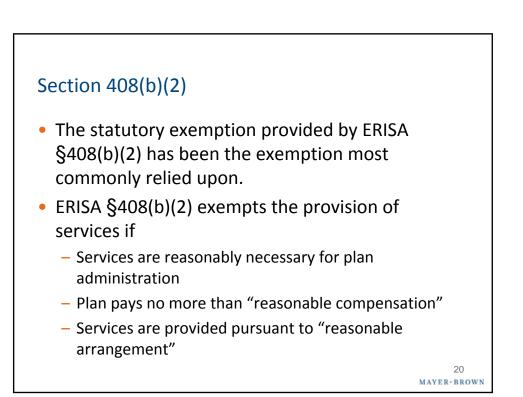


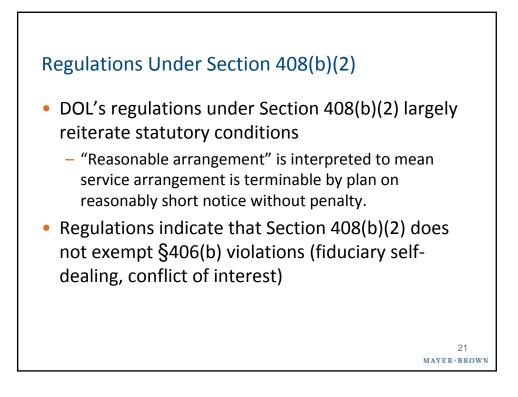


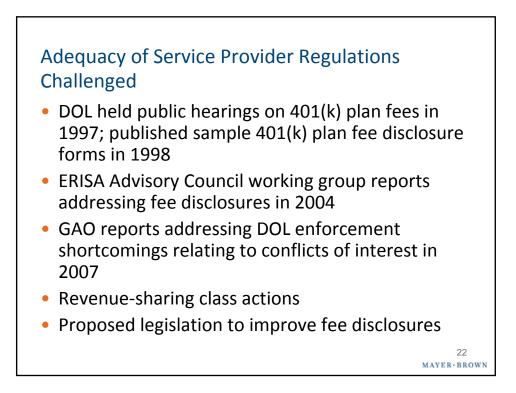
### **Prohibited Transaction Rules**

- Section 406(a)(1)(C) prohibits the direct or indirect provision of services by "parties in interest" to ERISA plans (unless exemptive relief is available).
- "Parties in interest" include plan sponsors, fiduciaries, and persons who provide services to plans, as well as certain affiliates of these persons.
- Thus, plan service arrangement presumptively must satisfy conditions of an exemption.

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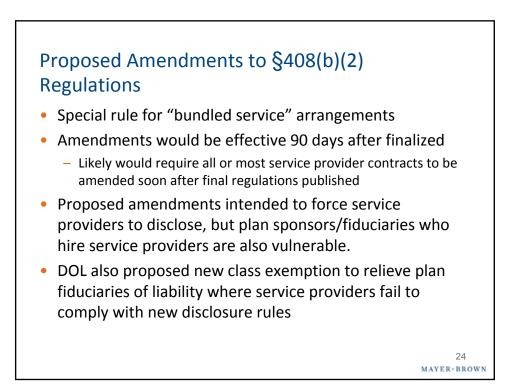






- Proposed amendments published 12/13/07
- DOL clearly focused on 401(k) plans, but proposed amendments apply to all ERISA plans.
- Amendments would re-define "reasonable arrangement" to focus on sufficiency of service provider disclosures.
  - Service providers would be required to disclose all sources of "direct and direct compensation" received by service provider and "affiliates"
  - Service providers would be required to disclose broadly-defined "conflicts of interest"; concept does not correspond to ERISA definitions
  - Ongoing duty to update disclosures

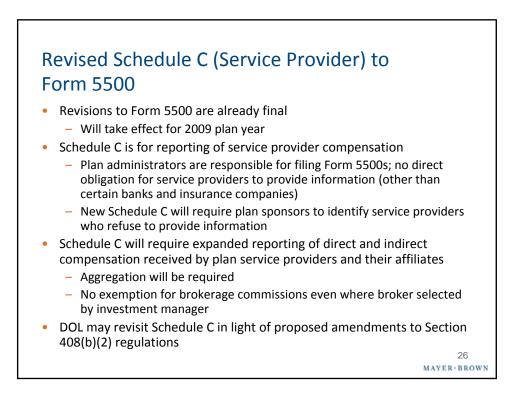




# Alternatives to Section 408(b)(2)

- Possible increased emphasis on non-plan asset vehicles
- Alternative exemptions
  - ERISA §408(b)(8) (plan investments in pooled investment funds)
  - ERISA §408(b)(6) (ancillary bank services)
  - PTE 84-14 (QPAM)
  - PTE 90-1 and PTE 91-38 (transactions with pooled separate accounts and commingled trust funds)
  - PTE 75-1 (securities transactions)
- But DOL is re-examining whether other exemptions may cover service provider arrangements and/or whether further amendments of those exemptions are appropriate

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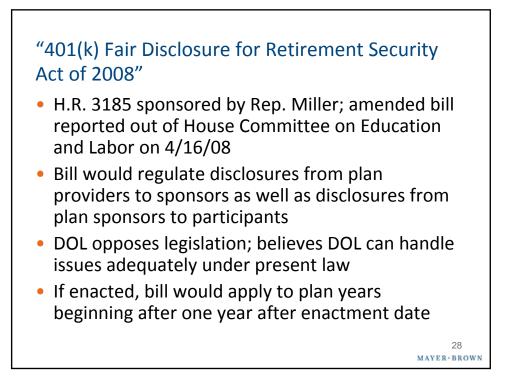


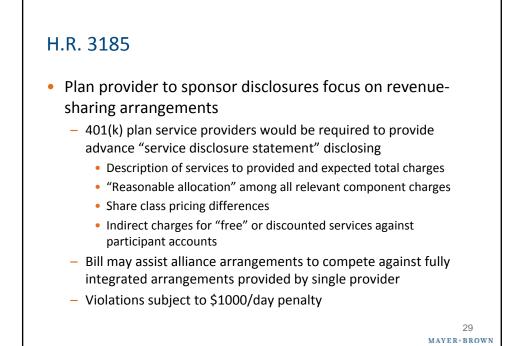


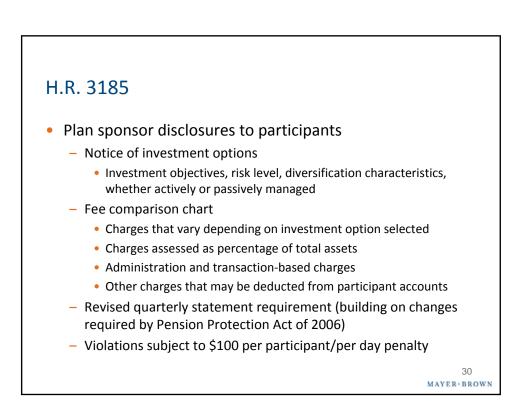
- Section 404(c)(1) provides limited "safe harbor" from fiduciary liability for participant investment allocation decisions
- Regulations under Section 404(c)(1) require plan sponsors to provide limited information about fees and expenses
  - description of annual operating expenses of each designated investment alternative
  - description of transaction fees and expenses in connection with purchases or sales of investments

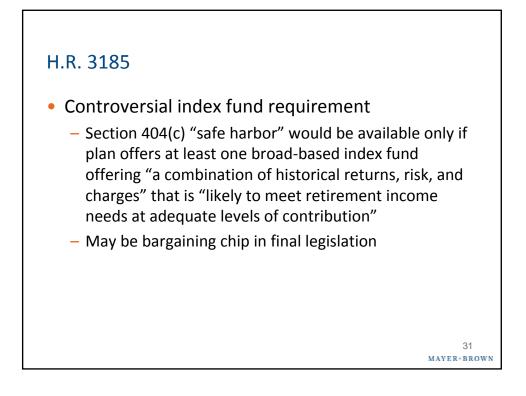
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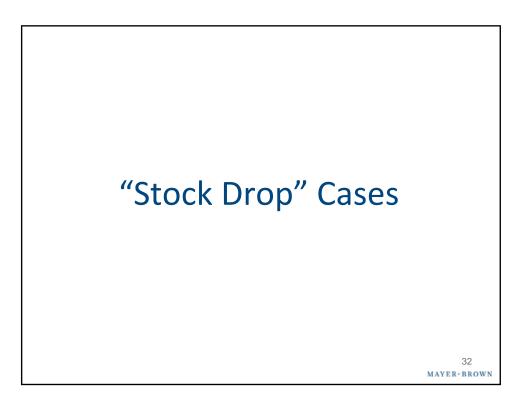
• DOL will soon propose amendments to 404(c) regulations to expand disclosure requirements



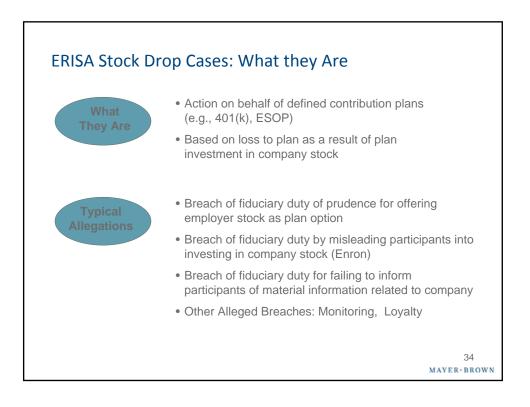


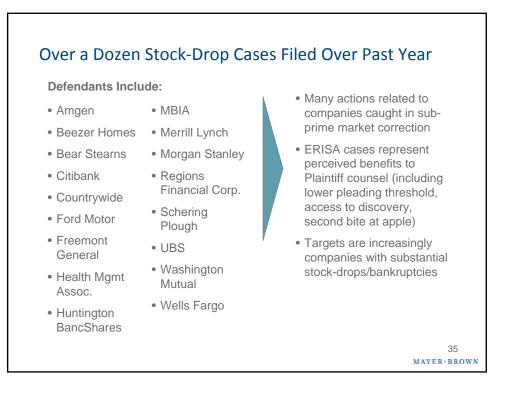


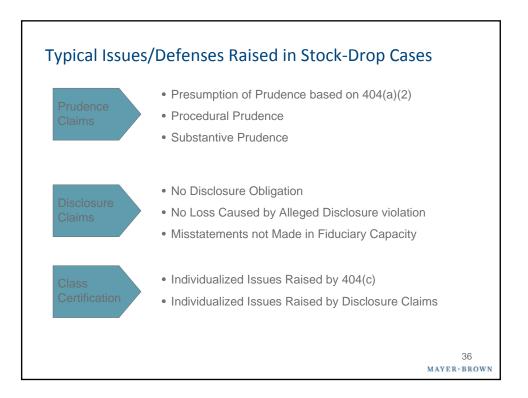


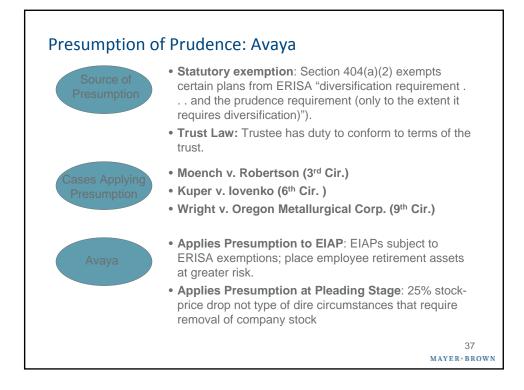




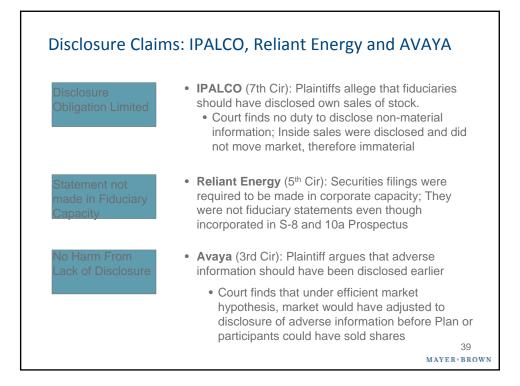


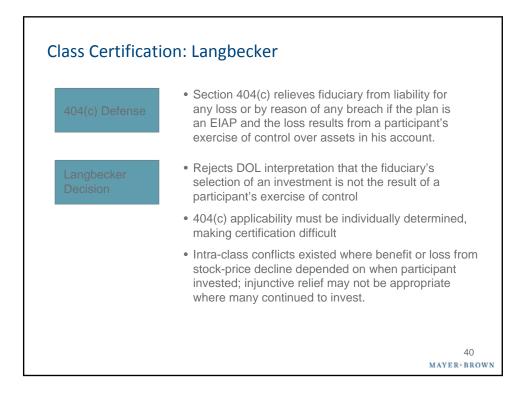


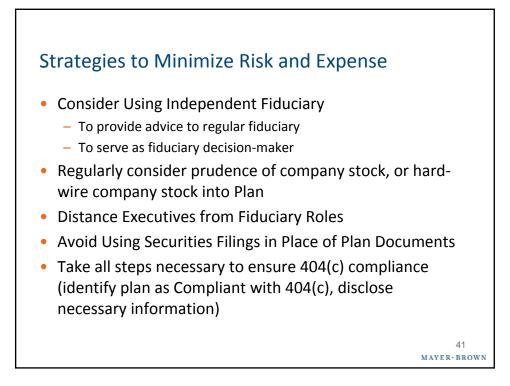




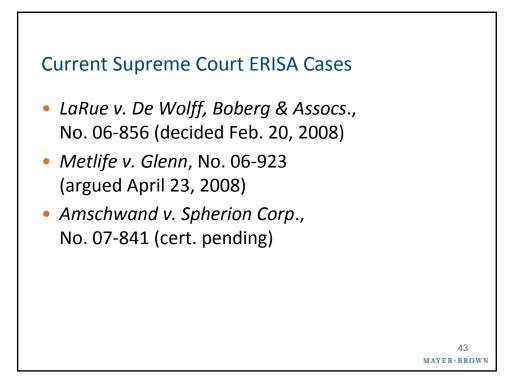
Procedural Prudence: USAirways and IPALCO		
Situation	<ul> <li><u>USAirways</u></li> <li>US Airways sliding into bankruptcy after 9/11</li> </ul>	IPALCO • Small utility merged with AES; stock declined 90% after merger
Procedures Taken	<ul> <li>Fiduciaries considered whether to offer company stock at each of 4 annual meetings;</li> <li>On 2 occasions, sought outside legal opinions</li> </ul>	<ul> <li>Company stock was design feature of plan</li> <li>Corporate due diligence conducted before merger found merger to be in best interests of shareholders</li> </ul>
	<ul> <li>Appointed independent fiduciary when company considering reorganization</li> </ul>	<ul> <li>No separate meeting of plan committee to consider prudence of AES stock</li> </ul>
	<ul> <li>Fiduciary belief in company supported by market, stock price, bond ratings, and analyst reports</li> </ul>	<ul> <li>Fiduciaries sold their individual positions before merger (because not going to be with AES after merger)</li> <li>38</li> <li>MAYER-BROWN</li> </ul>

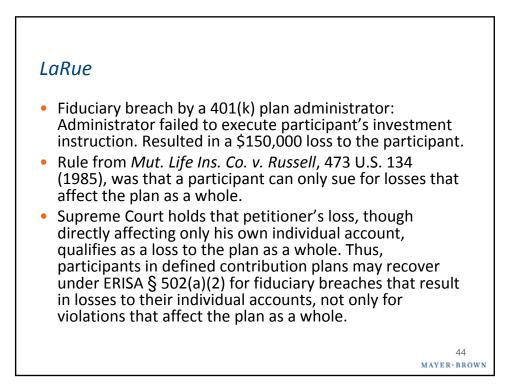








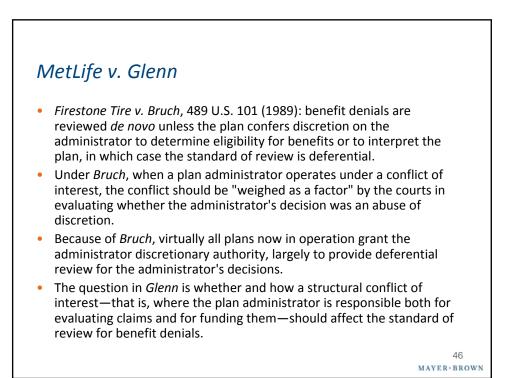




### LaRue

- Personal liability for fiduciaries under ERISA § 409(a), which requires a breaching fiduciary to reimburse the plan for any losses the plan suffers due to the breach of fiduciary duty.
- Decision may open the floodgates to litigation, increase the costs of fiduciary insurance, and require plans and their administrators to devote a greater percentage of plan resources to escalating litigation and administrative costs.
- Critical that defined contribution plans and the companies that sponsor them take all steps possible to ensure that the operation and administration of these plans comply with ERISA rules.
- Company executives, officers, and directors should carefully monitor hired administrators and advisors.
- Decision may not be limited to mishandling of employees' investment instructions. Timeliness and accuracy of allocation of employee contributions, choice of administrators, etc. may become the subject of future litigation.

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# MetLife v. Glenn The Parties' Arguments

- MetLife argued that a "structural conflict of interest" was merely a *potential* conflict that courts should not consider unless the claimant proved that it had actually tainted the benefits denial.
- Glenn (and the government) argued that a structural conflict should be given an unspecified amount of weight, as substantive evidence in deciding whether the administrator's decision was reasonable.

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### *MetLife v. Glenn* Oral Argument

- It seems quite likely that the justices will conclude that a so-called structural conflict is a conflict of interest that affects the standard of review.
- It seems quite likely that the Supreme Court will prescribe some form of more aggressive review in "structural conflict" cases. The Court, however, seemed unpersuaded by any of the specific options presented to it by the parties.

### *MetLife v. Glenn* Likely Impact

- Assuming the Court does mandate some form of moreaggressive review in structural conflict cases, this would likely have a significant impact on the industry.
- The precise details of how sponsors and administrators should address these issues will necessarily depend on the contours of the Court's eventual decision in *Glenn*.
- Based on the questioning at oral argument, however, it seem likely that after *Glenn* certain practices could affect the standard of review:
  - How a plan administrator compensates the personnel who review benefit claims
  - whether the plan administrator "walls off" its claims-review and benefit-funding units.



# Amschwand Question presented is whether claims for money relief against plan fiduciaries fall within the meaning of "appropriate equitable relief" under Section 502(a)(3). Petition for certiorari filed in December 2007. Court asked for government's views on case. On May 23, the government filed its invited brief, arguing that the Court should take the case and should hold that such claims are valid under Section 502(a)(3).

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- Should know in late June whether Court will grant certiorari. If so, case will be argued in the fall, with a decision likely in early 2009.
- Respondent stresses that most courts of appeals have held that, under Mertens v. Hewitt Assocs., 508 U.S. 248 (1993) and Great-West Life & Annuity Insurance Co. v. Knudson, 534 U.S. 204 (2002), such suits are not allowed under ERISA.
- Petitioner and the government argue that although in *Mertens* the Court held that "equitable relief" means relief that was "*typically* available in equity," 508 U.S. at 256, petitioner's suit "is directly analogous to a traditional action by the beneficiary of a trust to compel the trustee to redress a breach of trust." U.S. Br. 10.
- Were the Court to grant cert. and agree with the government, it would significantly increase potential exposure for ERISA fiduciaries.

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