves were to be rewarded with good-health bonuses. An employee quits or is discharged for cause. Does he receive his sick-leave pay?

Commandment XXIII.

The plan must clearly define words or phrases, such as "technological reasons" causing "permanent displacement," as contrasted with layoffs because of lack of work.

A severance-pay plan may provide that each employee will receive a cash allotment, the size of which would be determined by length of service if an employee is "permanently displaced because of technological reasons." What are "technological reasons"?

Commandment XXIV.

The collective bargaining agreement should contain a provision covering duplicate payment of benefits when each spouse of a married couple works for a different company and one plan bars dupli-

cation of benefits, but the other one does not. Which is the primary claim for dependents?

Group-hospitalization and disability-payment plans usually contain provisions barring duplication of benefit payments in order to avoid double payment for the same medical service. Where is the primary claim when one spouse's plan bars duplication and the other's does not, and their joint dependent is covered in both plans?

Commandment XXV.

The contract should cover situations where equally reputable physicians disagree as to the capability of an employee's returning to work.

The particular benefit plan should provide for resolution of the dilemma created when one doctor advises that an employee be terminated because of a permanent medical disability, and another doctor, equally reputable, sees no harm in letting the employee work.

Commandment XXVI.

The plan should cover the situation where an employee is injured or dies while on strike and is unable to return to work when the strike is over.

The plan should set forth clearly whether or not an employee injured while on strike is entitled to benefits and the amount of benefits he is to receive during the period after the contract has expired. Further, the collective bargaining agreement should provide, if retroactivity is agreed to, whether increased benefits relate back to the date the old contract expired.

Assume that a striking employee suffered a severe heart attack in May and died on August 14, without having returned to work when the strike was settled in July. The question is whether the employee was still an employee and entitled to benefits since he never returned to work.

Commandment XXVII.

The plan should provide guidelines for employees receiving sick-leave benefits as to the type of activity they can engage in without fear of forfeiting sick-leave pay.

An employee was granted a sick leave. While on sick leave, he drove 200 miles to visit his wife and children. He was reported

to have attended family social gatherings while there and even to have played basketball. The employee should know the ground-rules on forfeiture of sick pay.

Commandment XXVIII.

The plan should specify whether termination pay is collectible if the employee accepts the option to move to another company plant.

The collective bargaining agreement provided for severance pay. The company operated two plants, but was forced to close one. Senior employees at the closed plant were allowed to bump employees at the other plant. A dispute arose as to whether an employee who moved to the remaining plant was eligible for severance pay.

Commandment XXIX.

The plan should address itself to the handicapped employee and the effect of an affirmative-action program.

When a company institutes an affirmative-action program for handicapped employees, negotiators should concern themselves with the effect on an existing program, its coverage, and, of course, the costs of the new program. We will return to this issue in more detail.

Commandment XXX.

The plan should address itself to a comprehensive definition of covered operations and illnesses.

Does the plan spell out what operations, illnesses, or mental disabilities are covered?

Commandment XXXI.

The plan should make clear whether or not an employee on sick leave can receive both sick-and-accident benefits and vacation pay.

The company and the employee agree upon when the employee would take his vacation. Prior to that date and after the employee became sick, he was granted sick leave and sick-and-accident benefits. While still on sick leave, the employee's vacation date arrived. The company argued that the employee could not receive both vacation pay and sick-and-accident benefits.

Commandment XXXII.

The plan should disclose the controlling date when female employees are entitled to maternity benefits.

Is the controlling date when conception takes place or when the child is born?

Hopefully, these arbitration cases and commandments, primarily taken from Morris Stone's excellent collection, which I strongly urge you to obtain, will stimulate you to a careful examination of your own plans and collective bargaining agreements.

C. Other Related Concerns and Areas

1. Implication of Alexander *v.* Gardner-Denver

As we have previously stated, this is not a program concerning the Employee Retirement Income Security Act of 1974 (ERISA), but certainly we must examine if there is a tie-in between ERISA and *Alexander* v. *Gardner-Denver.*[7] As you know, in *Gardner-Denver* the Supreme Court held that Title VII provided a separate cause of action to an alleged discriminatee despite an arbitrator's award adverse to the employee.

If the employee's claim, under your plan, is denied by an arbitrator, can that employee file a civil action under Section 402(2) of the ERISA pension-reform act?[8] When I put this question to two arbitrators, I received two entirely different answers. Here again the parties should address themselves to this possibility within the framework of celebrated footnote 21[9] and should at least discuss, if not agree to, mandating the arbitrator to consider, in addition to the plan, ERISA, its regulations, the

[7] 415 U.S. 36, 7 FEP Cases 81 (1974).

[8] 29 U.S.C. § 1132.

[9] "We adopt no standards as to the weight to be accorded an arbitral decision since this must be determined in the court's discretion with regard to the facts and circumstances of each case. Relevant factors include the existence of provisions in the collective bargaining agreement that conform substantially with Title VII, the degree of procedural fairness in the arbitral forum, adequacy of the record with respect to the issue of discrimination, and the special competence of particular arbitrators. Where an arbitral determination gives full consideration to an employee's Title VII rights, a court may properly accord it great weight. This is especially true where the issue is solely one of fact, specifically addressed by the parties, and decided by the arbitrator on the basis of an adequate record. But courts should ever be mindful that Congress, in enacting Title VII, thought it necessary to provide a judicial forum for the ultimate resolution of claims of discrimination in employment. It is the duty of courts to assure the full availability of this forum."

Occupational Safety and Health Act (OSHA), its regulations, and applicable Court decisions.

2. Determination and Extent of Disability

Always of concern to the parties is the standard used by an arbitrator to determine the extent and duration of disability. If a lesson is to be learned from workers' compensation case law, it is this: Much more is involved in determining disability than a mere examination of medical reports or doctors' testimony. Also to be considered is occupational or functional disability to the employee for the job being performed prior to the injury. What standards the parties want should be a matter of record for the arbitrator.

3. Employee's Right to Examine His Personnel and Medical Records

What do your plans say, if anything, about the rights of employees to examine their medical and personnel records in the event that a claim is made? Under the National Labor Relations Board and court decisions, a union may obtain such information in preparing for the possible filing of a grievance, the processing of a grievance, or preparing for a grievance. If the employer refuses, then such refusal could be a basis for an 8(a)(5) unfair labor practice charge. Further, this very issue could directly confront an arbitrator if a request is made for a subpoena duces tecum, assuming, *arguendo,* that such a subpoena is enforceable if the company refuses to furnish the medical information requested.

4. Introduction of Medical Testimony in the Arbitration Case

As to the introduction of medical testimony itself, assuming —and I think safely—that doctors won't testify before arbitrators, we have encountered some very serious problems. For example, one arbitrator refused to permit the introduction of a doctor's deposition previously taken in the grievant's compensation case growing out of the same set of facts and between the same parties. The arbitrator ruled that the doctor should have been subpoenaed and an effort made to take his deposition prior to the actual arbitration hearing. The arbitrator also refused to allow a posthearing deposition. This was his ruling even though the same law firm was involved in the compensation case and the arbitration case.

In any event, the rules of evidence as to what the arbitrator may consider and the method of introducing medical evidence should be developed between the parties and set out in the plan or the collective bargaining agreement, or at a prearbitration conference.

5. The Handicapped Employee

The recognition of the handicapped as employees with enforceable rights is yet another area to be considered. Section 503[a] of the Rehabilitation Act of 1973 [10] provides that any contract in excess of $2,500 entered into by any federal department or agency must contain a provision requiring that, in employing persons to carry out such affirmative action, employment-qualified handicapped persons must be employed and advanced.

Discrimination against handicapped workers is a relatively new problem that is just coming into its own. We urge you to address yourselves to this reality for numerous reasons, only one of which is the possible effect on insurance rates. Increased hiring of handicapped employees raises serious questions concerning promotional opportunities and seniority, particularly where the next sequence job entails greater risks of injury to the handicapped.[11]

6. The Age Discrimination in Employment Act of 1967, as Amended

Certainly your plan must be examined in light of the 1978 amendment to the Age Discrimination in Employment Act of 1967 pertaining to the mandatory retirement age.

The U.S. Supreme Court, in *United Airlines, Inc.* v. *McMann,*[12] held that an involuntary retirement of a 60-year-old employee under the terms of a bona fide retirement plan, established in 1941, was not a subterfuge to evade the purposes of the Age Discrimination in Employment Act and was, therefore, lawful under Section 4(f)(2) of the act as a bona fide employee-benefit plan. The Court rejected the per se rule requiring employers to bear the burden of showing a business or economic purpose to

[10] 29 U.S.C. §793(a).

[11] For a more detailed discussion of this problem, *see* G. C. Pat, *Countdown on Hiring the Handicapped,* Personnel J. (March 1978).

[12] 46 L.W. 4043, 16 FEP Cases 146 (1977).

justify a bona fide retirement plan established prior to the act. We refer to this case not just because of its holding, but because the parties should be aware of the implications of the Age Discrimination Act in structuring and interpreting the provisions of their plans. Nor can the implication of Title VII be overlooked. However, the age-discrimination amendments have probably overruled *McMann* in part.

The Supreme Court, in *City of Los Angeles* v. *Manhart,*[13] held that an employer violated Title VII of the Civil Rights Act by requiring female employees to make larger contributions to pension plans than male employees, upholding the Ninth Circuit finding of a violation despite *General Electric* v. *Gilbert.*[14] Some other cases are of interest not only because of their decisions, but to point out that the reasoning of the Court involves (1) exhaustion of contractual remedies before litigation can be commenced, (2) consideration of medical testimony, and (3) alleged violation of a union's duty of fair representation.[15]

In *Malone* v. *White Motor Corp.,*[16] the Supreme Court held that the Minnesota statute that establishes minimum standards for funding investing of employee pensions was not preempted by the federal labor policy, since nothing in the act expressly foreclosed all state regulatory power on issues subject to collective bargaining. The Court further held that the legislative history of ERISA indicated that the congressional intent was to preserve certain state regulatory authority as pertained to pension plans, including those resulting in collective bargaining. The Court remanded the case to determine whether Minnesota statute impairs contractual obligations or fails to provide due process in violation of the U.S. Constitution. Of course, there are other important issues in this area wending their way to the Supreme Court.

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[13] Case No. 76–1810 (April 25, 1978); 17 FEP Cases 395 (1978).

[14] 429 U.S. 125 (1976).

[15] *See Lugo* v. *Employees Retirement Fund,* 529 F. 2d 251, 91 LRRM 2286 (2d Cir. 1976), *cert. den.,* 429 U.S. 926, 93 LRRM 2362; *Justice* v. *Union Carbide,* 405 F. Supp. 920, 91 LRRM 3063 (E.D. Tenn. 1975); *Hayes* v. *Kroger Co.,* ——— F.Supp. ———, 92 LRRM 3503 (S.D.Ohio 1976).

[16] 46 L.W. 4295 (April 3, 1978).

D. Conclusion

Naturally, we cannot anticipate every situation and problem that develops from employee welfare plans. What we have tried to do, obviously, is to trigger your thinking in an effort to minimize conflicts.

We have strayed from that portion of the program assigned to us and our commandments. We have done so with malice aforethought simply because this field is ever expanding and concominant with that expansion is an almost symbiotic relationship between the problems and pitfalls that accompany that expansion for unions, for companies, and for arbitrators.