

1987

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Recommended Citation

Lawrence J. O'Connell, *Northeast Department ILGWU Welfare Fund v. Teamsters Local No. 229 Welfare Fund: An End to the Escape Clause as a Method of Coordinating Health Benefits Under ERISA?*, 3 J. Contemp. Health L. & Pol'y 329 (1987).
Available at: <http://scholarship.law.edu/jchlp/vol3/iss1/22>

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NOTE

NORTHEAST DEPARTMENT ILGWU WELFARE FUND V. TEAMSTERS LOCAL NO. 229 WELFARE FUND: AN END TO THE ESCAPE CLAUSE AS A METHOD OF COORDINATING HEALTH BENEFITS UNDER ERISA?

In 1974, Congress enacted the Employee Retirement Income Security Act ("ERISA")¹ to provide for, *inter alia*, "minimum standards" and "financial soundness"² of employee benefit plans.³ ERISA requires that all assets of these benefit plans be held in trust by one or more fiduciaries who are to manage and control the plan.⁴ In order to effectuate employee benefit and pension security, the statute describes the fiduciary duties of plan trustees as

1. 29 U.S.C. §§ 1001-1461 (1982 & Supp. II 1984).

2. Congress stated in ERISA's declaration of policy:

The Congress finds that the continued well being and security of millions of employees and their dependents are directly affected by [employee benefit plans]: . . . that owing to the lack of employee information and adequate safeguards concerning their operation it is desirable in the interests of employees and their beneficiaries, and to provide for the general welfare and free flow of commerce, that disclosure be made and safeguards be provided with respect to the establishment, operation, and administration of such plans; . . . that owing to the inadequacy of current minimum standards, the soundness and stability of plans with respect to adequate funds to pay promised benefits may be endangered; that owing to the termination of plans before requisite funds have been accumulated, employees and their beneficiaries have been deprived of anticipated benefits

29 U.S.C. § 1001(a), *quoted in* Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund, 764 F.2d 147, 163 (3d Cir. 1985) [hereinafter *Northeast Dep't*].

3. Employee Welfare Benefit Plan is defined by ERISA as:

any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, apprenticeship or other training programs, or day care centers, scholarship funds, or prepaid legal services, or (B) any benefit described in section 186(c) of this title (other than pensions on retirement or death, and insurance to provide such pensions), 29 U.S.C. § 1002.

4. 29 U.S.C. § 1103.

follows: “[A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and a) for the exclusive purpose of: (1) providing benefits to participants and their beneficiaries; and (2) defraying reasonable expenses of administering the plan. . . .”⁵

A popular method of cost containment⁶ employed by trustees of health-benefit plans has been coordination of benefits⁷ (“COB”). Because of the large number of households with two working spouses, there are many cases where husband and wife are both insured as an employee and a dependent.⁸ As a result, COB was instituted to “prevent employees from being reimbursed for more than 100% of a covered expense.”⁹ The basic function of COB is to apportion coverage when an employee has group medical insurance through one or more plans.¹⁰ The apportionment is carried out through the use of “other insurance” clauses, of which there are three types: pro rata, excess, and escape (or no liability).¹¹ For purposes of this note, only the latter two types need be discussed. An excess clause provides coverage for the difference between the percentage of total expense covered by the primary plan¹² and 100% of the expense.¹³ However, the presence of an escape clause in a medical benefit plan completely excludes the insured from coverage if he is covered by any other insurance policy.¹⁴

In *Northeast Department ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*,¹⁵ the United States Court of Appeals for the Third Circuit addressed the validity of excess and escape clauses in light of plan trustees’ fiduciary duty.¹⁶ While recognizing the propriety of excess

5. 29 U.S.C. § 1104; *Northeast Dep’t*, 764 F.2d at 162.

6. “[T]here are a few published examples of savings ranging from 1% to 9%, with the average considered to be in the area of from 3 - 3 1/3%.” Parker, *Administration of Coordination of Benefits*, in VII, TEXTBOOK FOR WELFARE, PENSION TRUSTEES AND ADMINISTRATORS 16 (1965).

7. *Id.* at 7.

8. *Id.* at 6.

9. BUSINESS INSURANCE, Mar. 12, 1984, at 43, col. 2.

10. *Id.* at col. 1.

11. *Northeast Dep’t*, 764 F.2d at 160.

12. Fundamental to COB is a system by which plans define themselves as primary or secondary in relation to other plans with which they are to be coordinated. In the case of an excess clause, the primary plan will pay to its maximum coverage and the secondary plan will pay the excess not covered by the primary. In the case of an escape clause, the primary plan will pay up to its maximum coverage and the secondary will pay nothing.

13. *Northeast Dep’t*, 764 F.2d at 160.

14. *Id.*

15. 764 F.2d 147 (3d Cir. 1985).

16. *Id.* at 162. The court also addressed the question of whether the district court properly exercised subject-matter jurisdiction over this suit. The panel concluded that there was proper jurisdiction; however, it was divided on the basis for jurisdiction.

clauses,¹⁷ the court held that "the escape clauses in ERISA covered employee benefit plans are unenforceable as a matter of law."¹⁸

The dispute in *Northeast Department* arose when Mrs. Ruth Fazio, a participant in the ILGWU plan, submitted bills for certain medical expenses to the ILGWU Fund.¹⁹ The ILGWU Welfare Fund plan contained an escape clause and consequently the Fund administrator advised Mrs. Fazio that she was not eligible for benefits under its plan because she was covered by the Teamsters' plan, of which her husband was a participant.²⁰ Mr. Fazio thereupon submitted a claim for his wife's medical expenses to the Teamsters Fund.²¹ The Teamsters Fund plan contained an excess clause, and it also refused to pay these charges²² because Mrs. Fazio was covered by the ILGWU plan.²³

The district court suggested, and defendants agreed, that (1) the ILGWU Fund would pay Mrs. Fazio's claim, (2) the action brought by Mrs. Fazio would then be dismissed, and (3) the ILGWU would file, contemporaneously with the dismissal, a complaint in federal court against the Teamsters Fund seeking a declaration of the rights and obligations of the two funds in regard to Mrs. Fazio and persons similarly situated.²⁴

The district court found that the escape clause in the Ladies Garment Workers' Plan did not contravene public policy, citing "the economic realities of [the ILGWU's] situation, . . . [R]ealizing the limiting financial constraints in which they work."²⁵ On appeal, the Third Circuit decided unanimously to reverse the district court's decision holding that the incorporation of the escape clause into the ILGWU Plan represented an arbitrary and capricious judgment by the plan's trustees²⁶ in violation of ERISA's standard of fiduciary care.²⁷

This note will first examine the standard of review employed by the courts in examining trustee action under ERISA, with particular emphasis on the

17. *Id.* at 163.

18. *Id.* at 164.

19. *Id.* at 150.

20. *Id.*

21. *Id.*

22. Presumably there was no "excess" which needed to be covered by the Teamsters' Plan.

23. *Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 150 (3d Cir. 1985).

24. *Id.*

25. 584 F. Supp. 73, 76 (M.D. Pa. 1984).

26. *Northeast Dep't*, 764 F.2d at 163.

27. 29 U.S.C. § 1104. *Accord*, *Edwards v. Wilkes-Barre Publishing Co. Pension Trust*, 757 F.2d 52 (3d Cir. 1985); *Struble v. New Jersey Brewery Employees' Welfare Trust Fund*, 732 F.2d 325, 333-34 (3d Cir. 1984).

denial of benefits to individual claimants such as Mrs. Fazio. An analysis of *Northeast Department* will suggest that the result reached there, comports with the underlying policy of ERISA. An examination of escape clauses leads to the conclusion that the *Northeast Department* decision to invalidate them, as a method of medical benefit coordination is sound in light of ERISA's policy of protecting anticipated benefits.²⁸

I. THE ARBITRARY AND CAPRICIOUS STANDARD OF REVIEW

ERISA requires trustees to act "solely in the interest of the . . . beneficiaries"²⁹ Judicial construction of this language, as applied in distribution-of-benefits cases such as *Northeast Department*, has resulted in the development of two standards which are applied independently of one another depending upon the type of trustee action.³⁰

The "arbitrary and capricious" standard which has as its origin the Labor Management Relations Act ("LMRA"),³¹ is also regularly employed in the ERISA context.³² This standard is employed solely in disputes arising from trustee denial of benefits to individual claimants, such as Mrs. Fazio in *Northeast Department*.³³ The arbitrary and capricious standard is considered somewhat more deferential to the exercise of trustee discretion than the "sole benefit" standard explicitly mandated by ERISA.³⁴ The "sole benefit" standard applies to trustee action which advances third party interests to the detriment of plan participants and beneficiaries.³⁵

In *Rosen v. Hotel and Restaurant Employees and Bartenders Union*,³⁶ a suit brought under the LMRA, the Third Circuit stated that "judicial review of . . . trustee decisions is limited to a determination of whether the trustees' actions were arbitrary and capricious."³⁷ *Rosen* involved a retiree whose application for pension benefits was denied because he lacked sufficient

28. See *supra* note 2.

29. See *supra* note 5 and accompanying text.

30. *Struble*, 732 F.2d at 333-35.

31. *Id.* at 333.

32. *Id.* (citing *Music v. Western Conference of Teamsters Pension Trust Fund*, 712 F.2d 413 (9th Cir. 1983)).

33. See *id.* (citing *Elser v. I.A.M. Nat'l Pension Fund*, 684 F.2d 648 (9th Cir. 1982)).

34. 29 U.S.C. § 1104. The more deferential "arbitrary and capricious" standard is used in these cases because the essence of the plaintiff's complaint is "not whether the trustees have sacrificed the interests of the beneficiaries as a class in favor of some third party's interests, but whether the trustees have correctly balanced the interest of present claimants against the interests of future claimants." *Struble*, 732 F.2d at 333.

35. *Struble*, 732 F.2d at 333-34. See generally 29 U.S.C. §§ 1105-1112.

36. 637 F.2d 592 (3d Cir. 1980), *cert. denied*, 454 U.S. 898 (1981).

37. *Id.* at 596.

credited service under the terms of the pension plan.³⁸ Rosen's deficiency in credited service resulted from his employer's failure to make the required contributions to the pension fund.³⁹ The court held that the plan trustees breached a fiduciary duty to inform Rosen of the deficiency of credited service as well as a concurrent duty to take action to correct it.⁴⁰ In its decision, the *Rosen* court stressed that the fiduciary responsibility of a trustee requires at the very least that he notify beneficiaries of facts material to their interests.⁴¹ "Continued eligibility," the court stated, "is the core of the trustee-beneficiary relationship and those responsible for the administration of the fund are required to notify [beneficiaries] when their . . . eligibility is [jeopardized]."⁴²

In *Ponce v. Construction Laborers Pension Trust for Southern California*,⁴³ a Ninth Circuit case similar to *Rosen*, a group of retirees challenged their pension plan's "break-in-service" eligibility rule as arbitrary and capricious.⁴⁴ The gravamen of their complaint was that because the break-in-service rule applied only to a small number of otherwise eligible participants, the rule served no legitimate purpose because the resulting savings to the fund would be minimal.⁴⁵ The *Ponce* court rejected this argument for several reasons, two of which are of particular relevance here.⁴⁶

By referring to the limited standard of review under the LMRA,⁴⁷ the Ninth Circuit reasoned that "short of plainly unjust measures,"⁴⁸ trustees

38. *Id.* at 594.

39. *Id.*

40. *Id.*

41. *Id.* at 599-600; see also RESTATEMENT (SECOND) OF TRUSTS § 173 comment b (1959).

42. *Rosen*, 637 F.2d at 600; cf. *Agro v. Joint Plumbing Indus. Bd.*, 623 F.2d 207, 211 (2d Cir. 1980) (imposing duty on plan trustees to provide actual notice of plan amendments); *Kosty v. Lewis*, 319 F.2d 744, 749 (D.C. Cir. 1963) (action of plan trustees in cutting off pension eligibility without notice held arbitrary and capricious). *But cf.* *Michota v. Anheuser-Busch*, 755 F.2d 330, 335-36 (3d Cir. 1985) (because of the nature of labor relations, incorporation of plan amendment in collective bargaining agreement constitutes constructive notice satisfying trustees' duties), noted in *Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 164 n.17 (3d Cir. 1985).

43. 628 F.2d 537 (9th Cir. 1980).

44. *Id.*

45. *Id.* at 542.

46. A third reason offered by the court for rejecting the plaintiffs' argument was that a break-in-service rule "is intended to promote an employer's legitimate interest in the continuous employment of his employees." *Id.* at 542.

47. The *Ponce* case involved the LMRA, not ERISA; yet, the same standard of review is used interchangeably in LMRA and ERISA trust cases. See *supra* note 32 and accompanying text.

48. *Ponce*, 628 F.2d at 542 (quoting *Sailer v. Retirement Fund Trust*, 599 F.2d 913, 914 (9th Cir. 1979)).

have broad discretion in dealing with questions of pension eligibility.⁴⁹ Citing language from the United States Court of Appeals for the District of Columbia, the court also stressed that “[i]t is for the trustees, not judges, to choose between various reasonable alternatives.”⁵⁰ In light of this limited standard of review, the *Ponce* court stated that it would be less disturbed by a rule that excludes a small number of beneficiaries than one which excludes a large number.⁵¹ According to that decision, the fiduciary obligations of the LMRA do not sound in equal protection but rather are intended to ensure that trustees will provide benefits to “as many intended employees as is economically possible.”⁵² Additionally, the court rejected plaintiffs’ contention that a rule with limited applicability would have only minimal impact on the financial soundness of the plan. Denial of benefits to only one beneficiary, the court reasoned, would obviously leave funds available for other, eligible beneficiaries.⁵³

The Ninth Circuit relied extensively on *Ponce* in *Elser v. I.A.M. National Pension Fund*,⁵⁴ a 1982 case which, unlike *Ponce* and *Rosen*, was governed by ERISA. *Elser* involved a group of retirees who were denied pension benefits because of cancellation provisions incorporated into their pension plan.⁵⁵ As a result of these provisions, some employees who worked for several years could be excluded from benefits whereas others with less service would be eligible for benefits.⁵⁶

At the outset, the court recognized that its review should be limited to “those cases where the eligibility requirements are so patently arbitrary and unreasonable as to lack foundation in factual basis and/or authority in governing case or statute law.”⁵⁷ However, borrowing language from the District of Columbia Circuit, the court stated that when an eligibility requirement discriminates among intended beneficiaries, the trustees must show some rational relationship between the fund’s purpose and the requirement.⁵⁸ Therefore, the trustees must satisfactorily demonstrate by actuarial evidence that the cancellation provisions were designed to protect the financial stability of the fund.⁵⁹

49. *See id.*

50. *Id.* (quoting *Roark v. Lewis*, 401 F.2d 425, 429 (D.C. Cir. 1968)).

51. *See id.*

52. *Id.* (quoting *Gaydosh v. Lewis*, 410 F.2d 262, 266 (D.C. Cir. 1969)).

53. *See id.*; *see also* *Wilson v. Board of Trustees*, 564 F.2d 1299, 1302 (9th Cir. 1977).

54. 684 F.2d 648 (9th Cir. 1982).

55. *Id.* at 657.

56. *Id.* at 656.

57. *Id.* at 655-56 (quoting *Roark*, 401 F.2d at 429).

58. *Elser*, 684 F.2d at 656 (quoting *Roark*, 401 F.2d at 429).

59. *Id.* at 657.

II. COORDINATION OF BENEFITS

As stated previously,⁶⁰ coordination of benefits is a method by which administrators of health-benefit plans seek to avoid duplicate coverage leading to a profit for the participant.⁶¹ The problem of duplication of benefits led to a study made by a joint industry committee⁶² which developed a model policy provision for COB.⁶³ The model non-duplication provision states:

- 1) The plan covering the insured as an employee will determine its benefits before the plan covering him as a dependent.
- 2) The plan covering a person as a dependent of a male person will determine its benefits before the plan covering him as a dependent of a female person.⁶⁴
- 3) If the first two rules do not establish an order of determination, the plan which has covered the insured for the longer period of time will determine its benefits before the plan which has covered him for the shorter time.

This method of determining which plan shall provide primary coverage is almost identical to that of the Teamsters and ILGWU plans involved in *Northeast Department*.⁶⁵ However, the escape clause found in the ILGWU plan⁶⁶ is noticeably absent from the model provision. In fact, one of the guiding principles of the model provision was that the individual insured should recover all of his medical expenses.⁶⁷

The problem with escape clauses in any type of insurance, whether it be health, automobile, or other liability insurance, is that the insured may be deprived of compensation that they reasonably anticipate under the plan's purported coverage.⁶⁸ As a result, a participant of a plan with an escape clause, who thinks that he is covered by that plan and who expects to recover . . . expenses in accordance with the terms of that plan, automatically loses this coverage in the

60. See *supra* notes 7-14 and accompanying text.

61. See generally W. MEYER, *LIFE AND HEALTH INSURANCE LAW* 591-92 (1972).

62. See *id.* at 592; The Joint ALC-HIAA-LIAA Study Group on Non-duplication of Accident and Health Insurance Benefits.

63. W. MEYER, *supra* note 61, at 890-94.

64. This particular provision was unsuccessfully challenged as gender-based discrimination at the district court level in *Northeast Dep't*, 584 F. Supp. 68, 72-73 (M.D. Pa. 1983). The circuit court did not address this issue on appeal. *Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147, 160 (3d Cir. 1985).

65. *Northeast Dep't*, 764 F.2d at 160 n.9 & n.10.

66. *Id.* at 151.

67. W. MEYER, *supra* note 61, at 592. See also ARK. STAT. ANN. § 66-3709 (1980 & Cum. Supp. 1985); Ins. Dept. Rule and Reg. 21 (prohibiting coordination which reduces benefits below 100% of incurred medical expenses).

68. *Northeast Dep't*, 764 F.2d at 163.

presence of another insurance plan, even if the benefits he is entitled to receive under the other plan are much less favorable than those of his own.⁶⁹

The conflict between "other insurance" provisions in *Northeast Department* essentially presented an issue of first impression in the federal common law context of ERISA-covered benefit plans.⁷⁰ Yet, as the court noted in its opinion, this issue has been the subject of extensive state litigation.⁷¹ Conflicts between excess and escape clauses have arisen most often in cases dealing with automobile insurance policies.⁷² However, one recent state case, *Starks v. Hospital Service Plan of New Jersey*,⁷³ involved a dispute between health insurers.

The *Starks* court, which validated an excess clause, began with the premise that COB provisions in group health plans⁷⁴ are lawful so long as they are used only to avoid duplicate benefits and do not encroach upon a beneficiary's expectation of complete coverage.⁷⁵ The *Starks* court further asserted that COB provides insurers with a method of "[deciding] among themselves which is to bear . . . [the] loss, or whether it is to be shared and in what proportion."⁷⁶ Inevitably there will be times, the court noted, when because of the nature of COB provisions, a dispute will arise between insurers as to their respective obligations.⁷⁷ When confronted with such a conflict, the "judicial task" is to determine whether the obligations that the respective insurers intended to assume are compatible with each other, with the beneficiary's expectations and with the strictures of public policy.⁷⁸ After expressing satisfaction with the applicability of COB to the health insurance realm, the court held that the excess clause in one policy was perfectly

69. *Id.*

70. *Id.* at 159.

71. *Id.*

72. *Id.*

73. 182 N.J. Super. 342, 440 A.2d 1353 (App. Div. 1981).

74. Several states prohibit coordination against individual policies. CAL. INS. CODE §§ 10270.98-.99 (West 1972 & Supp. 1987); FLA. STAT. ANN. § 627.4235 (West 1984 & Supp. 1986); IND. CODE ANN. § 27-8-5-10 (Burns 1975); LA. REV. STAT. ANN. § 22:643 (West 1978); VA. CODE ANN. §§ 38.1 - 348.9 (1981). Tennessee prohibits a coordination provision in group policies where the entire premium is paid by the insured. TENN. CODE ANN. § 56-26-130 (1980), noted in W. MEYER, LIFE AND HEALTH INSURANCE LAW 245 (Cum. Supp. 1986).

75. *Starks*, 182 N.J. Super. at 350, 440 A.2d at 1358.

76. *Id.* at 351, 440 A.2d at 1358 (quoting *Cozi v. Government Employees Ins. Co.*, 154 N.J. Super. 519, 529, 381 A.2d 1235, 1240 (App. Div. 1977)).

77. *See id.*

78. *Id.* The highest courts of Kansas and of Mississippi have expressly adopted this mode of analysis. *Blue Cross and Blue Shield of Kan. v. Riverside Hosp.*, 237 Kan. 829, 837, 703 P.2d 1384, 1390-91 (1985); *Blue Cross and Blue Shield of Miss. v. Larson*, 485 So. 2d 1071, 1074 (Miss. 1986).

valid and sufficient to shift primary liability to the other plan.⁷⁹ In so doing, the court stated, however, that escape clauses are inherently "evil" because the beneficiary would be provided with less than a total loss recovery.⁸⁰

In the early case of *Grasberger v. Liebert and Obert*,⁸¹ the Supreme Court of Pennsylvania fashioned a creative solution to a conflict between two automobile insurance policies: one with an excess clause, the other with an escape clause. The court reasoned that because the policy with an excess clause covers only the amount of loss above what is covered by the other policy, the insured is not covered by the excess policy up to that amount.⁸² Therefore, the escape policy would not receive the benefit of its escape clause because the insured would not be covered by other valid insurance.⁸³

In *Insurance Co. of North American v. Continental Casualty Co.*,⁸⁴ the Third Circuit held that under Pennsylvania law, escape clauses are not enforceable. Relying on *Grasberger*, the court stated that such a rule protects the interest of the insured,⁸⁵ which is to secure the benefit of both policies.⁸⁶ If the escape clause is given effect, the court stressed, the insured would be liable for the uncovered amount.⁸⁷ Because of the potential for an insurer to avoid responsibility under its policy, the Third Circuit recognized the prevailing judicial disfavor with escape clauses.⁸⁸

III. Northeast Department: AN END TO ESCAPE CLAUSES UNDER ERISA?

In *Northeast Department*,⁸⁹ the United States Court of Appeals for the Third Circuit decided unanimously that the incorporation of an escape clause into an ERISA-covered health plan represents arbitrary and capricious conduct by the plan trustees and is therefore unenforceable as a matter of law.⁹⁰ The court based its decision on the underlying policy of ERISA which is the protection of anticipated employee benefits.⁹¹ It rejected the argument that a participant could protect himself by carefully reading and

79. *Starks*, 182 N.J. Super. at 351, 440 A.2d at 1358.

80. *Id.* at 354, 440 A.2d at 1360.

81. 6 A.2d 925 (Pa. 1939).

82. *Id.* at 926.

83. *Id.*

84. 575 F.2d 1070 (3d Cir. 1978).

85. *Id.* at 1074.

86. *Id.* at n.6.

87. *Id.*

88. *Continental Casualty*, 575 F.2d at 1072.

89. *Northeast Dep't ILGWU Health and Welfare Fund v. Teamsters Local Union No. 229 Welfare Fund*, 764 F.2d 147 (3d Cir. 1985).

90. *Id.* at 164.

91. *Id.* at 163; *see supra* note 2.

understanding the escape clause.⁹² Due to the complexity of COB, the Third Circuit concluded that the reality would be that most participants would not make informed choices and would consequently be left with unpaid medical expenses.⁹³ Accordingly, the *Northeast Department* decision placed the onus on the trustees to "look out for the welfare" of their beneficiaries by precluding planned incorporation of potentially harmful provisions such as escape clauses into their plans.⁹⁴

The Third Circuit relied heavily on state common law to reach its conclusion that escape clauses should not be enforced.⁹⁵ Before examining the particular COB provisions before it, the court stated that the *Starks* method of analyzing the competing COB provisions in light of each other and in light of the demands of public policy was fundamentally sound.⁹⁶ It rejected, however, the *Grasberger*⁹⁷ court's contractual solution⁹⁸ to a conflict between an escape clause and an excess clause,⁹⁹ stating that although *Grasberger* purported to rely on contract analysis, policy considerations undoubtedly played a large role in the decision.¹⁰⁰

The *Northeast Department* court properly concluded that escape clauses have no place in health-benefit plans. State common law has overwhelmingly rejected the escape clause as a valid method of coordinating benefits.¹⁰¹ Moreover, the fiduciary duty of plan trustees requires that they exercise vigilance to inform beneficiaries and participants of their eligibility status,¹⁰² that they refrain from adopting unjust measures¹⁰³ or rules which exclude large numbers of beneficiaries from coverage,¹⁰⁴ and that they not employ eligibility requirements which lack authority in governing case law.¹⁰⁵

Coordination of benefits is a valuable weapon in the war on the rising cost of health insurance. With the use of COB provisions such as those proposed

92. *Northeast Dep't*, 764 F.2d at 164 n.16.

93. *Id.*

94. *Id.* Thus far one federal court, the United States District Court for the Middle District of Tennessee, has relied on *Northeast Dep't* to invalidate an escape clause. *Musto v. American General Corporation*, 615 F. Supp. 1483 (M.D. Tenn. 1985).

95. *Northeast Dep't*, 764 F.2d at 162.

96. *Id.* at 159.

97. *Insurance Co. of North America v. Continental Casualty Co.*, 575 F.2d 1070 (3d Cir. 1978).

98. *See supra* notes 85-86 and accompanying text.

99. *Northeast Dep't*, 764 F.2d at 162 n.14.

100. *Id.* at 162.

101. For cases upholding escape clauses in the automobile insurance context, see 8A J. APPLEMAN, *INSURANCE LAW AND PRACTICE* § 4910, at 458 n.1 (1981).

102. *See supra* notes 40-42 and accompanying text.

103. *See supra* note 49 and accompanying text.

104. *See supra* note 52 and accompanying text.

105. *See supra* note 59 and accompanying text.

by the joint industry committee,¹⁰⁶ insurers have realized savings of as much as nine percent.¹⁰⁷ After *Northeast Department*, health-plan trustees will have to resort to the more acceptable excess clause, a mechanism more compatible with the fiduciary dictates of ERISA, as a means of coordinating benefits.

CONCLUSION

Northeast Department will have a major impact on the formulation of group medical plans. It sanctions the use of COB as a means of controlling costs; however, it assures plan beneficiaries that the coverage they expect will be there when they need it. Furthermore, although the Third Circuit is the first federal court to address trustee action within the COB context, its decision will likely be followed because of the strong policy upon which it is based.

Protection of fund assets and beneficiaries' anticipated benefits is the foremost responsibility of plan trustees. *Northeast Department* reaffirmed that weighty obligation and should serve as significant guidance for the future stewardship of employee benefit plans.

Lawrence J. O'Connell

106. W. MEYER, *supra* note 61, at 890-94.

107. See Parker, *supra* note 6.

