Proskauer

newsletter

A report to clients and friends of the firm

Edited by **Stacey C.S. Cerrone** and **Russell L. Hirschhorn**

September 2014
in this issue

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Editor's Overview

As the summer draws to a close, no one would fault you if you missed the Fourth Circuit's decision in *Tatum v. RJR Pension Investment Committee*, which was published on August 4th. However, plan sponsors and fiduciaries should take note of it. As explained below in the article by Myron Rumeld and Russell Hirschhorn, in a 2-1 decision, over a blistering dissent, the Fourth Circuit made a number of significant rulings on the burdens of proof related to loss causation, the meaning of "objective prudence," and the standards for reviewing decisions pertaining to stock funds in the wake of the Supreme Court's ruling in *Fifth Third v. Dudenhoeffer*, many of which are difficult to reconcile with existing case law. We already know that the Circuit has denied RJR's petition for rehearing en banc. It remains to be seen whether RJR will petition for review by the Supreme Court.

As always, please be sure to review the section on Rulings, Filings, and Settlements of Interest. This month we cover Revenue Procedures that provide guidance to individuals on their obligation to maintain minimum essential coverage under the Affordable Care Act's "individual mandate," new guidance on locating missing participants for terminated defined contribution plans and ERISA section 510 retaliation claims.

Divided Fourth Circuit Panel Rules On Burden of Proving Loss Causation in ERISA Fiduciary Breach Case

By Myron Rumeld and Russell Hirschhorn

"As for those who might contemplate future service as plan fiduciaries, all I can say is: Good luck."

That was the sentiment expressed in a blistering dissent by Fourth Circuit Judge J. Harvie Wilkinson in the latest ruling in a lawsuit challenging the decision by the fiduicaries of the RJR 401(k) plan to liquidate two stock funds that previously had been available to plan participants wishing to invest in Nabisco stock. *Tatum v. RJR Pension Inv. Committee et al.,* No. 13-1360, 2014 WL 3805677 (4th Cir. Aug. 4, 2014). In a split decision, the panel ruled that, because plaintiff-participant Richard Tatum had proved that the plan fiduciaries acted imprudently by liquidating the stock fund without the benefit of a proper investigation, the burden of proof shifted to defendants to show that a prudent fiduciary *would* have made the same decision. In so ruling, the Court reversed the lower

court decision, which had found in favor of defendants after a bench trial upon finding that they had demonstrated that a prudent fiduciary *could* have made the same decision.

The Fourth Circuit's decision makes a number of significant statements and rulings on the burdens of proof related to loss causation, the meaning of "objective prudence," and the standards for reviewing decisions pertaining to stock funds in the wake of the Supreme Court's ruling in *Fifth Third v. Dudenhoeffer*. Some of the Court's pronouncements are difficult to reconcile with existing case law. If not set aside on en banc or Supreme Court review and if adopted elsewhere, the decision could substantially impact the future conduct of fiduciary breach litigation, as well as plan practices in administering stock funds.

Background

For many years, RJR Nabisco—the product of the merger of Nabisco and R.J. Reynolds Tobacco—sponsored a 401(k) plan, which consisted of six diversified funds and two undiversified funds:

- The Nabisco Common Stock Fund, consisting of stock in the food business, and
- The RJR Nabisco Common Stock Fund, consisting of stock in the food and tobacco businesses.

In March 1999, the merged company decided to spin off its tobacco business, R.J. Reynolds, from its food business, Nabisco. The decision was prompted by R.J. Reynolds' exposure to tobacco litigation and the negative effect it was having on the company's stock price—a phenomenon referred to as the "tobacco taint."

The 401(k) plan at issue (the "Plan") was created on the date of the spin-off by RJR for the benefit of RJR employees. The Plan designated a benefits committee as being responsible for making Plan amendments, and an investment committee as being responsible for Plan investments. For simplicity's sake, these committees and RJR are collectively referred to as "RJR."

After the spin-off, the RJR Nabisco Common Stock Fund was divided into two separate funds:

- Nabisco Group Holdings Common Stock Fund, consisting of stock in the food business, and
- RJR Common Stock Fund, consisting of stock in the tobacco business

As a result of the spin-off, the Plan had two funds holding Nabisco stock: the Nabisco Common Stock Fund and the Nabisco Group Holdings Fund (the "Nabisco Funds"). The Plan provided for the retention of the Nabisco Funds as "frozen" funds in the Plan. The Plan also retained the six diversified funds offered in the pre-spin-off plan, as well as the RJR Common Stock Fund. Thus, as a result of the spin-off, the Plan maintained an investment option that consisted of investments in a single, *non*-employer (Nabisco) stock.

Notwithstanding the Plan language providing that the Nabisco Funds remain as frozen funds in the Plan, RJR decided to eliminate them from the Plan because it was concerned that having funds that were invested in a single, non-employer stock could expose it to a breach of fiduciary duty suit based on a failure to diversify the fund. According to the majority's opinion, the decisions to freeze and then liquidate the Nabisco Funds were made at a meeting by a working group consisting of RJR employees who

had no authority under the Plan that lasted no longer than one hour. The group discussed: (a) reasons for removing the Nabisco Funds, including what it perceived to be the high risk of having a single, non-employer stock fund in the Plan; (b) its belief that these type of investment funds were only held in other companies' plans as frozen funds in times of transition, *i.e.*, for a short period after the spin-off; and (c) its belief that a single stock fund in the Plan would add complexity and cost. The group's recommendation was reported back to a member of the Plan's fiduciary committees, who agreed with the working group's recommendation.

RJR subsequently notified Plan participants that the Nabisco Funds would be eliminated from the Plan as of January 31, 2000. A few days before the scheduled spin-off, Tatum emailed members of the Plan committees and asked them not to go through with the elimination of the Nabisco Funds because it would result in a 60% loss to his account. Tatum explained that he wanted to wait for the stock price to increase before selling his stock and that the company had been "optimistic" that the share price would increase after the spin-off. Tatum was told that the divestment could not be stopped.

Between the date of the spin-off and the time of the decision to eliminate the Nabisco Funds, the market price for the two stock funds holding Nabisco stock had declined; the price of Nabisco Holdings stock had dropped 60%, and the price of Nabisco Common Stock had dropped 28%. The drop in value was attributable to a series of tobacco lawsuits pending against RJR. Subsequently, however, and after the Nabisco Funds were liquidated, an unanticipated attempt by Carl Icahn to take over the company resulted in a bidding war that substantially increased the value of the Nabisco Funds.

Procedural History

In May 2002, Tatum commenced a putative class action lawsuit alleging, among other things, that RJR breached its fiduciary duties under ERISA by eliminating the Nabisco Funds from the Plan on an arbitrary timeline without conducting a thorough investigation. Tatum alleged that this caused substantial loss to the Plan because the Nabisco Funds were sold at their all-time low, "despite the strong likelihood that Nabisco's stock prices would rebound."

Following a month long bench trial, the district court held that: (i) RJR breached its fiduciary duties when it liquidated the Nabisco Funds from the Plan without undertaking a proper investigation into the prudence of doing so, (ii) as a breaching fiduciary, RJR bore the burden of proving that its breach did not cause the alleged losses to the Plan; and (iii) RJR met its burden of proof because its decision to eliminate the Nabisco Funds was "one which a reasonable and prudent fiduciary could have made after performing such an investigation."

The Fourth Circuit Majority's Opinion

On appeal, Tatum argued that the district court applied the wrong standard for determining loss causation. In particular, he argued that the district court incorrectly considered whether a reasonable fiduciary, after conducting a proper investigation, *could* have sold the Nabisco Funds at the same time and in the same manner, as opposed to whether a reasonable fiduciary *would* have done so. In response, RJR first argued that the district court erroneously concluded that it breached its duty of procedural prudence and that, as a breaching fiduciary, it bore the burden of proving that its breach did not cause the Plan's loss. RJR also argued that, even if the district court ruled properly that the burden of causation shifted, the court applied the appropriate causation standard.

The Fourth Circuit addressed each of these issues, as follows.

(1) Did RJR breach its duty of procedural prudence?

The majority agreed with the district court that RJR failed to engage in a prudent decision-making process. It found that the working group's decision was made based on faulty assumptions about the illegality of maintaining a stock fund, and without the benefit of analysis, research or investigation. The majority noted that the group did not, for example, appoint an independent fiduciary, seek outside legal and financial expertise, hold meetings to ensure fiduciary oversight of the investment decision, or continue to monitor and receive regular updates on the investment's performance. It also rejected RJR's argument that a "lesser standard of procedural prudence" was required here because investments in a single stock fund are inherently imprudent. The Court stated that the fiduciaries were required to take into account all the facts and circumstances in evaluating the prudence of continued investment in the funds

(2) Which party bears the burden of proof as to loss causation?

The majority concluded that RJR, as the breaching party, bore the burden of proving that its fiduciary breach did not cause a loss to the Plan, despite the default rule that the burden of proof rests with the plaintiff. It based its conclusion on prior case law in the Fourth Circuit and the common law of trusts, which holds that when a beneficiary proves that a trustee committed a breach of trust resulting in a loss, the burden shifts to the trustee to prove that the loss would have occurred in the absence of the breach. This approach, according to the majority, was consistent with ERISA's purpose of protecting participants and beneficiaries.

In so ruling, the majority purported to distinguish decisions from the Second and Eleventh Circuits in *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98, 105 (2d Cir. 1998) and *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335, 1343 (11th Cir. 1992), each of which left the burden of proof of causation with the plaintiff. The Court found *Silverman* distinguishable because it addressed claims for co-fiduciary liability under ERISA section 405(a)(3); and it found *Willet* distinguishable because that decision did not address a situation in which plaintiffs had already established both fiduciary breach and a loss.

(3) Did RJR carry its burden of proof on causation?

The Court held that, to carry its burden of disproving causation, RJR had to prove that despite its imprudent decision-making process, its ultimate investment decision was "objectively prudent." Relying on its earlier decision in *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, 663 F.3d 210 (4th Cir. 2011), the majority explained that a decision is objectively prudent if "a hypothetical prudent fiduciary would have made the same decision anyway." This standard contrasted with the district court ruling, which only required RJR to prove that "a hypothetical prudent fiduciary *"could have"* decided to eliminate the Nabisco Funds. It found that the distinction between "would" and "could" is both real and legally significant—the latter describes what is merely possible, while the former describes what is probable and is a more difficult standard for a fiduciary to satisfy. The "would have" standard was more appropriate, according to the majority, because "[c]ourts do not take kindly to arguments by fiduciaries who have breached their obligations that, if they had not done this, everything would have been the same."

The majority also rejected RJR's argument that the Supreme Court's ruling in *Dudenhoeffer* militated in favor of a "could have" standard for evaluating the sufficiency of

pleading a stock-drop claim. Specifically, the Supreme Court ruled that when faced with claims alleging that a fiduciary failed to act prudently on inside information that called into question whether the market price of the stock was accurate, courts should "consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that [acting on the insider information] would do more harm than good." The majority stated that the Court's use of "could not have" in this instance did not alter its view that a "would have" standard applies to determine loss causation after a fiduciary breach is established.

Judge Wilkinson's Dissent

In a lengthy dissent, Judge Wilkinson took issue with the majority's ruling for multiple reasons.

First, Judge Wilkinson accused the majority of adopting a loss causation standard that strays from the statutory test of objective prudence, in favor of one premised on the view of prudence as the single best or most likely decision. He found the majority's distinction between "would have" and "could have" to be "semantics at its worst." He quoted then-Judge Antonin Scalia's statement that he knew of "no case in which a trustee who has happened—through prayer, astrology or just blind luck—to make (or hold) objectively prudent investments (e.g., an investment in a highly regarded "blue chip" stock) has been held liable for losses from those investments because of his failure to investigate and evaluate beforehand" (citation omitted). According to Judge Wilkinson, while an "insufficiently studious fiduciary" may be removed as a fiduciary, monetary liability only attaches if the investment decision was imprudent in the end.

Second, Judge Wilkinson stated that he believed that loss causation remains part of the plaintiff's burden in establishing monetary liability under ERISA. He argued that Congress expressly provided in ERISA section 409 that a plaintiff must prove that the losses "resulted from" the breach of fiduciary duty, and that the "weight of circuit precedent" had reached the same conclusion.

Third, Judge Wilkinson opined that monetary liability is particularly inappropriate because defendants had made a reasonable decision to diversify the Plan's assets. The Nabisco Funds were, in his view, more dangerous than an ordinary single-stock fund because of the "tobacco taint" and the risk that a massive tobacco-litigation judgment against RJR also could harm Nabisco.

In short, Judge Wilkinson concluded that the Plan fiduciaries made prudent investment decisions made in the interest to asset diversification and it made no sense to impose personal monetary liability upon them.

The View from Proskauer

There are several reasons why we find the majority's ruling to be disturbing.

First, the Court's decision to shift the burden of proof with respect to loss causation does not appear to comport with many rulings on the subject. As other courts have noted, there is only a consensus to shift the burden of proof with respect to damages.[1]

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[1] *See, e.g., Board of Trustees of AFTRA Retirement Fund v. JPMorgan Chase Bank, N.A.*, 860 F. Supp. 2d 251 (S.D.N.Y. 2012) (explaining that while the Second Circuit concluded that in evaluating the proper measure of loss under section 409 the burden of proving that the funds would have earned less than the most profitable investment

Second, characterizing the defendants' burden as proving "objective prudence," and then defining "objective prudence" to mean that another fiduciary "would" have made the same decision appears to be inconsistent with how the "objective prudence" standard has been applied in other contexts. Numerous courts have dismissed claims for failure to state a plausible claim of imprudence because the challenged decision was viewed to be objectively prudent; and, in doing so, the courts have concluded that the challenged decision was one that a prudent fiduciary "could" have made, not that the fiduciary "would" have made that precise decision. As these cases recognize, a plaintiff should not be permitted to proceed to discovery on a claim of procedural imprudence unless the objective facts indicate that there is a basis to suspect that the fiduciaries acted imprudently.[2]

Third, notwithstanding the majority's effort to distinguish the Supreme Court's recent decision in *Fifth Third,* the *Fifth Third* decision *does* appear to advocate a "could have" standard for evaluating the plausibility of a claim. Moreover, the majority only purported to address the Supreme Court's standard for evaluating claims based on insider information. With respect to claims based on public information—which appear to be more akin to the claim in *Tatum*—the Supreme Court stated that, "allegations that a fiduciary should have recognized from publicly available information alone that the market was over- or under-valuing the stock are implausible as a general rule, at least in the absence of special circumstances." If that same standard applied to a decision to eliminate the stock fund—and we perceive no reason why it should not—there would be no apparent basis for finding a fiduciary breach in *Tatum,* where there is no question that the stock in the Nabisco Funds was liquidated at then market prices.

Fourth, it is difficult to understand how the majority's "would have" standard would apply in other contexts. In this case, the defendants could conceivably demonstrate that it is more likely than not that, even after a thorough investigatory process, they would have made the same decision to extinguish the stock fund. But in a case challenging the procedural prudence to invest in a particular product, where there are many products to choose from, it would appear to be very difficult for the breaching fiduciaries to demonstrate that they would have made the exact same investment choice if they had conducted a more prudent search.

Finally, the majority's decision appears to be insensitive to the realties presented to employers and plan fiduciaries when there is a corporate spin-off, and an employer stock fund no longer holds stock of only the employer/plan sponsor. Most fiduciaries would question the merits of providing participants with the option of investing their retirement assets in a single non-employer stock fund given the inherently volatile nature of any single stock. Thus, plan fiduciaries have routinely looked to eliminate such funds after allowing plan participants the opportunity to diversify their stock investment over time as

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alternative is on the fiduciaries found to be in breach of their fiduciary duty, *see Donovan v. Bierwirth*, 754 F. 2d 1049 (2d Cir. 1985), it subsequently held that "[c]ausation of damages is . . . an element of the claim, and the plaintiff bears the burden of proving it," *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98 (2d Cir. 1998)).

[2] *See*, *e.g.*, *Young v. General Motors Inv. Corp.*, 325 F. App'x 31 (2d Cir. 2009) (affirming dismissal of plaintiffs' fiduciary breach claim because plaintiffs failed to allege any facts relevant to determining whether a fee is excessive under the circumstances and thus failed to provide a basis upon which to infer that defendants' offering of the funds was a breach of their fiduciary duties)

they see fit. The *Tatum* decision may erect fiduciary standards for making these decisions that are substantially higher than those adhered to in the past.

Whether or not the majority ruling in *Tatum* becomes the prevailing view on fiduciary standards and the burden of proving causation, it remains the case that plan fiduciaries will always be well served by having a documented record of a procedurally prudent process for all decisions concerning plan investments.

Rulings, Filings, and Settlements of Interest

IRS Increases 9.5% Affordability Threshold—Or Did It?

By Paul M. Hamburger, Peter Marathas and Stacy Barrow

> On July 24, 2014, the Internal Revenue Service (IRS) released three Revenue Procedures (2014-46, 2014-37, and 2014-41), which provide guidance to individuals on their obligation to maintain minimum essential coverage (MEC) under the Affordable Care Act's (ACA) so-called "individual mandate."

Most notably for employers is that, in Revenue Procedure 2014-37, the IRS increased the threshold for determining whether an employer has offered affordable coverage to an employee. For these purposes, the IRS increased the percentage of an employee's *household income* that can be charged for group health insurance and still be considered *affordable* for purposes of the ACA's "pay-or-play" requirements. The IRS guidance increases the percentage from 9.5% to 9.56%. In other words, an employer assessing the affordability for employee-only coverage for its least expensive plan in 2015 can require an employee to pay up to 9.56% of his or her household income and the insurance will still be considered affordable.

It has been widely reported that the IRS has increased the affordability percentage *in all cases* from 9.5% to 9.56%. This is not necessarily true.

By way of background, the IRS had previously acknowledged that when it comes to having employers measure "affordability" of health coverage, tracking an employee's *household income* would be difficult, if not impossible. Responding to this concern, the IRS released regulations that permitted employers to use one of three *safe harbors* to determine affordability. The three safe harbors permit an employer to measure affordability based on whether the applicable premium exceeds 9.5% of W-2 income, an employee's Rate of Pay or a measure of the Federal Poverty Level. That is, an employer using one of the safe harbors would not need to ask about an employee's *household income* to determine whether the insurance is affordable for purposes of the ACA; it would simply take the applicable safe harbor, multiply by 9.5% and measure the result against the premium for self-only coverage.

Some vendors, consultants and others have announced that employers can now use the increased 9.56% to determine whether coverage is affordable for purposes of the safe harbor. Based on the literal regulatory rules, this is not correct.

The reason this is not true is that the IRS regulations on affordability have "hard-wired" the 9.5% standard into those regulations; the regulations do not cross-reference to the statutory reference for affordability. As the IRS continues to index

the affordability measure for household income over time, as is required by the ACA, a concomitant change to the percentage established in the regulations will be required or else these two percentages will very quickly become dramatically out-of-sync.

Some type of announcement from the IRS increasing the regulatory 9.5% threshold to the statutory 9.56% threshold for the applicable safe harbors would be welcome. In the meantime, employers planning on complying with the regulatory safe harbor rules should cap premiums based on the literal terms of those regulations.

New Guidance on Locating Missing Participants for Terminated Defined Contribution Plans

By Emily Erstling

> On August 14, 2014, the U.S. Department of Labor (DOL) provided new guidance to plan fiduciaries of terminated defined contribution plans for locating missing and unresponsive participants in order to distribute their benefits. The guidance comes in the form of Field Assistance Bulletin (FAB) No. 2014-01, which replaces FAB No. 2004-02. As discussed below, the guidance may also prove useful in finding missing and unresponsive participants in other circumstances as well.

FAB 2004-02 instructed fiduciaries terminating defined contribution plans to attempt to locate missing participants through, among other search methods, Internal Revenue Service ("IRS") and Social Security Administration ("SSA") letter-forwarding services. The IRS and SSA, however, have since discontinued those services. FAB 2014-01 therefore provides much-needed guidance.

In general, FAB 2014-01 provides that, regardless of the size of the participant's account balance, plan fiduciaries must employ "low-cost" steps to locate missing and unresponsive participants. However, the size of the participant's account balance must be weighed against the efficacy of higher-cost methods when deciding whether to pursue a more expensive approach when the lower-cost methods fail.

Search Steps

The following low-cost steps are required to be taken before determining that a participant cannot be located, but may be performed in any order:

> Certified Mail. Fiduciaries must attempt to contact a missing participant through certified mail. Fiduciaries may use the DOL's model notice to locate missing participants, or other appropriate form of notice.
> Check Related Plan and Employer Records. Fiduciaries must cross-reference a missing participant's information with other employer plan records, such as a group health plan. To counteract privacy concerns, a plan fiduciary can request that an employer or other plan fiduciary contact the missing participant directly or forward correspondence on behalf of the plan.
> Check with Designated Plan Beneficiary. Fiduciaries must attempt to locate the missing participant through his or her beneficiary. Again, to counteract privacy concerns, the fiduciary can ask the beneficiary to get in touch with the plan fiduciary or to forward correspondence on behalf of the plan.
> Use Free Electronic Search Tools. Fiduciaries must make reasonable use of no-cost internet search tools in order to find a missing participant or

beneficiary, including search engines, public record databases (such as those for licenses, mortgages and real estate taxes), obituaries and social media.

In the event that these low-cost methods are not successful in locating the participant, fiduciaries must consider the size of the participant's account balance and determine whether it is appropriate to take additional steps, such as paid internet search tools, commercial locator services, credit reporting agencies, information brokers, and investigation databases.

Distribution Options

In the event that a plan fiduciary determines that a missing participant cannot be located, the fiduciary must decide what to do with his or her benefit. FAB 2014-01 provides that the preferred option is to roll over the missing participant's account balance to an individual retirement plan, such as an individual retirement account (IRA) or annuity. However, if the fiduciary cannot find an individual retirement plan provider to accept such rollover, or determines that such rollover is not appropriate under a "compelling reason based on the particular facts and circumstances," the fiduciary may: (i) open an interest-bearing, federally-insured bank account in the missing participant's name and transfer the account balance to the account; or (ii) transfer the account balance to a state unclaimed property fund.

Because these two alternative options will entail adverse tax consequences to the participant that are not incurred in a trustee to trustee transfer, the plan fiduciary must prudently conclude that the distribution to a bank account or state is the most appropriate option. If the fiduciary opts to open a bank account, he or she must ensure that the participant would have an unconditional right to withdraw funds from the account, and must consider other information including the interest rate and bank-imposed charges on the account. If the fiduciary opts to escheat the account balance to a state unclaimed property fund, he or she must consider whether a searchable database is provided by the state and any interest payable by the state on such escheated funds.

FAB 2014-01 provides that 100% income tax withholding is not an acceptable method of distribution in the case of a missing participant. Some plan fiduciaries have historically withheld 100% of a missing participant's distribution, in effect turning the benefit over to the IRS. The DOL has now clarified that this method is unacceptable, as it does not necessarily result in an offset to the participant's income taxes and can deprive a participant of his or her benefit.

The DOL further clarified a Patriot Act issue that had been of concern to plan fiduciaries attempting to open a bank account in the name of a missing participant. The customer identification and verification provisions of the Patriot Act require that financial institutions verify the identity of a customer who opens an account. The DOL reports that, in the case of employee benefit plans, this verification will only be required when the participant contacts the financial institution to claim the account or exercise control over it, and not when the plan initially establishes the account in the missing participant's name.

View From Proskauer

Although FAB 2014-01 applies to the location of missing and unresponsive participants in the case of defined contribution plan termination, plan fiduciaries may also find the guidance helpful when determining appropriate procedures for locating missing participants and distributing their benefits in other circumstances where no guidance exists. The methods described under FAB 2014-01 reflect the growing ability to locate a missing participant through free internet searches and other electronic databases that were not as comprehensive in 2004 when FAB 2004-02 was released. Plan fiduciaries should ensure that they follow all of the steps required by FAB 2014-01 when attempting to locate missing and unresponsive participants in a defined contribution plan termination, and consider whether additional steps are necessary in order to fulfill their fiduciary obligations.

District Court Allows ERISA Section 510 Retaliation Claim to Proceed

By Tulio Chirinos

> A federal district court in Pennsylvania concluded that Irene Najmola, a former employee of Chester County Hospital, sufficiently pled a retaliation claim under ERISA section 510 by alleging that her employment was terminated shortly after returning from short-term disability leave. In so ruling, the court determined that Najmola sufficiently pled that defendant had the specific intent to interfere with her attainment of ERISA benefits by alleging that she: (1) was an employee; (2) utilized her ERISA protected short-term disability plan; and (3) was terminated. In addition, the Court held that the temporal proximity between the exercise of her short-term disability leave and her termination were sufficient at the motion to dismiss stage to infer that defendants had the intent to interfere with or retaliate against plaintiff for utilizing ERISA protected benefits. The case is *Najmola v. Women's Healthcare Group of Pa*., 2014 U.S. Dist. LEXIS 101583 (E.D. Pa. July 24, 2014).

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.

For more information about this practice area, contact:

Stacey C.S. Cerrone
504.310.4086 –scerrone@proskauer.com

Amy R. Covert
212.969.3531 – acovert@proskauer.com

Russell L. Hirschhorn
212.969.3286 – rhirschhorn@proskauer.com

Robert W. Rachal
504.310.4081 – rrachal@proskauer.com

Myron D. Rumeld
212.969.3021 – mrumeld@proskauer.com

Howard Shapiro
504.310.4085 – howshapiro@proskauer.com

Beijing | Boca Raton | Boston | Chicago | Hong Kong | London | Los Angeles | New Orleans | New York | Newark | Paris São Paulo | Washington, DC

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