

The ERISA Litigation Newsletter

A report to clients and friends of the firm

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Edited by

Robert Rachal &

Russell L. Hirschhorn

Editor's Overview

Our lead article this month reviews the merits and class rulings in fee litigation since we last wrote on this issue. Although the courts are generally continuing to allow the claims to go forward at these preliminary stages, the recent ruling in *Braden v. Wal-Mart* suggests a few courts may closely scrutinize these claims to determine whether they cross the “plausibility” threshold.

Our other article addresses the Sixth Circuit’s analysis of the appropriate statute of limitations to apply to a claim for benefits under ERISA § 502(a)(1)(B). Instead of simply applying the lengthy period used for contract actions, the Sixth Circuit looked at the nature of the claim at issue to conclude it was based on an alleged statutory violation, and was thus subject to the shorter state limitations period applicable to claims based on statutory liability.

Finally, do not forget to check out our case notes in Rulings, Filings and Settlements of Interest. These include cases addressing enforcement of a plan limitations period, the constitutional standing required to bring an employer stock claim, and when ERISA § 204(h) notice is required for a cash balance conversion.

Fee Litigation Update: The Trend Continues

by Amy Covert and Michael Spencer

In the inaugural issue of the Newsletter (April 2008), the Newsletter observed that “the judicial caution in dismissing lawsuits at a preliminary stage is begetting further [fee] lawsuits” The judicial caution persists, with many courts rejecting challenges to class certification and denying motions to dismiss. However, since we last reported on this issue, two courts have joined the *Hecker v. Deere* court (which decision is currently on appeal to the Seventh Circuit) in granting defendants’ motions to dismiss, while another court recently granted in large part defendants’ motion for summary judgment.



Substantive Rulings

In *Braden v. Wal-Mart Stores, Inc.*, 6:08-cv-03109-GAF (W.D. Mo. Oct. 28, 2008), plaintiff alleged that defendants breached their fiduciary duties by, among other things, imprudently choosing fund options with excessive fees, failing to inform plan participants of material information, and engaging in prohibited transactions by paying allegedly unreasonable compensation for plan services. Plaintiffs' suit focused on ten of the plan's mutual fund investment options. These funds were retail class funds, which are generally more expensive than institutional class funds, and most were actively-managed rather than passively-managed funds, purportedly resulting in higher expenses. Additionally, seven of the ten funds charged 12b-1 fees. In the complaint, plaintiff provided a chart comparing the ten challenged funds to less expensive alternative options available in the 401(k) market. This chart listed the funds' respective expense ratios and estimated losses to the plan as a whole, but did not note any services or other characteristics of the funds.

The court dismissed plaintiff's claim that defendants breached their duties of prudence and loyalty. The court observed there were no factual allegations that the defendants failed to investigate the funds. The court further refused to assume that the presence of less expensive funds demonstrated a breach of duty in selecting more expensive funds, reasoning that such a leap was not plausible since defendants could have chosen funds with higher fees for any number of valid reasons, including the potential for higher returns, lower risk, more services offered, or greater management flexibility. The court also dismissed plaintiff's claim that defendants engaged in prohibited transactions involving revenue sharing and alleged kickback payments. The court stated that revenue sharing was not inherently unlawful, and held that plaintiff made no showing that the revenue sharing fees were unreasonable in relation to the services provided, and that the complaint was devoid of any factual allegation that kickbacks were received. The court also dismissed plaintiffs' claim that defendants failed to provide complete and accurate information to the plan's participants and beneficiaries, explaining that the information plaintiff sought does not meet the materiality threshold, and that defendants had no duty to disclose revenue sharing payments. Following the court's decision, plaintiffs filed a notice of appeal.

In another ruling favorable to defendants, *Columbia Air Servs. Inc. v. Fidelity Management Trust Co.*, 2008 WL 4457861 (D. Mass. Sept. 30, 2008), the court granted Fidelity's motion to dismiss claims that Fidelity breached its fiduciary duty of loyalty by receiving a share of mutual fund fees earned by Fidelity-brand mutual funds. In so holding, the court found that plaintiff had failed to allege any facts that would support the conclusion Fidelity was acting as a fiduciary with respect to negotiating its own compensation for services provided to the plan at issue. Specifically, Fidelity was not a fiduciary "with respect to the Plan such that receipt of any share of fees charged by affiliated mutual funds would have constituted a breach of a fiduciary duty owed to the Plan."

In *Kanawi v. Bechtel Corp.*, No. C 06-05566 (CRB) (N.D. Cal. Nov. 3, 2008), plaintiffs claimed that defendants violated their fiduciary duties by allegedly causing the plan to pay unnecessary fees and engaging in prohibited transactions and failing to adequately disclose information related to those fees. Defendants moved for summary judgment, arguing that: (i) ERISA's statute of limitations barred plaintiffs' claims for conduct that occurred more than six years prior to the initiation of the lawsuit; (ii) plaintiffs could not prove that defendants paid excessive fees by investing in certain mutual funds; (iii) plaintiffs could not prove that the plan's fiduciaries engaged in a prohibited transaction by retaining the investment advisor and administrative service provider to the plan; and (iv) ERISA § 404(c) absolved defendants from liability.

The court first agreed with defendants that ERISA's six-year statute of limitations barred plaintiffs' claims that arose more than six years prior to the initiation of the action. The court rejected plaintiffs' efforts to toll the statute of limitations, holding that plaintiffs "failed to produce evidence to support a finding that Defendants took affirmative steps to conceal a breach of fiduciary duty or made knowing misrepresentations with the intent to defraud Plaintiffs."

The court granted summary judgment in favor of defendants on plaintiffs' excessive fee claim, holding that plaintiffs failed to show that the plan was paying unnecessary layers of management fees because Bechtel – not the plan – paid the majority of the plan-level fees. The court further held that the evidence did not support a determination that the fees paid by the plan were patently unreasonable or that the defendants abrogated their duties in reviewing the plan's performance, as the record showed that the plan fiduciaries met regularly to discuss the plan's investments and sought the advice of an outside consultant to ensure it was making proper decisions.

As to plaintiffs' prohibited transaction claim, the court granted defendants' motion for summary judgment insofar as fees for the investment advisor were paid by the plan sponsor, not the plan. The court, however, denied summary judgment for the four month period in which the fees were paid using plan assets, finding that a genuine issue of material fact existed as to whether payment by the plan of those fees constituted a prohibited transaction. The court explained that the summary judgment evidence did not clearly establish whether the fees paid were reasonable.

The court also denied defendants' motion for summary judgment based on ERISA § 404(c), finding that there appeared to be genuine disputes about whether the plan satisfied Section 404(c)'s requirements. In *dicta*, the court adopted the Department of Labor's position that Section 404(c) "would not absolve Defendants from their own breaches of fiduciary duties that occurred before any participant exercised control over the investment of his account."

Unlike the generally favorable defense rulings discussed above, in *Martin v. Caterpillar*, No. 07-cv-1009 (C.D. Ill. Sep. 25, 2008), the court denied defendants' motion to dismiss. In *Caterpillar* plaintiffs alleged that defendants breached their fiduciary duties by pursuing investment options with excessive and unreasonable fees, by making investments for their

own benefit, and by failing to make certain disclosures to plan participants related to the fees charged by certain investment funds, including the Caterpillar stock funds. Defendants moved to dismiss plaintiffs' claims, arguing that the disclosures to participants were consistent with ERISA and the additional disclosures demanded by the plaintiffs were not warranted by ERISA. Defendants also argued that the safe harbor provisions of Section 404(c) relieved them of any liability with respect to alleged breaches of fiduciary duties. Defendants further argued that plaintiffs' claims were not pleaded in a manner consistent with Rule 8(a) of the Federal Rules of Civil Procedure.

Although the court denied the defendants' motion to dismiss, the court agreed with defendants that ERISA does not require plan fiduciaries to make disclosures regarding revenue sharing. Nonetheless, the court held that this finding was not dispositive because "inadequacy of disclosures is only one aspect of Plaintiffs' claim" and the "central complaint is that defendants are breaching their fiduciary duties by failing to act in their best interests and by charging excessive fees in order to generate a profit for themselves." In reaching its conclusion, the court refused to consider the various reporting documents (*e.g.*, annual reports, prospectus, 401(k) plan information) attached in support of the motion to dismiss because plaintiffs did not adopt the documents in their complaint and disputed the accuracy and veracity of the documents. As to defendants' attempt to assert a Section 404(c) defense, the court held that it was "incorrect to resolve such a defense on a motion to dismiss" because it was an affirmative defense that plaintiffs had no obligation to negate at the pleadings stage.

In *Shirk v. Fifth Third Bancorp*, 2008 WL 4449024 (S.D. Ohio Sept. 26, 2008), the court also denied defendants' motion to dismiss. In *Fifth Third Bancorp* plaintiffs had initially brought a "stock drop" action. However, after revenue sharing and excessive fee claims came into vogue, plaintiffs amended their complaint to add allegations that defendants breached their fiduciary duties by allowing Fifth Third Bancorp and its affiliates to charge the plan and its participants excessive and unreasonable fees and expenses. The plaintiffs also added allegations that the defendants engaged in undisclosed self-dealing by offering Fifth Third Bancorp mutual funds to generate seed money that facilitated the marketing of Fifth Third Bancorp's proprietary funds. Defendants moved to dismiss the newly asserted fee claims, arguing that plaintiffs failed to plead any "causational nexus" or compensable harm or loss to the plan resulting from any alleged breach of disclosure. Defendants also argued that ERISA does not require disclosure of individual fees and expenses as sought by plaintiffs, and the total annual operating expenses of each investment option available under the plan were expressly disclosed to participants. The court denied defendants' motion to dismiss, holding that the suit was brought on behalf of the plan under ERISA § 502(a)(2), and that plaintiffs pled a causal nexus between the plan's losses and defendants' alleged breach of disclosure obligations. Specifically, the court held that ERISA requires disclosure of material information, and that certain of the information at issue may have been material. The court also held that whether or not defendants disclosed their annual operating expenses of investment options presented a contested issue of fact and was therefore not appropriate for adjudication on a motion to dismiss.

Class Certification Rulings

In response to motions for class certification, many courts have concluded that the requirements of Rule 23 of the Federal Rules Civil Procedure are satisfied by allegations that the claims are brought on behalf of the plan and that the communications were plan-wide:

- In *Beesley v. Int'l Paper Co.*, 2008 WL 4450319 (S.D. Ill. Sept. 30, 2008), plaintiffs moved to certify a class of over 71,291 plan participants, alleging that defendants breached their fiduciary duties by causing unreasonable and excessive fees and expenses to be charged against the assets of the plan at issue, by maintaining company stock as an imprudent investment option and by concealing and misleading participants regarding the fees charged and the risk posed by the company stock. Defendants argued that plaintiffs' claims lacked commonality because each plan participant's individual claim requires highly individualized inquiries about individual investment decisions. The court rejected defendants' claim that individualized nature of participants' investment decisions negated commonality and typicality – concluding that the primary focus is on defendants' fiduciary conduct and any injury to the plan, and that plan-wide communications may support a class claim. The court also held future participants were properly in the class because plaintiffs sought injunctive relief that may affect them.
- In *Spano v. Boeing Co.*, 2008 WL 4449516 (S.D. Ill. Sept. 30, 2008), plaintiffs alleged, among other things, that defendants breached their fiduciary duties by causing the plan to pay unreasonable and excessive administrative fees and by concealing information and misleading participants regarding the fees charged as well as the risks posed by investments in the company stock fund. Applying the same reasoning as in *Beesley*, Judge Herndon rejected defendants' objections to certification based on commonality and typicality. Judge Herndon also held that the class did not need to distinguish between participants who invested in certain funds and those that did not because the issue in the case was the defendants' conduct, and the relief sought would affect the plan as a whole.
- In *Taylor v. United Tech. Corp.*, 2008 WL 2333120 (D. Conn. June 3, 2008), plaintiffs sought class certification for their claims that defendants breached their fiduciary duties by causing the plan to pay excessive recordkeeping, administrative, investment management and brokerage fees, making misrepresentations regarding those fees, allowing excess cash to be held in the company stock fund, and failing to recapture "float" (the interest on funds that have not yet been disbursed after a participant withdraws funds). Defendants first argued that plaintiffs lacked standing to prosecute breach of fiduciary duty claims based on the amount of cash held in the company stock fund because none of the named plaintiffs had investments in the company stock fund at the time the lawsuit was commenced. Defendants also argued that the proposed representatives did not have standing to assert claims based on revenue sharing because they did not appear to be adversely affected by the revenue sharing. As to class

certification, Defendants challenged only typicality and adequacy of representation under Rule 23(a). The court rejected each of these arguments, concluding plaintiffs did not need to show they were individually harmed by challenged conduct to have standing, concluding that a showing of harm to the plan would suffice. Further, on class issues, the court concluded the interest in showing fiduciary harm to the plan outweighed any divergence in individual damages, and that the releases plaintiffs signed did not affect typicality for claims brought on behalf of the plan. The court also held that a proposed class representative with even a “sketchy” understanding of the case is adequate so long as he understands his responsibilities, reviews pleadings and keeps apprised of the case by conferring with his counsel.

- In *George v. Kraft Foods Global, Inc.*, 251 F.R.D. 228 (N.D. Ill. 2008), plaintiffs sought class certification to recover excessive investment management, trustee, and brokerage fee payments out of 401(k) plan assets, under 502(a)(2) and 502(a)(3). The court granted class certification under Federal Rules of Civil Procedure Rule 23(b)(1) & (b)(2). In so holding, the court rejected defendants’ contention that proof of detrimental reliance and the Section 404(c) defense raise individual issues that would defeat typicality, concluding that “typicality is measured by reference to defendants’ actions toward the Plan as a whole, not with respect to individual defenses that might be raised with respect to how participants later may share in a recovery by the Plan.”
- In *Kanawi v. Bechtel Corp.*, 2008 WL 4571947 (N.D. Cal. Oct. 10, 2008), plaintiffs alleged disclosure violations, prohibited transactions with the third-party administrator, and the payment of unnecessary fees from plan assets. The court held that the commonality and typicality requirements were satisfied and rejected the argument that the Section 404(c) defense precluded certification, finding, among other things, that the “section 404(c) is an affirmative defense that must be proven, and is not an appropriate basis to deny class certification.”
- In contrast to the above pro-class rulings, in *Ruppert v. Principal Life Ins. Co.*, 2008 WL 397082 (S.D. Iowa Aug. 27, 2008), a court refused to certify a class of plans to bring claims against a full service plan provider. In *Ruppert* a trustee of a 401(k) plan filed a class action on behalf of over 25,000 401(k) plans challenging how a full service retirement plan service provider, Principal, disclosed and handled revenue sharing payments. The district court concluded class certification was not appropriate because commonality and typicality were not met. The plans at issue were marketed to independent financial advisors who advised plan sponsors. The district court found that, although templates were used to market the plans, the mutual funds offered, and the marketing and educational materials used, varied from plan to plan based on the involvement of the independent financial advisor and the size, needs and sophistication of the end user client. The district court also found that the scope of any fiduciary status by Principal would have to be determined on a plan by plan basis.

* * * *

Wal-Mart (and *Hecker v. Deere*) suggest that at least some courts may decline to make an “assumption of imprudence” to get plaintiffs past the factual lacuna in their complaints. However, many courts remain cautious in disposing of fee claims at a preliminary stage absent clear guidance from the appellate courts. Further, with respect to class certification, other than *Principal Life*, most courts appear to be concluding that Rule 23’s requirements are satisfied by allegations that the claims are brought on behalf of the plan and that communications were plan-wide. Given the recent rulings, it is likely that there will continue to be substantial fee-related litigation that will have to be resolved through summary judgment or trials.

Sixth Circuit Applies Kentucky’s Five-Year Statute of Limitations Governing Statutory Liabilities to an ERISA Claim for Benefits

By Kara Lincoln

In *Redmon v. Sud-Chemie Inc. Retirement Plan for Union Employees*, 2008 WL 4911160 (6th Cir. Nov. 18, 2008), the Sixth Circuit held that Kentucky’s five-year statute of limitations governing actions “upon a liability created by statute”, as opposed to the statute of limitations governing breach of contract, applied to a claim for benefits. In so holding, the court reasoned the “most analogous state statute of limitations” must be determined by looking at the nature of the claim and here the claim arose from a breach of an ERISA-imposed duty, rather than a breach of the plan’s terms.

Six years after her husband’s death, Redmon sought surviving spouse benefits, claiming that the waiver she signed at the time of her husband’s retirement was invalid because the plan administrator failed to explain the effect of the waiver to her when she signed it. (Because Redmond had waived her right to survivor benefits, her husband was entitled to a larger monthly benefit.) The district court dismissed her claim, finding it barred by the five-year statute of limitations governing “a liability created by statute, when no other time is fixed by the statute.”

On appeal, Redmon argued that the district court erred in refusing to apply Kentucky’s fifteen-year statute of limitations for breach of contract. While the Sixth Circuit acknowledged that it had previously applied that breach of contract statute of limitations to claims for benefits when no more specific statute was before the court, the Court observed that other Circuits have applied more specific statutes of limitations when they are available, such as Delaware’s one-year limitations period for employment disputes, and Minnesota’s two-year statute of limitations for recovery of wages.

The Sixth Circuit explained that an ERISA claim for benefits does not *per se* arise from the plan’s terms, such that it would always be most analogous to a claim for breach of contract. Rather, some ERISA claims for benefits are more analogous to a different type of claim, such as here, when the claim arose from ERISA-imposed duties rather than from the plan’s terms. The court then examined the nature of Redmon’s claim, ruling that it was “entirely

derivative of her claim that Sud-Chemie failed to comply with ERISA.” Therefore, it held the limitations period for statutory-liability was the most analogous.

The Sixth Circuit also held Redmon’s claim accrued when her husband’s retirement benefits ceased (at the time of his death), not when Redmon’s claim for benefits was denied.

The Sixth Circuit’s decision demonstrates that the longer statute of limitations typically applicable to breach of contract actions is not a one-size-fits-all period for ERISA benefit claims. In light of the rising number of statutorily based claims that seek recovery of benefits, the Sixth Circuit’s ruling may be cited frequently by defense counsel.

Rulings, Filings and Settlements of Interest

- In *Island View Residential Treatment Center v. Blue Cross Blue Shield of Massachusetts, Inc.*, 2008 WL 4891203 (1st Cir. Nov. 14, 2008), the First Circuit affirmed the dismissal of plaintiff’s claim for benefits, concluding that the plan’s two-year contractual limitations period was reasonable and therefore barred plaintiff’s claims. Here, plaintiff sought to recover from BCBS the cost of in-patient care furnished by plaintiff to a teenage patient more than two years after its administrative claim was denied. In so holding, the Court rejected plaintiff’s argument that some of the plan language was not clear and that the contractual time limit should be tolled.
- In *Ward v. Avaya, Inc.*, 2008 WL 4888494 (3d Cir. Nov. 13, 2008) (unpublished), the Third Circuit concluded that plaintiff Ward failed to allege sufficient facts to overcome the presumption imposed by *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995) and *Edgar v. Avaya, Inc.*, 503 F.3d 340 (3d Cir. 2007). The Third Circuit observed that, taken together, *Moench* and *Edgar* stand for the proposition that short-term financial difficulties do not give rise to a duty to halt or modify investments in an otherwise lawful ERISA fund that consists primarily of employer securities. Although Avaya’s stock traded at \$22.18 a share at the outset of the class period and then initially lost much of that value, after the class period ended, Avaya’s stock continued to rise, eventually fluctuating between \$12.00 and \$16.00 a share. “At most, “[Ward’s] allegations, if true, indicate[d] that during the Class Period, Avaya was undergoing corporate developments that were likely to have a negative effect on the company’s earnings and, therefore, on the value of the company’s stock.” The Third Circuit rejected plaintiff’s contention that it was inappropriate to consider the improvements in Avaya’s stock price following the end of the class period, reasoning that adopting such a rule would allow plaintiffs to bring breach of fiduciary duty claims based entirely on a narrow window of financial difficulty, potentially eviscerating the abuse of discretion standard articulated in *Moench* and *Edgar*.

- In *Catholic Healthcare West-Bay Area v. Seafarers Health and Benefits Plan*, 2008 WL 4951648 (9th Cir. Nov. 18, 2008) (unpublished), the Ninth Circuit determined that the district court lacked subject matter jurisdiction because plaintiff's state law claims for breach of implied contract, negligent misrepresentation, estoppel, quantum meruit, and indebitatus assumpsit did not encroach upon a relationship governed by ERISA. The Court observed that while plaintiff could have brought a derivative ERISA claim as an assignee, plaintiff's state law claims were based on an alleged representation of coverage, which did not require the fact finder to interpret the Plan. Accordingly, ERISA preemption did not apply and the case was reversed with instructions to remand to state court.
- In *IATSE Local 33 § 401(k) Plan Board of Trustees v. Bullock*, 2008 WL 4838490 (C.D. Cal. Nov. 5, 2008), the trustees of a 401(k) plan sued, among others, the mutual fund company MFS for allegedly paying undisclosed fees to the plan's investment advisor for promoting investments in MFS's mutual funds. Plaintiffs conceded MFS was not a fiduciary, but argued it was a "party in interest" that had engaged in a prohibited transaction. The court dismissed the ERISA claims against MFS, holding ERISA § 3(21)(B) exempted mutual funds from becoming parties in interest solely because a plan invests in the fund. The court held that a mutual fund's receipt of fees (such as, e.g., 12b-1, transfer agent fees, shareholder service fees) normally incident to such an investment falls within this exemption, reasoning that to hold otherwise would frustrate Congress's intent to exempt mutual funds from ERISA's fiduciary rules.
- In *Charles v. Pepco Holdings, Inc.*, 2008 WL 4787128 (3d Cir. Nov. 4, 2008), the Third Circuit ruled that ERISA § 204(h) did not require the company to notify employees of its 1998 conversion from a traditional defined benefit plan to a cash balance plan because the amendment was not reasonably expected to significantly reduce the amount of future annual benefits that would be received by employees. In so holding, the majority relied on defendants' expert testimony insofar as it used an assumption that participants' wages would experience zero growth over the same period. Judge Thomas L. Ambro, in dissent, stated that using zero wage growth as the proper assumption "contradicts textbook pension valuation practice" and "makes meaningful comparison of plans impossible."
- In *In re Boston Scientific ERISA Litigation*, 2008 WL 4768030 (D. Mass., Nov. 3, 2008), the district court addressed whether plaintiffs had standing under Article III of the U.S. Constitution to bring a class action regarding investments in the employer's stock. Plaintiffs claimed the stock was an imprudent investment because it was artificially inflated between May 2004 and January 2006. The plaintiffs, however, were net sellers of their stock investments during this period. The court held this was fatal to plaintiffs' claims, as they could show no requisite Article III "injury in fact" to them from the alleged breach; rather, plaintiffs made money by selling the stock for more than it would have been worth had there been no alleged breach. The court held that plaintiffs' inability to establish individual injury precluded them from seeking any monetary relief on behalf of the plan.

- In *Urban v. Comcast Corp.*, 2008 WL 4739519 (E.D. Pa. Oct. 28, 2008), plaintiffs claimed the employer's stock (which lost approximately 50% of its value in 2007) was artificially inflated because of material undisclosed weaknesses in the business, and that the defendant fiduciaries knew or should have known of this because of their involvement in the business. The plan permitted, but did not require, investment in the employer's stock during most of the class period. The district court declined to dismiss the prudent investment claim reasoning that, since the plan did not require this investment, there was no settlor's intent entitling the fiduciaries to a presumption of prudence regarding this investment. The court also concluded that plaintiffs may be able to show loss causation, reasoning that there were factual issues whether the fiduciaries could have prevented loss by, e.g., precluding new investment in employer stock during the period for which they allegedly knew or should have known the stock was artificially inflated.

Employee Benefits Litigation

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The Employee Benefits Litigation Group is led by Howard Shapiro and Myron Rumeld. The Group defends complex and class action employee benefits litigation.

For more information about this practice area, contact:

Howard Shapiro
504.310.4085 – howshapiro@proskauer.com

Myron D. Rumeld
212.969.3021 – mrumeld@proskauer.com

Robert Rachal
504.310.4081 – rrachal@proskauer.com

Russell L. Hirschhorn
212.969.3286 – rhirschhorn@proskauer.com

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