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The ERISA Litigation Newsletter

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Editor's Overview

The past month has been a busy one in ERISA litigation. The Second Circuit issued two important rulings: first, it held that a plan participant must show individualized harm (typically a loss of benefits) from a fiduciary breach or statutory violation in order to have the "injury-in-fact" required to bring suit under Article III of the U.S. Constitution; second, it held that ERISA's anti-alienation rule precluded the use of pension assets to fund attorney's fees under the "common fund" doctrine.

There have been continuing developments in fee and expense litigation. In one case, after factual development, the district court granted summary judgment dismissing all fee and expense claims made against United Technologies; in the other case, the district court declined to dismiss at the pleadings stage claims made against proprietary mutual funds offered by Wells Fargo in its plan.

We next address an opinion from the Seventh Circuit in which the court held that if a claims administrator improperly relies on its internal processing guidelines to deny benefit payments, that reliance makes those documents "plan documents" that are required to be produced by the plan administrator under ERISA § 104(b), 29 U.S.C. § 1024(b).

Our final article addresses continuing developments in the use of state insurance law to negate discretionary review clauses in insured ERISA plans. The Sixth Circuit joined several earlier district courts and became the first appellate court to conclude that ERISA does not preempt a state law ban on discretionary clauses.

Finally, be sure to review our section on "Filings, Rulings, and Settlements of Interest." That section includes reports on standing, statute of limitations, and four rulings in "stock drop" cases — which also serve as a good reminder that these cases have never gone away, and in fact have gained renewed energy in light of the recent stock market turmoil.

Second Circuit Pulls the Leg out from under Statutory Claims by Participants Not Injured by the Alleged Violation

By Myron Rumeld and Russell L. Hirschhorn

In *Kendall v. Employees Retirement Plan of Avon Products*, 2009 WL 763991 (2d Cir. Mar. 25, 2009), the Second Circuit held that a plan participant must be able to demonstrate a cognizable injury-in-fact to satisfy constitutional standing requirements when asserting a claim that a plan violates ERISA pursuant to ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3). The court concluded that because Kendall was not personally injured by the alleged violations, she did not have standing to assert that the Avon plan was impermissibly backloaded in violation of ERISA's minimum accrual requirements.

In so ruling, the court resolved an issue that it viewed to be left open from the Supreme Court's prior decisions in *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merk-Medco Managed Care*, 433 F.3d 181 (2d Cir. 2005) (*Central States I*)and 504 F.3d 229 (2d Cir. 2007) (*Central States II*). In *Central States I*, the Second Circuit held that requests for restitution and/or disgorgement under ERISA require that a participant suffer individual harm in order to satisfy the injury-in-fact requirement of Article III standing, but that a participant may obtain injunctive relief to rectify statutory violations without a showing of individual harm. In *Central States II*, the Second Circuit concluded that a plan trustee satisfied the injury-in-fact requirement because she represented a plan that had a contractual relationship with Merk-Medco and the underlying allegations involved harm to the plan. Because the trustee had satisfied the standing requirements, the court declined to consider whether the other plan participants, who were not harmed monetarily, would have standing merely by virtue of their seeking to vindicate "intangible right to the honest services of fiduciaries guaranteed to them by ERISA."

The court in *Kendall* first concluded that Kendall was required to allege injury-in-fact because, notwithstanding the characterization of her claim as one seeking injunctive relief to remedy the alleged statutory violation, Kendall was seeking primarily restitutionary relief in the form of the additional benefits that would result from plan reformation to comply with ERISA. The court then rejected Kendall's assertion that, even though there was no statutory violation with respect to her individual benefit, she could allege injury-in-fact by claiming that she would receive additional benefits if the plan was reformed to correct the statutory violation. Such an "injury," according to the court, was too speculative to constitute an injury-in-fact.

Significantly, in so ruling, the court stated that, even in cases where participants were seeking injunctive relief and thus need not show individualized harm, they still must allege an injury in the form of a deprivation of a right as a result of the alleged breach. In this regard, the court distinguished other cases, including the Third Circuit's decision in Horvath v. Keystone Health Plan E., Inc., 333 F.3d 450 (3d Cir. 2003), which allowed participants to seek injunctive relief for alleged violations of ERISA's notice and disclosure rules. Although the participants in *Horvath* may have suffered no harm from the alleged violations, they had been deprived of the notice required by the statute. Here, by contrast, the alleged statutory violation had no direct impact on Kendall at all, as it had no bearing on her benefits.

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The Second Circuit's decision in *Kendall* may play a significant role in limiting the opportunity for the plaintiff's bar to bring the types of statutory violation claims that expose plans to substantial liabilities. Going forward, it would appear that these claims can proceed only where the named plaintiffs can claim to be directly impacted by the alleged violations.

Excessive Fee Litigation: Court Rules in Favor of United Technologies Corporation on Summary Judgment; Court Allows Litigation against Wells Fargo To Proceed after Denying Defendants' Motion To Dismiss

By Amy Covert

Last February, the Seventh Circuit became the first appellate court to affirm the dismissal of all fee and expense claims (asserted against Deere) on a motion to dismiss. In March, the District of Connecticut continued the trend of rejecting these claims when it became the first district court to dismiss all fee and expense claims asserted against United Technologies on summary judgment. While some may have viewed these decisions to be the beginning of the end, the District of Minnesota quickly reminded us that these claims may be around for a while longer when it denied Wells Fargo's motion to dismiss. The *United Technologies* and *Wells Fargo* decisions are discussed below; please see our March Newsletter for an analysis of the Seventh Circuit's decision in *Hecker v. Deere*.

Taylor v. United Tech. Corp., 2009 WL 535779 (D. Conn. Mar. 3, 2009)

In *United Technologies*, the district court granted summary judgment in favor of United Technologies Corporation ("UTC") and related defendants in an ERISA "excessive fee" class action, concluding that the fiduciaries had acted prudently in selecting the plan investments.

UTC offered a 401(k) plan to eligible employees. Prior to 1997, the plan offered participants four investment options, including a UTC stock fund. From 1997 through 2006 the plan increased the investment options available to participants and, by 2006, the plan offered 24 investment options, including actively managed investment funds and target date retirement funds. Under a recordkeeping agreement, Fidelity and UTC negotiated a base annual fee for recordkeeping and administrative services of $40 per participant, although UTC received a per participant credit at a rate equal to $1.50 for every $100 million invested in Fidelity actively managed mutual funds. Both the annual fee and participant credit increased over time. From 1997 through 2001, UTC paid the recordkeeping fee owed to Fidelity. In 2002, UTC began assessing participant accounts a fee of $10 per quarter to pay a portion of Fidelity's recordkeeping fee. Because of the credits for investments in Fidelity managed funds, Fidelity's fee eventually fell below $10 per quarter. As a result, in 2004, UTC stopped charging participants a flat fee of $10 per quarter and instead began to charge participants the actual recordkeeping costs incurred in the previous quarter. In addition, some of the mutual funds available as investment options paid a "sub-transfer agent fee" to Fidelity for its recordkeeping services, which was part of the fund's expense ratio.

The court first rejected plaintiffs' attack on the use of a unitized stock fund, concluding that UTC was not obligated to proceed with a claimed "better alternative." In so holding, the court accepted defendants' explanation that the unitized stock fund held cash to facilitate more transactional liquidity than was available through ordinary common stock ownership, allowing for a one-day settlement period. Having determined that UTC did not breach its fiduciary duty by offering a unitized stock fund (and an allegedly high amount of cash in that fund), the court also rejected plaintiffs' related disclosure claims.

Next, the court rejected plaintiffs' claims that UTC breached its fiduciary duties by offering mutual funds with allegedly unreasonable fees and expenses and by offering actively managed investment options. The court reasoned that the evidence demonstrated that UTC's selection process included appropriate consideration of the fees charged on the mutual fund options and of the returns of each mutual fund net of its management expenses. In so holding, the court determined that plaintiffs failed to demonstrate that separate accounts were equivalent investment vehicles to the mutual funds offered under the plan. The court also found that plaintiffs failed to prove that UTC was motivated by a potential discount to its recordkeeping fee when it selected Fidelity mutual funds as investment options for the plan. Having concluded that UTC did not breach its fiduciary duties in its selection and offering of actively managed mutual funds, the court also rejected plaintiffs' related disclosure claim.

The court also rejected plaintiffs' claim that UTC allowed the plan to pay unreasonably high compensation to Fidelity for recordkeeping services through the use of revenue-sharing fees. Without explicitly addressing a decision from the same district court, *Haddock v. Nationwide Financial Servs. Inc.*, 419 F. Supp. 2d 156, 170 (D. Conn. 2006) which had held that revenue-sharing payments may constitute plan assets), the United Technologies court found that the first prong of Haddock's "functional" plan asset test was not met because Fidelity was not a fiduciary. Interestingly, the court also did not refer to the Seventh Circuit's recent decision in *Hecker v. Deere*, 2009 WL 332185 (7th Cir. 2009), which explicitly rejected the argument that revenue-sharing payments are plan assets. The court also held that plaintiffs failed to prove that Fidelity's fees were materially unreasonable and beyond the market rate, observing that UTC had produced evidence demonstrating that other service providers would have charged comparable rates. The court also held that plaintiffs could not prove that UTC failed to monitor or account for the revenue-sharing payments.

Finally, the court rejected plaintiffs' claims that defendants made misleading statements to participants regarding plan fees and expenses. In its prior ruling on defendants' motion to dismiss, the court had held that ERISA does not affirmatively require fiduciaries to disclose sub-transfer agent fees, but allowed plaintiff to proceed under a theory that UTC allegedly made misrepresentations to participants regarding such payments. On summary judgment, the court ruled that UTC did not make misleading statements to participants. Following other courts that have addressed this issue, the court held that sub-transfer agent fees were not material because they did not affect the share price. The court also held that UTC had no duty to disclose information about the fee discount to participants because the discount was not a motivating factor in the selection of the mutual funds, and the discount did not affect the investment value of the mutual funds.

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The *United Technologies* case is one of the many cases filed on September 11, 2006 by the same law firm, all of which make similar allegations attacking fees and revenue-sharing practices in connection with 401(k) plan investments. This is the first of these "excessive fee" cases to be decided on the merits after full discovery. It is also the first decision to reject a challenge to the so-called "cash drag" in unitized employer stock funds. The decision confirms the importance of procedural prudence. As we have discussed in prior editions of the Newsletter, plan fiduciaries should continue to monitor the 401(k) fee structures of the plans they oversee to make sure that the fees are reasonable in comparison to industry standards, and document their processes for conducting these reviews.

Gipson v. Wells Fargo & Co., 2009 WL 702004 (D. Minn. Mar. 13, 2009)

Continuing the trend of allowing cases that challenge plan investments to proceed to discovery, in *Gipson v. Wells Fargo & Co.* a district court denied defendants' motion to dismiss plaintiffs' claims that Wells Fargo and related defendants breached their fiduciary duties by mismanaging the Wells Fargo 401(k) plan.

First, plaintiffs alleged that the plan's investment in Wells Frgo proprietary mutual funds, and the associated payment of management fees to a Wells Fargo affiliate, are prohibited transactions under ERISA § 406, which prohibits a plan fiduciary from engaging in certain transactions with "parties in interest" and also prohibits a fiduciary from self-dealing. The court rejected defendants' contention that plaintiffs failed to allege that defendants did not comply with Prohibited Transaction Exemption 77-3 ("PTE 77-3"), which exempts from the prohibited transaction rules investments in proprietary mutual funds if certain criteria are met. Without deciding whether the elements of PTE 77-3 are "part and parcel of a claim under Section 406," the court held that, construing the complaint in the light most favorable to plaintiffs, it sufficiently alleged that defendants did not comply with PTE 77-3 by asserting that defendants invested in a category of stock that generated higher fees for the Wells Fargo affiliate, rather than the "institutional" category that charged lower management fees.

Second, plaintiffs alleged that defendants breached their fiduciary duties by: (i) investing in a class of shares with higher administrative fees as opposed to a less expensive alternative; (ii) investing in funds with sub-par performance; and (iii) using plan assets as "seed money" to allow the funds to survive and attract other investors. The court denied defendants' motion to dismiss, concluding that plaintiffs' allegations satisfied the "plausibility" standard. The court also rejected defendants' contention that the statute of limitations barred plaintiffs' "seeding" claim, concluding that establishment dates of the Wells Fargo funds and the dates that the plan invested in those funds presented factual issues that could not be resolved at the pleadings stage.

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Wells Fargo illustrates the difficulty often encountered in seeking to have a case dismissed on the pleadings. Although the court did not reject defendants' defenses, the court concluded that it could not rule on those defenses absent factual development.

Seventh Circuit Imposes Disclosure Obligation on Internal Claim Processing Guidelines

By Brian Neulander

In *Mondry v. Am. Family Mut. Ins. Co*., 2009 WL 539861 (7th Cir. 2009), the Seventh Circuit held that the plan administrator was liable under ERISA § 104(b)(4), 29 U.S.C. § 1024(b)(4), for failing to provide the claims administrator's internal processing guidelines for reviewing benefit claims. The court also remanded for further consideration the issue of whether the disclosure violation required the plan administrator to pay interest on Mondry's delayed payment of benefits.

American Family Mutual Insurance Co. ("American Family") is the plan sponsor and plan administrator for the self-funded group health insurance plan offered to its employees. CIGNA is the claims administrator under the plan. Mondry sued American Family and CIGNA after CIGNA refused to cover speech therapy for Mondry's child. CIGNA denied Mondry's claim because it determined that speech therapy was not "restorative," a requirement that was only in CIGNA's internal claim processing guidelines, not the terms of the plan. Although it took sixteen months for Mondry's attorney to obtain a copy of CIGNA's internal guidelines and another ten months for Mondry's appeal to be considered, CIGNA's appeal committee ultimately concluded that Mondry's claim for benefits had been improperly denied because the "restorative" requirement was not a plan requirement. American Family was aware of the participant's efforts to acquire CIGNA's internal claims guidelines and had itself requested them, but had accepted without challenge CIGNA's representation that its guidelines were proprietary and "too big" to send.

Mondry filed suit against American Family and CIGNA alleging that they violated ERISA by failing to timely respond to multiple written requests for CIGNA's internal guidelines pursuant to ERISA § 104(b)(4), which requires the plan administrator to respond within 30 days to written requests for plan documents. In addition, Mondry asserted that American Family and CIGNA breached their fiduciary duties by failing to administer the plan solely in the interests of the participants and beneficiaries. The district court dismissed the claims against CIGNA and American Family, finding that the internal CIGNA guidelines were not controlling plan documents and thus there was no requirement for them to be produced.

The Seventh Circuit reversed and held that by "expressly rel[ying] on the [internal claims processing guidelines] as the basis for its decision to deny Mondry's claim for benefits, CIGNA gave those guidelines the status of documents that govern the operation of a plan, and their production to Mondry thus became mandatory." The court also concluded that American Family, as plan administrator, was required to disclose the documents to Mondry, although CIGNA was the one who possessed the documents. In so holding, the court reasoned that once American Family, as plan administrator, had notice that CIGNA was relying on the guidelines to deny Mondry's claim, American Family was obligated to force CIGNA to produce them. With regard to Mondry's breach of fiduciary duty claim (which sought interest for the delayed payments), the court remanded for further consideration, because Mondry had presented evidence that American Family may have contributed to CIGNA's delay in disclosing the documents.

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Mondry aptly illustrates the judicial hostility to the use of undisclosed processing guidelines to deny benefits. In light of the Seventh Circuit's ruling, plan administrators should review the documents and guidelines used by claims administrators to ensure that they are consistent with the terms of the governing plan documents. In addition, plan administrators may need to consider intervening when claims administrators refuse to comply with participants' written requests for the documents controlling benefit decisions.

Second Circuit Holds ERISA's Anti-Alienation Rule Prohibits Use of Pension Plan Assets To Fund Attorney's Fees under a Common-Fund Theory

By Robert Rachal

In *Kickham Hanley PC v. Kodak Retirement Income Plan*, 2009 WL 468266 (2d Cir. Feb. 26, 2009), the Second Circuit rejected a law firm's attempt to use the assets of a pension plan to fund its attorney's fees under the "common fund" doctrine.

Thise action arose out of Kodak's sale of its health group and divestment of approximately 3,500 employees to an unaffiliated company. A group of approximately 530 of these former employees had not vested in the Kodak pension plan at the time of their termination because they had worked less than five years for Kodak. On behalf of one of these participants, the law firm, Kickham Hanley filed an appeal with the plan administrator, claiming that this participant and all similarly situated participants vested in their pension benefits because there had been a partial termination of the plan. The plan administrator eventually granted the claim for benefits for this participant, and informed the other participants that they had qualified for the previously denied pension benefits.

During the administrative process, Kickham Hanley filed a complaint in federal court, ostensibly under the "common fund" doctrine, against the Kodak retirement plan and its fiduciaries. Kickham Hanley moved for a preliminary injunction barring the distribution of pension benefits to participants affected by the plan administrator's decision to vest their benefits unless 30% of these benefits were withheld for attorney's fees. The district court granted the preliminary injunction, but reduced the amount to be withheld to 15%.

On appeal, the Second Circuit held that since the benefits sought were "pension entitlements" (as noted, the plan administrator had granted the participants' administrative claim), as opposed to "contested pension claims," the benefits were protected by ERISA's anti-alienation rule from any reduction for attorney's fees. In so holding, the court observed that ERISA's fee-shifting statute, ERISA § 502(g), 29 U.S.C. § 1132(g), does not award fees for work done during the administrative process. The court also distinguished earlier ERISA cases in which fees had been awarded under a common fund as involving funds created from settlements negotiations in which the funds at issue had come from parties other than the plan.

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The Second Circuit has made it clear that attorneys cannot use the common-fund doctrine to acquire a portion of pension benefits awarded during the claims administrative process. The court's decision is based in part on its desire to encourage the administrative resolution of pension disputes. The court also suggested that ERISA's anti-alienation provision may bar common fund claims to pension benefits granted after suit is filed, noting that attorneys may seek fees under ERISA's fee-shifting provisions once suit is filed.

ERISA Pre-Emption: Sixth Circuit Sustains Michigan Ban on Discretionary Clauses

By Charles F. Seeman III

As reported in the May 2008 *Newsletter*, there has been a wave of litigation over whether state law prohibitions against discretionary clauses in life, disability, medical and similar insurance contracts are preempted by ERISA. In general, these clauses provide insurers of ERISA plans with discretion to interpret and apply ERISA plan terms. Discretionary clauses often have been viewed as playing a significant role in containing plan costs, because they limit a court's review of claims determinations to an inquiry into whether the plan fiduciary abused its discretion.

In *American Council of Life Insurers v. Ross*, 2009 WL 691062 (6th Cir. Mar. 18, 2009), the Sixth Circuit joined several earlier district courts and became the first appellate court to conclude that a state law ban on discretionary clauses was not preempted by ERISA.

The parties agreed that Michigan's ban related to employee-benefits plans, which placed it within the ambit of ERISA's preemption provision. The Sixth Circuit thus focused on ERISA's savings clause and the two-part test enunciated in *Kentucky Association of Health Plans v. Miller*, 538 U.S. 329 (2003). The court first found "no serious dispute" that the Michigan ban was directed at regulating insurance (the first *Miller* factor), rejecting the industry's argument that the regulation's effects were felt primarily by plan fiduciaries, not insurers. The court also held that the Michigan ban substantially affected the risk-pooling arrangement between insureds and insurers (the second *Miller* factor) because the ban:

(i) directly dictated which policy terms were prohibited; and (ii) eliminated plan administrators' "unfettered discretion" in making benefits determinations. On this point, the court rejected the industry argument that the ban was only implicated after the transfer of risk had occurred, noting that prior Supreme Court decisions did not turn on the timing of risk transfer.

The industry also asserted an implied preemption defense, arguing that the Michigan ban conflicted with ERISA's goal of establishing uniform standards for adjudicating benefits claims. The court found this argument unpersuasive, observing that the Michigan ban did not create any alternative remedies to ERISA, and that ERISA does not bar *de novo* review of benefit claims. Thus, the Michigan ban was "saved" from ERISA pre-emption as a permissible regulation of the insurance industry.

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Unfortunately for many plans, the Sixth Circuit's decision represents yet another step in a growing trend toward greater state regulation of decision-making by ERISA plan fiduciaries of insured plans. In an environment where insurance costs are already skyrocketing, this trend may force some employers to adopt self-insured plans, with more limited benefits to employees, or to eliminate one or more employee benefit programs altogether.

Rulings, Filings and Settlements of Interest

- On March 9, 2009, the U.S. Court of Appeals for the Ninth Circuit denied a petition for rehearing *en banc* in *Golden Gate Restaurant Ass'n v. City & County of San Francisco*. A panel of the Ninth Circuit previously held that ERISA does not preempt a San Francisco ordinance that requires certain employers to make minimum health care expenditures on behalf of covered employees, either by paying into their own employee benefits plans or into a fund maintained and administered by the city. See our Client Alert and November 2008 Newsletter for a more detailed analysis of the litigation.

- In *Browning v. Tiger's Eye Benefit Consulting*, 2009 WL 497391 (4th Cir. Feb. 26, 2009), the Fourth Circuit affirmed the dismissal of fiduciary breach claims asserted by a 401(k) plan trustee on the grounds that the claims were time-barred by ERISA's three-year statute of limitations, based on "actual knowledge." The trustees claimed that the plan's third-party administrative consultant breached its fiduciary duties by failing to render advice in the best interests of the plan, diversify funds, and adequately investigate an investment that resulted in over $500,000 in losses, and by investing the plan's assets for its own benefit. Assuming without deciding that the third-party administrative consultant was a plan fiduciary, the Fourth Circuit concluded that the trustees' claims were time- barred. Observing that there is a split among the circuits in defining what constitutes "actual knowledge," the court concluded that it need not settle on a hard and fast definition in this case. Rather, according to the court, actual knowledge must be differentiated from constructive knowledge, and the point at which one has actual knowledge "depends largely on the complexity of the underlying factual transaction, the complexity of the legal claim[,] and the egregiousness of the alleged violation." Here, the court determined that the nature of the transaction was not overly factually complex (it involved the purchase of only a single promissory note), the alleged breach by the third-party administrative consultant was quite egregious (the entire purchase price of $555,000 was unrecoverable), and by February 19, 2002 (which was more than three years before suit was filed) the trustees were unambiguously informed that the plan's investment was placed in court-appointed receivership. The trustees thus undoubtedly had knowledge of the transaction's harmful consequences as well as notice of the actual harm.

- In *Chastain v. AT&T*, No., 2009 WL 580932 (10th Cir. Mar. 9, 2009), the district court dismissed on standing grounds a putative class action benefits claim brought against AT&T for changes made to the plan of a spun-off company, Lucent. The plaintiff-retirees, who were transferred to Lucent's plans post-retirement, and who claimed they were aggrieved by subsequent changes to that plan, could not maintain an action against AT&T because they were no longer "participants" in AT&T's plan under *Varity Corp v. Howe*, 516 U.S. 489 (1996). Applying *Varity,* the

Tenth Circuit stated that, "[e]ven if AT&T at one time had an irrevocable obligation to the appellants, it passed that obligation to [the spun-off company, Lucent] when it passed the administration of the benefits plans." Additionally, the court squarely rejected the doctrine of "but-for" standing, noting that the Tenth Circuit does not follow the First, Second, Third, Fifth, Sixth, and Eighth Circuits recognition of standing for plaintiffs who would have been plan participants "but for the alleged malfeasance of a plan fiduciary."

- In *Gregorovich v. E.I. DuPont* (D. Del. Mar. 13, 2009), the district court held that the statute of limitations on plaintiff's benefits claim was triggered at the time plaintiff received an underpayment of benefits. In so holding, the court concluded that plaintiff's claim was time-barred even though the limitations period was tolled during the administrative review process and during the period his claim was pending in state court.

- In *Harris v. Koenig*, 2009 WL 633173 (D.D.C. Mar. 12, 2009), the district court granted in part and denied in part defendants' motion to dismiss a stock drop class action related to alleged securities fraud and two securities settlements regarding Waste Management from 1990 to 2002. The court ruled that the claims related to alleged fraud during the 1990 to 1998 period were time-barred pursuant to ERISA's three-year statute of limitations because the plaintiffs had "actual knowledge" of all the essential facts necessary to bring their claims as of February 24, 1998, the day Waste Management publicly announced its restatement of prior earnings. The court refused to dismiss the remaining claims, which related to the settlement of the securities cases in Illinois federal court in 1999 and Texas federal court in 2002. According to the court, there were factual issues as to whether it was prudent for the plan to enter these settlements, including whether the investment manager for the plan, State Street, adequately evaluated these settlements. The court also held that plaintiffs did not have to show loss causation from the acceptance of these settlements, reasoning that once plaintiffs showed breach and a prima facie case of loss to the plan, the defendants then had to show their breach did not cause that loss.

- In *Delphi Corp. Securities*, *Derivative, & ERISA Litig.*, 2009 WL 692566 (E.D. Mich. Mar. 18, 2009), the district court granted defendants' motion for summary judgment, ruling that athe plan's trustee did not breach its fiduciary duty by failing to sell Delphi's stock until three days before Delphi filed for bankruptcy. The plan's investment manager, State Street, managed the Delphi stock in the plan. Under the plan's trust agreement, however, State Street was required to follow other plan fiduciaries' instructions in doing so (except as required by ERISA) and had no duty to inquire as to the correctness of those instructions. The court ruled that these provisions made State Street a "directed trustee" as to the stock fund. Applying

the Department of Labor's guidance for directed trustees in FAB 2004-03 (Dec. 17, 2004), the court held that State Street was obligated to follow the named fiduciaries' directions (to hold the Delphi stock) absent "limited, extraordinary circumstances" that called into question Delphi's viability as a going concern. State Street had closely monitored the performance of Delphi stock from March through October 2005, and the court agreed that State Street did not have reliable public information that showed Delphi's bankruptcy was imminent until the end of September. Therefore, the court held that State Street's failureing to sell the stock until October 5 was not a breach of fiduciary duty.

- In *In re Pfizer, Inc. ERISA Litig.*, Civ. Action No. 1:04 CV 10071 (S.D.N.Y. Mar.20, 2009), the district court denied in large part defendants' motion to dismiss. The court held that the *Moench* presumption of prudence is an evidentiary burden and should not be decided on a motion to dismiss. In so holding, the court did not address the many circuit and district court decisions rejecting this argument. The court also determined that, even if it were appropriate to consider the presumption at the pleading stage, plaintiffs alleged sufficient facts to render their claim plausible under that presumption. . It observed, for example, that plaintiffs had cited the substantial losses the plans suffered as evidence that defendants should have been aware or put on inquiry notice of the serious problems associated with the company stock funds. The court also permitted several other secondary liability claims to proceed against defendants, including duty of loyalty, duty to monitor knowing participation and co-fiduciary liability. Finally, the court granted defendants' motion to dismiss with respect to all claims involving the Puerto Rico plans for lack of standing, since none of the named plaintiffs were participants in those plans.

- In *Shirk v. Fifth Third Bancorp*., 2009 WL 692124 (S.D. Ohio Jan. 29, 2009), the district court granted summary judgment in favor of defendants on a stock drop claim. Plaintiffs alleged that offering company stock was imprudent because Fifth Third allegedly had a breakdown in internal controls that ultimately resulted in an $81 million pre-tax charge. The court concluded that the stock fund was an ESOP and that the presumption of prudence applied to this investment because the plan administrator's interpretation of the plan to require this investment was reasonable. The court then determined that plaintiffs failed to offer any evidence to rebut this presumption since, for example, , e.g., the stock increased in price during the class period, the company's financial metrics were stronger than those of its peers', and the auditor and executives all testified that the breakdown in internal controls was not viewed as material. The court also concluded that the disclosure claim was unfounded because plaintiffs failed to prove there were any material misrepresentations related to the disclosures of Fifth Third's controls.

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