Proskauer

newsletter

ERISA Litigation

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in this issue

A report to clients and friends of the firm

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Editor's Overview

This month, our lead article discusses the Sixth Circuit's recent decision in *Pfeil v. State Street Bank & Trust*, a potentially significant opinion in the field of employer-stock litigation. The article examines the *Pfeil* court's suggestion in *dicta* that the presumption of prudence — *i.e.,* a presumption insulating plan fiduciaries' decisions to permit participant employer-stock investments where plan terms permit or require them — does not apply at the motion to dismiss stage. The article also describes several ways in which the Sixth Circuit's decision departs from the jurisprudence in other circuits, and considers the implications of the decision on future employer-stock claims.

Our second article discusses whether release agreements negotiated between employers and employees are enforceable to bar ERISA claims. The article discusses the general standards applied by the courts to determine whether a release was knowing and voluntary, the ERISA anti-alientation provisions that courts traditionally have relied upon to hold releases unenforceable, and whether different standards may be applicable to different types of ERISA claims. It also takes note of a recent Supreme Court decision that may provide support to the lower courts in finding ERISA's anti-alienation provisions inapplicable to release agreements. The article concludes with some practical advice for drafting release agreements that are more likely to be held enforceable.

As always, be sure to review the section on Rulings, Filings, and Settlements of Interest.

Has the Sixth Circuit Breathed New Life into Employer Stock-Drop ERISA Litigation?

Contributed by Russell L. Hirshhorn and Anthony S. Cacace

In *Pfeil v. State Street Bank and Trust Co.*, No. 10-CV-2302, 2012 WL 555481 (6th Cir. Feb. 22, 2012),[1] the Sixth Circuit decided three issues that it had not previously confronted in employer stock-drop ERISA litigation. Unfortunately for ERISA plan sponsors and fiduciaries, the court's ruling on each issue may increase plaintiffs' ability to survive a motion to dismiss within the Sixth Circuit. First, the court stated that the presumption of prudence applicable to a plan fiduciary's decision to invest in an employer stock fund should not be applied on a motion to dismiss. Second, based on what would appear to reflect a lack of understanding of the modern portfolio theory, the court ruled that plaintiffs adequately pled loss causation by alleging that the offering of a company stock fund was imprudent, without regard to the plan's other investment alternatives. Lastly, the court ruled that safe harbor available to plan fiduciaries pursuant to ERISA § 404(c) should not be evaluated on a motion to dismiss and, in any event, would not, in its view, eliminate a plan fiduciary's responsibility for making imprudent investment options available in 401(k) plans.

Background & Procedural History

General Motors (GM) sponsored two defined contribution 401(k) plans, one for hourly employees and one for salaried employees (GM Plans). The GM Plans offered participants several investment options, including mutual funds, non-mutual fund investments, and the GM Stock Fund (GM Fund). The Plan documents explained that the purpose of this stock fund was "to enable Participants to acquire an ownership interest in General Motors and is intended to be a basic design feature" of the Plans. The Plans further provided that this fund "shall be invested exclusively in [General Motors stock]" without regard to diversification of assets, the risk profile of the investment, the amount of income provided by the stock, or fluctuations in the market value of the stock. The Plans documents stated, however, that these restrictions would not apply if the Plan fiduciary:

> in its discretion, using an abuse of discretion standard, determines from reliable public information that (A) there is a serious question concerning [General Motors'] short-term viability as a going concern without resort to bankruptcy proceedings; or (B) there is no possibility in the short-term of recouping any substantial proceeds from the sale of stock in bankruptcy proceedings.

[1] 2012 BL 39978.

In the event either of these conditions were met, the Plan documents directed the Plan fiduciary to divest the Plans' holdings in the GM Fund.

On June 30, 2006, GM appointed State Street Bank and Trust Company (State Street) as the independent fiduciary of the Plans. Plaintiffs alleged that, at that time, GM already was in "serious financial trouble" and that the prevailing view was that bankruptcy protection was "virtually a certainty" for the company. In fact, according to plaintiffs, on July 15, 2008, GM's Chief Executive Officer announced that the company needed to implement a restructuring plan to combat second quarter 2008 losses, which he described as "significant." Plaintiffs alleged that under these circumstances, State Street should have recognized as early as July 15, 2008 that GM was bound for bankruptcy and that GM stock was no longer a prudent investment for the Plans.

It was not, however, until November 21, 2008 that State Street informed participants that it was suspending further purchases of GM stock, citing "GM's recent earnings announcement and related information about GM's business." State Street did not take any action to divest the over fifty million shares of GM stock held by Plan participants until March 31, 2009. GM filed a bankruptcy petition on June 1, 2009.

Plaintiffs filed a complaint alleging that State Street breached its fiduciary duties under the Employee Retirement Income Security Act of 1974, as amended (ERISA) by failing to prudently manage Plan assets. In particular, plaintiffs asserted that State Street should have recognized that GM was destined for bankruptcy, GM stock was no longer a prudent investment option to be offered under the Plans, and State Street should have divested the GM Plans' investments in the GM Fund much sooner.

On September 30, 2010, the district court granted State Street's motion to dismiss, finding that while plaintiffs sufficiently pled that State Street breached its fiduciary duty by continuing to offer the GM Fund as an investment option under the Plans, plaintiffs failed to plausibly allege that State Street's alleged breach proximately caused losses to the GM Plans. In so ruling, the district court reasoned that Plan participants could have, without penalty, divested their own accounts of the GM Fund and reinvested their assets in other investment options offered under the GM Plans. Thus, according to the district court, State Street could not be held liable, as a matter of law, for the losses to the Plans.

The Sixth Circuit's Decision

Application of Presumption of Prudence

First espoused by the Third Circuit and since followed by the Second, Fifth, Sixth, Seventh and Ninth Circuits, courts routinely have reviewed a plan fiduciary's decision to invest in an employer stock fund for an abuse of discretion.[2] Three of these Circuits and most (but not all) district courts have applied this presumption of prudence at the motion to dismiss stage. In so ruling, these courts generally have reasoned that the presumption of prudence is not an evidentiary standard, but rather a standard of review by which a plan fiduciary's conduct must be evaluated. According to these courts, if plaintiffs are unable to plead a plausible set of facts to overcome that presumption of prudence by, for example, pleading that the company was in a dire situation or facing impending collapse, these courts have concluded that a plan fiduciary should not be required to further defend the merits of his decision to invest in an employer stock fund.

The Sixth Circuit concluded that it need not decide whether the presumption of prudence should be applied at the motion to dismiss stage because the district court concluded that plaintiffs pled sufficient facts to rebut the presumption of prudence, particularly insofar as the complaint contained detailed allegations of GM's "precarious financial situation" during a time when State Street decided to continue holding GM stock as a Plan asset. Nevertheless, the Court decided to "take this opportunity" to decide whether the presumption should apply at this stage, and concluded that it should not. The Court reasoned that the presumption of prudence is an evidentiary standard that concerns questions of fact and thus not appropriately evaluated on a motion to dismiss. Although several Circuits have reached the opposite conclusion, the Sixth Circuit distinguished those authorities on the grounds that those Circuits adopted "more narrowly-defined tests for rebutting the presumption than the test this Court announced in [*Kuper v. Iovenko*, 66 F.3d 1447, 1459-60 (6th Cir. 1995)]." In particular, the Sixth Circuit observed that the rebuttal standard adopted in *Kuper* requires plaintiffs merely to prove that "a prudent fiduciary acting under similar circumstances would have made a different investment decision" whereas other Circuits have required that the participants demonstrate that the company was in a "dire situation" or faced "impending collapse."

Loss Causation

To establish a causal connection between State Street's alleged fiduciary breach and losses to the Plans, the Sixth Circuit ruled that plaintiffs must only show "a causal link between the [breach of duty] and the harm suffered by the plan," *i.e.*, "that an adequate investigation would have revealed to a reasonable fiduciary

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[2] *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); *Edgar v. Avaya, Inc.*, 503 F.3d 340 (3d Cir. 2007); *In re Citigroup ERISA Litigation*, 662 F.3d 128 (2d Cir. 2011); *Kirschbaum v. Reliant Energy*, 526 F.3d 243 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2006); *Quan v. Computer Sciences Corp.*, 623 F.3d 870 (9th Cir. 2010).

that the investment [in GM stock] was improvident." The Sixth Circuit observed that, according to the complaint, GM stock ceased to be a prudent investment on the date (July 15, 2008) that GM announced its restructuring plan in response to its "significant" second quarter losses, and State Street did not make the decision to divest the Plans of GM stock until March 31, 2009. State Street's delay, according to plaintiffs, caused the Plans to suffer hundreds of millions of dollars in losses. Based on these allegations, the Court disagreed that plaintiffs' complaint should be dismissed for the failure to plead that State Street's alleged breach of duty was "a proximate cause for the losses suffered by the Plans."

In so ruling, the court determined that the district court "erroneously relied" on the fact that the Plans were participant-directed and had the ability to divest their Plan accounts of GM stock on any given business day and that, as a result, plaintiffs had not pled loss causation. As the Plan fiduciary, "State Street was obligated to exercise prudence when designating and monitoring the menu of different investment options that would be offered to plan participants." According to the Sixth Circuit, State Street could not avoid liability for offering an imprudent investment merely by including it alongside a larger menu of prudent investment options. The Court explained that "[m]uch as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty." Lastly, the Court determined that State Street could not avoid responsibility by asserting at the pleadings stage that plaintiffs themselves caused the losses to the Plans by choosing to invest in the GM Fund, as such a rule would improperly shift the duty of prudence to monitor the menu of plan investments to plan participants.

ERISA § 404(c) Defense

In ruling that plaintiffs failed to adequately plead causation, the district court relied in part on the safe harbor provision found in ERISA § 404(c), 29 U.S.C. § 1104(c). Section 404(c) provides, in relevant part, that a plan fiduciary is not liable for any losses caused by any breach which results from a participant's exercise of control over those assets. The Sixth Circuit ruled that Section 404(c) is an affirmative defense that is not properly evaluated on a motion to dismiss, and that, consistent with the U.S. Department of Labor's view, it does not relieve fiduciaries of the responsibility to select and make available prudent investment options.

Proskauer's Perspective

Although the plaintiffs' bar may view the Sixth Circuit's decision as having given new life to employer stock-drop ERISA litigation, there are at least two reasons why that is not likely to be the case, at least outside the Sixth Circuit. First, the Court's ruling that the presumption of prudence is inapplicable on a motion to dismiss is clearly dicta and thus is not binding even on district courts in the Sixth Circuit. Even if followed by district courts within the Sixth Circuit, there is no basis for applying the Sixth Circuit's view that the presumption of prudence is an evidentiary standard elsewhere. Indeed, the Sixth Circuit recognized that other courts viewed the presumption of prudence to be a standard of review and thus capable of being evaluated on a motion to dismiss. It distinguished its decision on the grounds that other courts had adopted more narrowly defined tests for rebutting the presumption than it announced in *Kuper*. Thus, a reversal of the trend favoring the application of the presumption of prudence at the motion to dismiss stage would require other Circuits to adopt the Sixth Circuit's definition of the presumption, in lieu of the definition that has been widely adopted elsewhere.

Second, insofar as the Sixth Circuit refused to accept as a defense to the plan's offering of a large menu of investment options alongside the stock fund, its ruling seems to misunderstand or turn a blind eye to the modern portfolio theory. That theory, which is widely recognized, permits plan fiduciaries to include high yield/high risk investments as part of a diversified portfolio because the risk of a particular investment should not be evaluated independently of the other investments.

It remains to be seen what, if any, impact this decision will have on the future of employer stock fund ERISA litigation. It would seem likely, however, that the Sixth Circuit will become a venue of choice for plaintiffs filing stock drop lawsuits.

Does ERISA Preclude the Enforceability of General Releases?[3]

Contributed by Brian Neulander

The effectiveness of general release agreements in barring later-filed ERISA claims has been a frequent subject of litigation. Such agreements are often negotiated between employers and employees in connection with reductions in force, or individually negotiated separations, wherein the employer typically provides enhanced severance payments in exchange for the employee's release of all work-related claims.

Notwithstanding the employer's perception that it paid for a release of *all* claims, plaintiffs will often resist the application of general releases to ERISA-governed disputes by making one or more of the following arguments:

- ERISA precludes waiver of vested benefits;
- ERISA precludes waiver of fiduciary breach claims; and
- an individual release is not effective as to ERISA § 502(a)(2), 29 U.S.C. § 1132(a)(2), claims brought on behalf of the plan.

These arguments stem from two "anti-alienation" provisions within the statute, as well as the general recognition that "ERISA evinces Congress's intent to preserve employee pension and welfare rights." *Smart v. Gillette Co. Long-Term Disability Plan*, 70 F.3d 173, 181 (1st Cir. 1995).

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[3] Originally published by Bloomberg Finance L.P. Reprinted with permission.

This article discusses each of the arguments against the enforceability of general releases in ERISA cases, and with respect to each provides an overview of the current state of the law. There is some basis for believing that recent decisions by the Supreme Court and circuit courts may have enhanced the ability of employers/plan sponsors to enforce general releases as a bar to individual ERISA claims, but the precise impact or application of these rulings remains uncertain. Regardless of the impact of these rulings, the ability to enforce general releases in connection with ERISA § 502(a)(2) claims on behalf of the plan as a whole, including class action claims, remains problematic. As discussed below, individual releases are generally viewed as ineffective as to claims under ERISA § 502(a)(2).

Heightened Scrutiny of the Knowing and Voluntary Standard For Waiver of ERISA Claims

The enforceability of any general release turns on whether the plaintiff knowingly and voluntarily relinquished the claim asserted. *See, e.g.*, *Howell v. Motorola, Inc.*, 633 F.3d 552, 559 (7th Cir. 2011) (noting courts must examine totality of the circumstances because releases are viable only when plaintiffs knowingly waive the right to bring later suit). Generally, courts analyze and weigh six factors to determine whether a knowing and voluntary waiver occurred:

1. the plaintiff's education, business experience, and sophistication;
2. the parties' respective roles in deciding the final terms of the arrangement;
3. the agreement's clarity;
4. the amount of time available to the plaintiff to study the agreement before acting on it;
5. whether the plaintiff had independent advice — such as the advice of counsel — when she signed the agreement; and
6. the nature of the consideration tendered in exchange for the waiver.

Smart, 70 F.3d at 181 n.3.

In ERISA-governed cases, courts apply heightened scrutiny to these factors when determining whether a release was knowingly and voluntarily executed. Because ERISA expressly creates duties of loyalty and prudence in favor of plan participants, courts "examine the totality of the circumstances in which the release was signed to ensure the fiduciary did not obtain the release in violation of [these] duties." *Leavitt v. Northwestern Bell Telephone Co.,* 921 F.2d 160, 162 (8th Cir. 1990). *See also Finz v. Schlesinger*, 957 F.2d 78, 81 (2d Cir. 1992) ("The validity of an individual's waiver of pension benefits is subject to closer scrutiny than his or her waiver of general contract claims.").

Release of Claims to Vested Benefits

Some courts do not even reach the multi-factor analysis described above because they view certain ERISA claims as non-waivable under ERISA § 206(d)(1), which states: "Each pension plan shall provide that benefits provided under the plan may not be alienated or assigned." 29 U.S.C. § 1056(d)(1). Referring to ERISA § 206(d)(1) as an "anti-alienation" provision, these courts apply the principle that a general release is ineffective as to claims for vested pension benefits. *See*, *e.g*., *Lynn v. CTX Transportation, Inc*., 84 F.3d 970, 975 (7th Cir. 1996) (concluding general release was unenforceable in light of "anti-alienation" provision).

In *Lynn*, the plaintiff (Lynn) signed a resignation agreement that released "all claims, demands, and legal proceedings of whatsoever kind or nature" in exchange for five additional years of pension credits. *Id*. at 972. Lynn then sued, claiming entitlement to additional years of pension credits based on his military service. Even though it found that "Lynn . . . should have known that the agreement he was signing would affect his retirement benefits," the Seventh Circuit nevertheless held that the claim was not released. In so ruling, the court divided ERISA claims into waivable and non-waivable categories, holding that "pension entitlements" are non-waivable." *Id*. at 975-76. The court characterized Lynn's claim as a non-waivable "pension entitlement" because it required examination and interpretation of the underlying plan language. *Id*. at 975.

In a ruling that arguably runs counter to the reasoning in *Lynn*, in 2009 the Supreme Court concluded that ERISA § 206(d)(1) did not preclude plan participants from knowingly disclaiming their ERISA interests, holding that waiver is distinct from alienation or assignment. *Kennedy v. Plan Adminstrator for DuPont Savings and Investment Plan*, 555 U.S. 285, 295-97 (2009). The suit arose from a divorce decree between William and Liv Kennedy in which Liv disclaimed any interest in William's pension. *Id*. at 289. William, who had previously designated Liv as a beneficiary under the pension plan, failed to change the designation form according to the terms of the plan. *Id*. When William died, the plan administrator disregarded the divorce decree's waiver, relying on the plain terms of the plan and the beneficiary designation on file to distribute William's pension funds to Liv. *Id*. at 289-90.

The district court ruled that the funds were improperly paid to Liv because she explicitly and knowingly waived her interest. *Id*. at 290. The Fifth Circuit reversed, ruling that the divorce decree was an invalid assignment or alienation under ERISA. *Id*. at 290-91. The Supreme Court rejected the Fifth Circuit's reasoning, holding that the appellate court cast the "alienation" net too far. *Id*. at 292. Based on an extensive analysis of ERISA's trust law antecedents, the Court concluded that ERISA's "anti-alienation" provision does not void the knowing and voluntary waiver of ERISA benefits. *Id*. at 296-97.[4] The Court nevertheless held that the plan administrator had properly disregarded the waiver because it conflicted with the actual beneficiary designation made in accordance with the plan documents, i.e., the terms of the plan trumped the state law waiver.

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[4] The Supreme Court suggested that the Department of Labor's fluctuating views on the enforceability of releases as to employee benefits contributed to the inconsistent rulings in this arena. *Kennedy*, 555 U.S. at 296 n.7.

To date, only one lower court has relied on *Kennedy* to enforce a general release as to claims for "vested" benefits. *Bacon v. Steifel Labs, Inc.*, No. 09-CV-21871, 2011 WL 4944122 (S.D. Fla. Oct. 17, 2011).[5] In *Bacon*, the plaintiffs asserted fiduciary breach claims, alleging that the plan fiduciaries concealed the true value of the company to improperly acquire company stock from participants.[6] The court dismissed these claims, upon finding that they had been released, and in so doing applied *Kennedy* to reject plaintiffs' argument that ERISA's anti-alienation prevented the releases from being enforced.

Bacon was a fiduciary breach case, and it remains unclear whether courts will apply similar reasoning, in reliance on *Kennedy*, to enforce general releases as a bar to traditional ERISA § 502(a)(1)(B) claims. A recent district court ruling suggests that courts may continue to rely on *Lynn* to prevent general releases from barring traditional benefit claims, at least where these claims were not contemplated at the time the release was executed. *Davis v. Retirement Plan of Phibro Animal Health Corp.*, No. 08-CV-779, 2012 WL 113750, at *8-9 (S.D. Ill. Jan. 13, 2012) (discussing unsettled law in Seventh Circuit and ruling that release was ineffective as to "vested" benefit claim).[7]

Release of Fiduciary Breach Claims

When evaluating the enforceability of a release with respect to fiduciary breach claims, courts consider the effect of ERISA § 410(a), which states that "any provision in an agreement or instrument which purports to relieve a fiduciary from responsibility or liability for any responsibility, obligation, or duty under this part shall be void as against public policy." 29 U.S.C. § 1110(a). At least one district court has relied on this provision to invalidate a general release. *Baker v. Kingsley*, No. 03-CV-1750, 2007 WL 1957654, at *4 (N.D. Ill. May 31, 2007) ("ERISA itself prohibits parties from waiving claims for breaches of fiduciary duty.").[8] In 2009, the Third Circuit rejected *Baker*'s reading of the statute, holding that "§ 410 applies to instruments that purport to alter a fiduciary's statutory duties and responsibilities, whereas an individual release or covenant not to sue merely settles an individual dispute without altering a fiduciary's statutory duties and responsibilities." *In re Schering Plough Corp. ERISA Litigation*, 589 F.3d 585, 593-94 (3d Cir. 2009). The Third Circuit accordingly concluded that ERISA § 410(a) did not render the release agreement unenforceable. Nevertheless, the court found that the release did not bar plaintiff's fiduciary breach claims that

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5 2011 BL 267518.

6 The *Bacon* court found that because plaintiffs were relatively sophisticated businessmen who received a 45-day window to consider the terms of the releases, and were expressly advised to consult with counsel before signing, the facts and circumstances demonstrated that plaintiffs knowingly and voluntarily waived any and all claims, including their ERISA rights, in exchange for enhanced severance benefits. The court also rejected, as a matter of law, plaintiffs' argument that separate consideration is necessary to release ERISA claims.

7 2012 BL 7974, at *8-9.

8 2007 BL 200814.

were brought derivatively on behalf of the plan itself. *See* discussion below regarding plan-wide claims and ERISA § 502(a)(2).

More recently, the Seventh Circuit held that an employee who knowingly and voluntarily signed a release in exchange for enhanced severance pay waived his right to sue for breach of ERISA's fiduciary duties arising from the loss in value of company stock held in a 401(k) plan. *Howell*, 633 F.3d at 559-61. The court noted the importance of the federal policy in favor of voluntary settlement, and relied on a "freedom-of-contract" rationale to reject plaintiffs' argument that ERISA § 410 preserved the right to sue for additional benefits that purportedly would have accrued but for the alleged fiduciary breach. *Id*. After considering the statutory text, the court ruled that release agreements do not relieve a fiduciary from adhering to ERISA's duties; instead, a release "merely settles a dispute that the fiduciary did not fulfill its responsibility or duty on a given occasion." *Id*. (citation omitted). Because the release was viable under ERISA, the court determined that plaintiff had waived all claims that he was entitled to benefits beyond those reported in his 401(k) account at the time the release was signed. *Id*.

Two district courts have relied on *Howell* to expand the preclusive power of general releases with respect to statutory notice claims. *Davis*, 2012 WL 113750, at *8-9 (enforcing general release against ERISA § 204(h), 29 U.S.C. § 1054(h), claim, *i.e.*, plaintiff waived ability to claim that defendant failed to provide proper notice of ERISA plan amendment)[9]; *Hakim v. Accenture U.S. Pension Plan*, No. 08-CV-3682, 2011 WL 4553022, at *3 (N.D. Ill. Sept. 29, 2011) (same).[10]

Release of Plan-wide Claims

Courts have applied different considerations in determining the enforceability of individual releases to preclude claims brought to remedy fiduciary breaches that impact an ERISA plan as a whole. ERISA § 502(a)(2) provides for civil actions against fiduciaries for breach of any statutorily imposed duty, and makes such breaching fiduciaries personally liable for any resulting losses to the plan. "The vast majority of courts have concluded that an individual release has no effect on an individual's ability to bring a claim on behalf of an ERISA plan under § 502(a)(2)." *In re Schering Plough*, 589 F.3d at 594 (noting that an individual cannot release a plan's claims, as a matter of law); *Yost v. First Horizon National Corp*., No. 08-CV-2293, 2011 WL 2182262, at *11 n.59 (W.D. Tenn. June 3, 2011) (same) (collecting cases).[11] However, the releasing participants may be considered unsuitable class representatives for purposes of asserting a breach of fiduciary duty claim as a class action. *Compare In re Schering Plough*, 589 F.3d at 600-02 (remanding for additional consideration of releasing participant's ability

[9] 2012 BL 7974, at *8-9.

[10] 2011 BL 3682, at *3.

[11] 2011 BL 156587, at *11 n.59.

to serve as class representative), *with Yost*, 2011 WL 2182262, at *11 (noting unsettled law; holding release did not defeat class certification).[12]

Proskauer's Perspective

Common workplace scenarios, such as corporate mergers and reductions in force, necessitate the legal flexibility to settle in advance participant claims for plan benefits. From the employer's perspective, removing contingent liabilities, including those related to plan benefits, is often a necessary precondition to making the severance payments that facilitate workforce changes. And, from the employee's perspective, an immediate severance payment may be more desirable than holding a right to claim additional benefits, particularly if, at the time severance is offered, the employee has no particular claim in mind. The uncertain impact of ERISA's special rules against alienation of benefits thus threatens to undermine what would otherwise be mutually agreeable business practices.

ERISA should not be construed so as to interfere with the freedom of employers and employees to enter into mutually beneficial agreements that extinguish claims for additional benefits. A knowing and voluntary general release should be effective under ERISA, regardless of whether a later-filed suit couches the claim as one for breach of fiduciary duty, statutory notice violation, or "vested" benefits based on a re-interpretation of the underlying plan.

The Supreme Court's recent ruling in *Kennedy* provides some hope that courts will, with increased frequency, find ERISA's anti-alienation provisions inapplicable to release agreements, and therefore reject previously-made distinctions in the enforceability of releases based on whether the underlying claim is viewed as one for "vested" rights. Whether or not this reasoning, as set forth in *Bacon*, will have universal application remains to be seen, however. For now, employers/plan sponsors should consider incorporating by reference into a release agreement the final benefit statement (accrued benefit or 401(k) account balance), as this may enhance the likelihood that a later suit for additional benefits will be barred. Furthermore, even if releases gain universal acceptance as bars to individual claims under ERISA, employers should be aware of the potentially limited impact of such releases in preventing claims brought on behalf of the plan as a whole, including class actions.

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[12] 2011 BL 156587, at *11.

Rulings, Filings, and Settlements of Interest

Section 510 Claim:

> In *Kim v. Columbia University*, No. 10-3076, 2012 WL 360624 (2d Cir. Feb. 6, 2012) (summary order), the Second Circuit affirmed the grant of summary judgment in favor of Columbia University, dismissing a former employee's claims for retaliation and for benefits based on the forfeiture of his retirement account because he did not satisfy the plan's vesting provisions. The employee could not show the forfeiture was made in retaliation for his filing of discrimination claims because the university had been aware of these claims for over 15 years and his retirement account was closed, along with approximately 2,000 other accounts, during a routine audit of the retirement plan. Additionally, the employee's claim for benefits was found to be moot because his retirement account was restored, with interest, which was the only relief potentially available under ERISA.

Benefit Claim:

> In *Smith v. Life Ins. Co. of N. Am*., No. 11-30540, 2012 WL 373090 (5th Cir. Feb. 6, 2012), the court held that plaintiff, the beneficiary of his wife's life insurance policy, was not entitled to benefits because of the plan's "voluntary ingestion" exclusion. Mrs. Smith died immediately following the consumption of more than ten times the recommended dosage of two different prescription medications, as well as independently lethal amounts of two other narcotics. The district court ruled that the term "voluntary" was ambiguous and applied the doctrine of *contra proferentum* to grant summary judgment in favor of Mr. Smith. The Fifth Circuit reversed and remanded with instructions to grant summary judgment in favor of the plan because the administrator had discretion to interpret the plan. Noting that *contra proferentum* does not apply when an ERISA plan grants discretion to the plan administrator, the court applied the deferential legal standard of review to the undisputed facts of the case, ruling that the plan administrator's interpretation was reasonable.

Breach of Fiduciary Duty:

> In *Nauman v. Abbott Labs*., — F.3d —, No. 10–2272, 2012 WL 348498 (7th Cir. Feb. 3, 2012), the court held that Abbott did not unlawfully interfere with employee benefits, nor did it breach ERISA's fiduciary duties, in connection with a corporate spin-off that impacted the benefits available to the spun-off employees. The spin-off affects benefits in two ways: first, the terms of the transaction precluded retirement eligible employees from taking retirement from Abbott and immediately thereafter working at the new company; second the new company established a 401(k) plan, instead of continuing Abbott's defined benefit plan. Plaintiffs claimed that Abbott violated ERISA § 510 by using the spin-off to reduce unwanted pension liability, and that Abbott breached its duties by failing to properly disclose the types of benefits that the new company would offer. Following a nine day bench trial, the district court ruled in favor of Abbott on both claims. The Seventh Circuit affirmed, finding that plaintiffs failed to show the required specific intent to support the § 510 claim because there were several legitimate business reasons for the corporate transaction and employee benefits played no role in the decision to spin off the company and implement the no-hire policy. With respect to the disclosure claim, the court affirmed that Abbott was not a fiduciary of the new

company's plan, but even assuming fiduciary status, Abbott truthfully told employees that the new company would create its own benefits plan after the spin-off and that the new company's plan could be entirely different from the Abbott plan.

Class Certification:

> In *Nationwide Life Ins. Co. v. Haddock*, 10-4237-cv, 2012 WL 360633 (2d Cir. Feb. 6, 2012) (unpublished), the Second Circuit Court of Appeals vacated a class-certification order granted under Rule 23(b)(2), which permitted trustees of over 24,000 pension plans to assert class claims over fee arrangements in variable annuity contracts the plans held with Nationwide. The class alleged that Nationwide violated ERISA by collecting revenue-sharing payments from the mutual funds that it chose and offered to plans as investment options, and among other remedies, sought disgorgement of the payments received by Nationwide. The Second Circuit held that Rule 23(b)(2), as interpreted in *Wal-Mart Stores, Inc. v. Dukes*, 131 S.Ct. 2541 (2011), precluded certification where monetary relief is not incidental to the injunctive or declaratory relief sought by the class. The court concluded: "if plaintiffs are ultimately successful in establishing Nationwide's liability on the disgorgement issue, the district court would then need to determine the separate monetary recoveries to which individual plaintiffs are entitled from the funds disgorged." Because the district court initially certified the class under Rule 23(b)(2), it did not reach the issue of whether the class could be certified under Rule 23(b)(3). Accordingly, the Second Circuit remanded the proceedings to the district court to determine whether certification under Rule 23(b)(3) is proper.

ERISA Preemption:

> In *IBEW Pacific Coast Pension Fund v. Lee*, No. 10-6433, 2012 WL 447490 (6th Cir. Feb. 13, 2012), the Sixth Circuit held ERISA's surviving spouse provisions determined entitlement to benefits where the plan participant designated a woman other than his legally recognized spouse as his plan beneficiary. The plan participant designated a woman he purportedly married in Mississippi as his surviving spouse for the purpose of survivor benefits under his retirement plan even though he earlier married another woman in Washington from whom he never sought a divorce or annulment, and who did not consent to the designation of the second purported spouse as a beneficiary for survivor pension benefits. Recognizing that ERISA supplies the rule of law for making the determination over the proper beneficiary for benefits, the Sixth Circuit determined that reliance on state law to determine the validity of the participant's second marriage did not run afoul of ERISA's preemptive effect on state laws relating to the plan. The Sixth Circuit accordingly held the participant's second marriage was not legally recognizable under Mississippi state law, and that the participant's spouse through his first marriage was thus legally entitled to the participant's survivor benefits unless she waived that right.

> In *Arditi v. Lighthouse Intl.*, 11-423-cv, 2012 WL 400706 (2d Cir. Feb. 9, 2012), the Second Circuit held that ERISA preempted a plaintiff's state-law claim that his employer breached an agreement to calculate plaintiff's pension benefits in such a manner as to make him eligible for an unreduced pension under the plan's "Rule of 85" provisions. In doing so, the Second Circuit observed that (i) plaintiff was a participant of the pension plan seeking benefits under the plan and could have brought a claim for benefits under

ERISA; and (ii) the employer's obligation to provide those benefits was governed by the terms of the plan and not by any "independent legal duty," as plaintiff argued. United States District Judge Preska, sitting by designation, dissented, noting that the ERISA preemption test enunciated by the Supreme Court in *Davila* requires both that the plaintiff could have brought his claim as one for benefits under ERISA, and also that no other independent legal duty is implicated by defendant's conduct. In her dissent, Judge Preska found that only the first prong was satisfied, since the plaintiff raised "at least a colorable claim" that his right to an unreduced pension arose "under the express terms of his employment agreement."

Statute of Limitations:

> In *Muto v. CBS, Corp.*, — F.3d —, No. 10-3038, 2012 WL 284589 (2d Cir. Feb. 1, 2012), the Second Circuit applied New York's "borrowing" statute to benefits claims accruing in Pennsylvania, and in turn, found them untimely under Pennsylvania's four-year statute of limitations for contract claims. Former Westinghouse employees, all of whom were residents of Pennsylvania, who accrued benefits under the company's retirement plan but were terminated prior to vesting brought suit against CBS, as Westinghouse's successor corporation, for their accrued benefits under the plan. Affirming the decision of the district court, the Second Circuit looked to New York state contract law, which provides a six year statute of limitations but also specifies, under the borrowing statute, that a court must apply the shorter of the statute of limitations of New York or the jurisdiction in which the cause of action accrued. The Second Circuit found that the cause of action accrued in Pennsylvania, the jurisdiction in which the employees' claims arose, and applied Pennsylvania's statute of limitation for contract actions to the out-of-state former employees' claims and affirmed the dismissal of the suit as untimely.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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