Proskauer

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Editor's Overview

We begin this month with a review of 2009 decisions and settlements in stock-drop litigation. As the article observes, plan sponsors and fiduciaries should take solace in the fact that they continue to prevail on the merits and that courts appear more willing to grant motions to dismiss in light of the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009). It is not all good news, however. During the past year, we saw some of the largest stock-drop settlements ever and, with several stock-drop litigations related to the worldwide economic crisis underway, we do not anticipate seeing a slowdown in this litigation any time soon.

Two important rulings from the Second Circuit follow: first, in *In re Citigroup Pension Plan ERISA Litig.*, a case handled by Proskauer and Paul Weiss, the Court reversed the district court's decision and ruled that the plan did not violate ERISA's minimum accrual rules and ERISA Section 204(h); and, second, in *Ladouceur v. Credit Lyonnais*, the Court held that plaintiffs could not state a viable claim for fiduciary breach on the basis of oral statements purporting to alter the terms of an ERISA benefit plan.

Next, an article on the First Circuit's decision in *Wallace v. Johnson & Johnson* provides a good reminder that plan sponsors should make the plan terms explicit concerning who has the authority to delegate, and written formalities should be followed in those delegations in order to create a clean record to respond to any challenges to those delegations.

Lastly, we address the district court's latest ruling in the *Young v. Verizon* cash balance litigation, in which the court concluded it should reform the plan to correct a $1 billion-plus plan drafting error. As discussed in the article, the district court's lengthy opinion provides a useful roadmap on the factual and legal issues relevant to plan reformation.

As always, be sure to review the section on Rulings, Filings and Settlement of Interest, which is filled with a potpourri of interesting decisions and rulings.

A Review of Stock-Drop Litigation 2009 Decisions and Settlements

By Robert Rachal, Russell Hirschhorn & Brian Neulander

The recent financial crisis has, not surprisingly, fueled a lot of stock-drop litigation, some directed at companies that suffered an adverse event that led to a decline in their stock prices and some directed at companies that suffered stock prices decline in tandem with numerous other companies. While it will take some time for courts to sort these cases out and determine which ones should proceed past the initial pleading stages, two trends already are evident: the courts are more willing to dismiss cases at the initial pleadings stage, and the escalating costs of those cases that are not dismissed and proceed to settlement.

The standard stock-drop fact pattern in cases under ERISA is by now well-established. A publicly traded company offers its employees the option to participate in a 401(k) plan, or other type of eligible individual account plan, and one of the investment options offered is an employer stock fund. Following a decline in the employer's stock price, due to a financial restatement, product recall or other adverse event (*e.g.*, global economic crisis), plan participants file suit against the plan fiduciaries, claiming that the fiduciaries (who are often corporate executives or directors) breached their duties: (i) by failing to eliminate the employer stock fund as an investment option in the plan when they knew or should have known that it was an imprudent investment; and (ii) by making material misrepresentations or failing to disclose material information about the stock to which plaintiffs claim they were entitled. Defendants raise a number of defenses to the prudence claims, including that: the plan terms limit fiduciary discretion to remove or limit investments in the fund; a presumption of prudence attaches to investments in an employer stock fund pursuant to the Third Circuit's decision in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995); and that ERISA § 404(c) insulates fiduciaries from liability for participant-directed investments, including those in employer stock funds. With respect to the disclosure claims, defendants typically argue that plaintiffs failed to prove that defendants made any representations in their fiduciary capacity, made any material misrepresentations, or failed to disclose material information to which plaintiffs were entitled.

Given this backdrop, it is no surprise that the worldwide financial crisis, which drove former pillars of the banking and investment industry, such as Lehman Brothers, Bear Stearns, Merrill Lynch, and Washington Mutual, to merger or extinction, has led to an increase in stock-drop cases. Although we cannot predict the outcome for each of the newly-filed cases, we have reviewed this year's stock-drop decisions (over two dozen of them) and observed one trend that seems to have gained significant traction: Applying the U.S. Supreme Court's decisions in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009),which require plaintiffs to plead a "plausible" claim to survive a motion to dismiss, courts appear to be more willing to grant motions to dismiss (eight granted to six denied). Typically, these courts have ruled that plaintiffs were unable to plead facts sufficient to overcome the *Moench* presumption of prudence. In addition, defendants have prevailed when cases are decided on the merits, either at trial (one case) or summary judgment (four cases). However, the news is not all positive — and no one should conclude that stock-drop cases will be ending anytime soon — as 2009 also witnessed some of the largest stock-drop settlements of all time.

On the Merits, Defendants Improve to 4-0 at Trial & Prevail on Four Motions for Summary Judgment

Although stock-drop suits have been litigated for over a decade, 2009 saw just the fourth trial involving a publicly traded security. In *Brieger v. Tellabs*, *Inc*., 629 F. Supp. 2d 848 (N.D. Ill. June 26, 2009),[i] the district court ruled in favor of defendants following a bench trial. The court concluded that, even though defendants' predictions that the company would recover turned out to be wrong, defendants considered the information available to them at the time, and plaintiffs had not established that a prudent fiduciary, under those circumstances, was required to cease investment in or divest the employer stock fund. With respect to plaintiffs' disclosure claim, the court concluded that plaintiffs failed to prove that defendants made any material misrepresentations or failed to disclose material information to which the plan participants were entitled. In so ruling, the court rejected plaintiffs' claim that they were entitled to "receive daily or weekly disclosures with the most up-to-date information regarding the company's performance or the performance of its specific products."

In four other cases that were litigated beyond the initial pleadings, the courts also ruled for defendants. The First Circuit, in *Bunch v. WR Grace*, affirmed summary judgment dismissing a "reverse" stock-drop claim in which plaintiffs challenged the sale of employer stock — during a bankruptcy no less — by an independent fiduciary.[ii] In *In re Computer Sciences ERISA Litig.* and *Shirk v. Fifth Third Bancorp*, the companies experienced a decline in stock price due to alleged breakdowns in their respective companies' internal controls. In each case, the court held that a fiduciary's knowledge of the business setbacks that led to the stock price declines, without more, could not overcome the *Moench* presumption.[iii] In *Lingis v. Motorola, Inc.*, a third district court concluded that there was no viable fiduciary breach claim because the plan, in compliance with ERISA § 404(c), offered participants eight diversified funds in addition to the employer stock fund, which offered participants meaningful choices and the ability to diversify their portfolio in order to minimize the risk of large losses.[iv]

Defendants Are Prevailing More Often at the Initial Pleadings Stage

In one of the most interesting decisions issued this year, *In re Citigroup ERISA Litig.*, a district court in the Southern District of New York concluded that there is no fiduciary discretion exercised when the plan documents unequivocally require the offering of the employer stock fund, and hence no basis for a fiduciary breach claim under ERISA.[v] The *Citigroup* court found alternatively that, even if there were fiduciary discretion to override these plan terms, plaintiffs' allegations of financial problems and alleged mismanagement failed to overcome the *Moench* presumption.

The district court in *Citigroup* was not alone in dismissing stock-drop claims in 2009 at the pleadings stage. Six other district courts granted motions to dismiss: four concluded that plaintiffs could not plead facts sufficient to overcome the *Moench* presumption of prudence[vi] and two held that plaintiffs failed to allege "red flags" giving rise to a duty to investigate by the plans' fiduciaries.[vii] These courts, along with those dismissing claims on summary judgment (discussed above), are all in agreement that short-term financial difficulties, irrespective of the cause, do not create a duty to halt or sell off investments in an employer stock fund.

On the other end of the spectrum, a district court allowed participants in a NovaStar-sponsored 401(k) plan to proceed when the stock price had declined 99%, holding that plaintiffs had pled facts indicating a precipitous decline in NovaStar stock, and that defendants knew, or should have known, of NovaStar's "impending collapse."[viii] In addition, a minority of district courts have, with very little analysis and in some cases relying on outdated case law, concluded that plaintiffs' allegations were sufficient to overcome the *Moench* presumption on facts indistinguishable in any meaningful way from cases that were dismissed.[ix]

All of the courts that dismissed plaintiffs' prudence claims also dismissed plaintiffs' disclosure claims. In so ruling, they concluded that defendants were not acting in a fiduciary capacity in connection with the statements allegedly made and/or that defendants had no affirmative duty to inform plan participants about all corporate affairs.[x] In contrast, courts typically let fiduciary disclosure claims go forward when they deny defendants' motion to dismiss the prudence claims.[xi] A district court in Tennessee, however, dismissed plaintiffs' disclosure claims even though it allowed plaintiffs' prudence claims to proceed.[xii] The court reasoned, contrary to the majority of other courts, that the presumption of prudence did not apply at the pleadings stage, but that the disclosure claims were not viable because plan fiduciaries have no duty to disclose non-public information.

Finally, in *Brown v. Medtronic*, 619 F. Supp. 2d 646 (D. Minn. 2009), the court dismissed plaintiff's claims for lack of standing, reasoning that he suffered no harm as a result of selling his employer stock during the very period he alleged it was artificially inflated.

Settlements, But At What Price?

Although defendants continue to obtain favorable rulings on stock-drop claims from district and appellate courts, for a variety reasons, those stock-drop cases that are not dismissed continue to settle for significant sums of money and other forms of relief. In two of the largest settlements ever for stock-drop litigation, Merrill Lynch and Tyco agreed to settle plaintiffs' stock-drop claims for $75 million and $70.5 million, respectively. This year also saw the settlement of stock-drop claims involving investment in Countrywide ($55 million), General Electric ($40 million value with $10 million in cash), JDS Uniphase Corp. ($3 million) and Impac Mortgage Holdings ($300,000).[xiii]

Conclusion

The increased volume of ERISA stock-drop suits arising out of the financial crisis of 2007-2008, at first blush, mirrors the experience of the filings in the wake of the dot-com related crash of 2000-2002. This time around, however, there is more favorable law for defendants to lean on in defending these suits. Nevertheless, we expect the volume of such suits to continue to be strong, as plaintiffs will continue to file them whenever a company experiences an adverse event, or there is a significant downturn in an industry or the broader economy.

Second Circuit Dismisses All Claims in Citigroup Cash Balance Litigation

By Myron D. Rumeld and Russell L. Hirschhorn

After more than four years of litigation, the Second Circuit dismissed a variety of claims brought against a Citigroup defined benefit pension plan arising from the conversion of that plan to a cash balance plan. *See In re Citigroup Pension Plan ERISA Litig.*, 2009 WL 3335910 (2d Cir. Oct. 19, 2009). Reversing the findings of the district court, the Second Circuit held that the plan may comply with ERISA's minimum accrual rules by satisfying the so-called "fractional" test and that ERISA's statutory notice provisions of the cash balance amendments did not require Citigroup to include in its notices a reference to the plan's mechanism for ensuring compliance with the minimal accrual rules where the mechanism employed could only increase, not decrease, benefits.

Citigroup amended its defined benefit plan in 2000 to provide cash balance benefits for many of its employees, and then amended the cash benefit formula again in 2002. Under the plan's formula, benefit credits increased with age and years of service. Interest credits varied in accordance with the 30-year Treasury rate. Ordinarily, defined benefit plans must comply with ERISA's minimum benefit accrual rules, which are designed to prohibit the "backloading" of benefits that accrue at disproportionately higher rates in later years of service. The plan was designed in the first instance to comply with the minimum benefit accrual rules through the use of the 133-1/3% test, but also included a "top-up" provision providing that if the plan was not in compliance with the 133-1/3% test, it would instead comply with the fractional test by crediting to the account of departing participants an amount necessary to satisfy that test. (Under the 133-1/3% test, described in ERISA § 204(b)(1)(B), the rate of benefit accrual in any future year may not be more than one-third greater than the rate in the current year. The fractional test, set out in ERISA § 204(b)(1)(C), looks at whether a departing participant has accrued a benefit at least proportionate to his or her years of service.) It was undisputed that, under the benefit formula and interest rates in effect in 2000 and 2001, the plan was in compliance with the 133-1/3% test so that the "top-up" provision did not come into operation. Following the amendment of the plan in 2002, however, application of the "top-up" provision was required to satisfy the minimum benefit accrual rules.

Plaintiffs advanced a broad range of overlapping and seemingly inconsistent theories to challenge the cash balance plan amendments, including that: the plan was illegally "frontloaded" in violation of ERISA's age discrimination rules; the plan was illegally "backloaded" under the minimum accrual rules; and that, in advance of the cash balance plan amendments, Citigroup failed to issue a notice that complied with Section 204(h), which requires advance notice of amendments that will significantly reduce the future rate of benefit accrual, because the notice it issued had failed to describe the terms of the plan's "top-up" provision.

Following discovery, the district court denied defendants' motion for summary judgment, and granted plaintiffs summary judgment on each of their principal claims. One week later, the court certified a broad class of all participants in the plan.

Even though they successfully argued before the district court that the fractional test did not apply to cash balance plans, on appeal plaintiffs conceded, in light of intervening advice from the Internal Revenue Service, that the test could in fact be invoked, but contended instead that the test was being improperly applied only upon separation of service. The Second Circuit ruled that cash balance plans may satisfy ERISA's minimum accrual rules by complying with the fractional test and that the test is properly applied at separation of service. The court found support for its conclusion in the IRS regulations and Revenue Ruling 2008-07, each of which contained an example of a defined benefit plan that employed the fractional test. With respect to plaintiffs' notice claim, the Second Circuit held that the notice required under Section 204(h) need not include a description of how the plan will comply with the backloading rules. Furthermore, the court ruled that there was no reason to include a summary of the plan's "top-up" provision in the 204(h) notice because this provision acted to increase, rather than decrease, participant benefits.

Although plaintiffs' age discrimination claim was not up on appeal — the district court having stayed proceedings on the age claim pending the Second Circuit's decision in *Hirt v. Equitable Ret. Plan for Employees, Managers & Agents*, 533 F.3d 102, 110 (2d Cir. 2008) — the Circuit noted that it had in the interim ruled in *Hirt* that cash balance plans are not age discriminatory.

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The Second Circuit's decision is not likely to have an impact on many plans, but plan sponsors and fiduciaries can find comfort from the Court's apparent inclination to construe narrowly the obligations of plans to complying with some of ERISA's more technical rules.

Second Circuit Holds Oral Misrepresentations Cannot Give Rise to Claims of Breach of Fiduciary Duty

by Kara Lincoln

In *Ladouceur v. Credit Lyonnais*, 2009 WL 3104039 (2d Cir. Sept. 30, 2009), the Second Circuit held that an oral statement cannot support a fiduciary breach claim for misrepresentation, where the oral statement purported to offer benefits not required by the plan terms. The participants alleged they were told their pension benefits would be calculated based on their original date of hire with the acquired company (a wholly owned subsidiary of Credit Lyonnais), rather than the subsequent date this company merged into Credit Lyonnais. They received nothing in writing to that effect, and the written plan terms said otherwise. When the participants discovered their benefits would be based on the date of the merger, they brought promissory estoppel and breach of fiduciary duty claims.

In affirming summary judgment for defendants, the Second Circuit observed that ERISA plans are governed by written documents that cannot be modified by oral statements. The court had previously applied this principle as a basis for dismissing claims of promissory estoppel, and in *Credit Lyonnais* it applied the same principle in dismissing claims of fiduciary breach.

The court did not hold that oral misstatements could not make out a fiduciary misrepresentation; it did hold, however, that:

> [A] party alleging a breach of fiduciary duty *on the basis of a statement purporting to alter the terms of an ERISA benefit plan* must point to a written document containing the alleged statement.

* * *

Confusion has crept into ERISA fiduciary claims about whether oral statements can mandate benefits *beyond* those offered by the written terms of ERISA plans. While some decisions may still be read to permit such claims, the Second Circuit has made clear this court will not permit such claims to proceed. This is of significant practical importance in plan administration, as claimed memories of what was allegedly said regarding benefits are notoriously suspect, and all too often self-serving.

First Circuit Holds Plan Language Stating That Plan Committee May Delegate Its Authority Satisfies Procedural Requirements of ERISA

By Robert Rachal

In *Wallace v. Johnson & Johnson*, 2009 WL 3294841 (1st Oct. 14, 2009), the First Circuit considered the level of detail needed in plan language to delegate fiduciary authority to decide benefit claims. Because the plan stated that the pension committee could delegate its authority, and it did so to the corporate benefits department through a written instrument, the First Circuit affirmed the decision of the corporate benefits department under an abuse of discretion standard of review.

The underlying issue was whether commissions earned when plaintiff was in a prior management position should be included in the base compensation used to calculate her disability payments. The corporate benefits department, which had been delegated the authority to decide benefit claims by the plan's named fiduciary, the pension committee, concluded that "commissions" for non-management personnel did not include prior commissions earned as a manager since commissions for managers were not included in calculating the premiums for the group disability policy (which was funded solely by employee premiums).

The First Circuit agreed that this was a plausible reading of the plan under an abuse of discretion standard of review. In reaching this conclusion, the court addressed plaintiff's claim that the delegation to the corporate benefits department to decide her claim was faulty (and hence *de novo* review should apply) since the plan allegedly failed to describe adequately the procedures for this delegation under ERISA § 402(b)(2), which requires all plans to "describe any procedure under the plan for the allocation of responsibilities for the operation and administration of the plan," and ERISA § 405(c)(1), which states that a plan may provide for procedures for allocating fiduciary responsibilities and for named fiduciaries to designate persons other than named fiduciaries to carry out fiduciary responsibilities. The court concluded that ERISA required no particular procedures to delegate fiduciary authority, stating:

> For delegation, it is hard to divine what Congress could have wanted any plan to contain beyond a grant of authority to delegate, together with any limitations that might exist on any such grant or the method of making it. Beyond that, we do not see why more would be expected than that the delegating fiduciary comply with any general formalities provided in the plan or under corporate or trust law.

* * *

Wallace is consistent with *Curtiss-Wright Corp. v. Schoonejongen*, 115 S. Ct. 1223, 1229 (1995), in which the Supreme Court held that ERISA was indifferent to the level of detail provided in procedures to amend a plan, *e.g.*, "the company may amend the plan" is sufficient. *Wallace* also is a good reminder, though, that plans should make explicit who has the authority to delegate, and written formalities should be followed in those delegations in order to create a clean record to respond to any challenges to those delegations.

District Court Reforms Billion-Dollar "Scrivener's Error" in Verizon's-Bell Atlantic Cash Balance Plan

By Charles Seemann

As reported in our October 2008 Newsletter, a district court ruled that a plan administrator abused its discretion by unilaterally construing a plan to ignore a drafting error; however, the court left open the possibility that it could reform the plan to correct this error. In *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 2009 WL 367735 (N.D. Ill. Nov. 2, 2009), the court concluded that the $1.67 billion "scrivener's error" could be corrected through plan reformation

The Claim

At issue in *Young* was the calculation of account balances after Bell Atlantic converted its defined-benefit plan to a cash-balance plan. The cash-balance conversion became effective at the end of 1995, prior to a series of corporate transactions merging Bell Atlantic into Verizon. Because the Bell Atlantic defined-benefit plan provided for accelerated accruals closer to retirement, the conversion included a "transition factor," a multiplier used to account for greater employee longevity. For employees with greater longevity, and a larger transition factor, *i.e.*, greater than 1.00, application of the multiplier increased their opening cash balance in the newly converted plan.

Bell Atlantic issued numerous participant communications both before and after the conversion, explaining the operation of the transition factor. Contemporaneous internal memoranda, as well as cost projections and other materials prepared by plan consultants, likewise discussed the operation of the transition factor. These documents all made it clear that Bell Atlantic intended to apply the transition factor only once to each conversion calculation. The plan language was amended to reflect this operation of the transition factor, and a series of drafts passed between in-house counsel, plan consultants and outside counsel. Nevertheless, the final version of the plan included an unequivocal — but mistaken — provision requiring that the transition factor be applied *twice* when calculating each participant's opening cash balance. As noted by the court, a literal application of these plan terms would increase the plan's liabilities by $1.67 billion, and would lead to absurd results, such as shorter-service employees who qualified for the transition factor receiving far greater benefits than employees who had longer service.

After plaintiffs' counsel "discovered" this drafting error claim (it was not in the original complaint or in the initial claims submitted for administrative review), it submitted a claim based on a literal reading of the plan to the plan committee. The committee concluded that this double counting was a mistake that should be ignored in construing the plan. In its earlier ruling after trial, the court held the committee abused its discretion by ignoring unambiguous plan terms that required that the transition factor be applied twice. *Young v. Verizon's Bell Atlantic Cash Balance Plan*, 575 F. Supp. 2d 892 (N.D. Ill. 2008). The court, however, also signaled its willingness to consider a counterclaim seeking reformation of the apparently erroneous plan terms.

The Ruling

After a second trial, the court granted relief on the counterclaim for reformation. As a threshold matter, the court first held that reformation is an authorized form of "equitable relief" under ERISA § 502(a)(3), noting that a number of courts have concluded such relief is authorized under the Supreme Court's decisions such as *Mertens v. Hewitt Assocs*., 508 U.S. 248 (1993) and *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002). The court also concluded that the ERISA "plan documents" rule – *i.e.*, ERISA's requirement that a plan be established and maintained pursuant to a written instrument – did not foreclose reformation under appropriate circumstances. The court then examined the following factors to conclude that reformation was warranted:

Mutual Mistake – The court stated that reformation was appropriate when the plan document did not reflect the intention of the plan drafter, *and* there was objective evidence of intent, such as contemporaneous plan communications expressing the correct construction of the plan to the participants. Applying these principles here, the court observed that: (i) numerous participant communications, including a summary of material modifications, consistently described the conversion calculation as involving a single application of the transition factor, thereby giving participants' notice of the intended plan terms; and (ii) the documents surrounding the plan drafting clearly indicated the drafting was in error.

Reliance – The court found plaintiff had received the plan communications showing the correct construction of the plan, and there was no evidence that any participant had relied on the erroneous plan terms.

The Parties' Course of Dealing – Noting that a course of conduct is "particularly reliable" evidence in a reformation case, the court found that the administrator had consistently paid, and participants had consistently accepted, benefits based on a single-multiplier calculation. In addition, participants' quarterly statements consistently used the same methodology.

Unanticipated Windfall and ERISA Policy Considerations – The court also was concerned that, absent reformation, enforcement of the erroneous plan terms would lead to unwarranted windfalls and absurd results. In addition, enforcing absurd terms imposing more than $1 billion of unexpected liability could deter employers from offering benefits.

After finding that the evidence supported reformation, the court rejected a number of equitable defenses raised by plaintiff. These included a laches defense, with the court finding that Verizon had not unduly delayed seeking reformation, since no participant had previously invoked the erroneous plan terms, and any delay did not prejudice plaintiff. Plaintiff's ratification defense failed as well, since defendants' communications and conduct never manifested any intent to affirm the erroneous plan terms. The court also rejected negligence and unclean-hands defenses, finding that defendants' conduct did not rise to the requisite level of gross negligence, nor was there any evidence that defendants acted deceitfully or in bad faith.

* * *

On these facts, the court reformed the plan to delete the duplicative reference to the transition-factor multiplier. The court's lengthy ruling provides a useful roadmap to plan fiduciaries confronting long-past mistakes in their plan documents. Although it did not address this issue, the court's judgment also may be viewed as consistent with the Supreme Court's observation in *Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 82-84 (1995), that plan administrators have a duty to reject unauthorized plan terms. An appeal of the ruling is likely, and since the appeal will likely address the important issue of when reformation of plan documents is warranted, it will be one worth following.

Rulings, Filings and Settlements of Interest

- ???The May 2008, April 2009, June 2009 and August 2009 issues of the *Newsletter* reported on court decisions addressing the effect of ERISA's preemption provisions on state-level prohibitions against discretionary clauses in insured benefits plans. In *Standard Insurance Co. v. Morrison*, 2009 WL 3429501 (9th Cir. Oct. 27, 2009), the Ninth Circuit affirmed the district court's ruling (*see* May 2008 Newsletter) and held that a Montana statute authorizing regulatory rejection of discretionary clauses was "saved" from ERISA's broad preemptive provisions. In so holding, the *Morrison* court ruled that the statute satisfied the two–part test set forth in *Kentucky Association of Health Plans v. Miller,* 538 U.S. 329 (2003) – namely, that Montana's law: (i) was specifically directed to the insurance industry; and (ii) "substantially affects" the risk-pooling arrangement between the insurer and the insured. In reaching this conclusion, the Ninth Circuit embraced the Sixth Circuit's decision in *American Council of Life Insurers v. Ross*, 558 F.3d 600 (6th Cir. 2009), which sustained a similar Michigan law. As in *Ross*, the plaintiff argued that

discretionary clauses did not affect risk pooling, because risk is pooled at the time the policy issues, not when a benefits decision is made. The Ninth Circuit rejected this contention, noting that *Miller*, *Ross* and several other decisions established "that risk pooling extends to a much wider variety of circumstances." Relying in part on *Ross*, the court also rejected plaintiff's contention that the Montana law interfered with ERISA's exclusive remedial regime, noting that no new remedies are authorized under the Montana law.

- The Eighth Circuit, in *McCullough v. Aegon USA, Inc.*, 2009 WL 3575518 (8th Cir. Nov. 3, 2009), dismissed a participant's fiduciary breach and prohibited transaction claims relating to an alleged imprudent investment in a defined benefit plan because the relief sought was not "appropriate relief" under Section 502(a)(2) where the plan was overfunded. Plaintiffs claimed that defendants caused the plan to invest in funds offered by Aegon subsidiaries and affiliates and to purchase products and services from such affiliates and subsidiaries, resulting in the payment of fees "that were higher than the norm." In dismissing these claims, the court determined that allowing a participant to bring suit where the plan is overfunded, "would not advance ERISA's primary purpose of protecting individual pension rights, because the pension rights of such plaintiffs are 'fully protected,' and 'would if anything be adversely affected by subjecting the Plan and its fiduciaries to costly litigation.'"

- In *Raseneck v. AIG Life Insurance Co.*, 2009 WL 3526490 (10th Cir. Nov. 2, 2009), the Tenth Circuit addressed the standard of review to apply when a claim is "deemed denied" because the plan administrator did not issue a timely decision. Consistent with other courts' rulings on this issue, the Tenth Circuit held such claims should be reviewed *de novo* by the court, not under an arbitrary and capricious standard of review.

In *Brubaker, et al. v. Deere & Co.*,No. 08 Civ. 113 (S.D. Iowa Oct. 16, 2009), a district court held a bifurcated bench trial to determine if Deere & Company violated provisions of ERISA when it made changes to its retiree health care plan. The retirees alleged that Deere made "repeated promises of lifetime medical benefits" to its employees. The retirees also argued that the 2008 changes to their medical benefits breached "company-wide policies" and promises that they would receive, throughout their retirement, the medical benefits they enjoyed as active employees. The court ultimately agreed with Deere, finding that Deere "repeatedly and plainly stated in plan documents, including SPDs, that it retained the right to amend, modify, or terminate the benefit plans."

1 The other three cases to be decided after trial are: *DiFelice v. US Airways, Inc.*, 397 F. Supp. 2d 758 (E.D. Va. 2005), *aff'd*, *Difelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007); *Landgraff v. Columbia/HCA Healthcare Corp. of Am.*, No. 3-98-0090, 2000 U.S. Dist. LEXIS 21831 (M.D. Tenn. May 24, 2000), *aff'd*, 30 Fed. Appx. 366 (6th Cir. 2002); *Nelson v. IPALCO Enters.*, 480 F. Supp. 2d 1061 (S.D. Ind. 2007), *aff'd*, 512 F.3d 347 (7th Cir. 2008).

[ii] 555 F.3d 1, 9-10 (1st Cir. 2009) (independent fiduciary did not breach its fiduciary duties by divesting out of the employer stock fund in light of the company's bankruptcy, as well as the continued threat of asbestos litigation).

[iii] *In re Computer Sciences ERISA Litig.*, 2009 WL 2156696, at *5-6 (C.D. Cal. July 13, 2009) (no fiduciary breach when defendants failed to divest the stock fund upon learning of the SEC's stock option backdating investigation); *Shirk v. Fifth Third Bancorp*, 2009 WL 692124, at *13 (S.D. Ohio Jan. 29, 2009) (allegations that Fifth Third was "a complete and total mess" insufficient as matter of law to overcome *Moench* presumption and plaintiffs failed to present evidence that reasonable fiduciary in similar circumstances would act differently).

[iv] 2009 WL 1708097, at *14 (N.D. Ill. June 17, 2009); *but see In re Washington Mutual, Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919, 2009 WL 3246994, at *7-8 (W.D. Wash. Oct. 5, 2009) (denying motion to dismiss and concluding that ERISA § 404(c) had no application to claim regarding imprudence of offering employer stock fund as an investment option).

[v] 2009 WL 2762708, at *6-9, 15-19 (S.D.N.Y. Aug. 31, 2009); *Cf. In re Washington Mutual*, 2009 WL 3246994, at *6-7 (allowing fiduciary breach claim to proceed where plan document provided defendants with discretion to remove the employer stock fund).

[vi] *See In re Harley Davidson, Inc., Sec. Litig.*, 2009 WL 3233747, at *11 (E.D. Wis. Oct. 8, 2009) (stating a viable claim of imprudence requires more than allegations that there were gaps between supply and demand and a corresponding bad quarter and, furthermore, the decline in stock price was in no way indicative of a "chronic, deteriorating financial condition"); *Benitez v. Humana, Inc.*, 2009 WL 3166651, at *8 (W.D. Ky. Sept. 30, 2009) (plaintiffs provided no facts suggesting that defendants actually knew of the internal control and old software problems that caused the miscalculation of prescription drug plans and projected earnings and the existence of these mistakes was not enough to suggest defendants had knowledge of them); *Johnson v. Radian Group, Inc.*, 2009 WL 2137241, at *16 (E.D. Pa. July 16, 2009) (even if C-BASS, a corporation in which Radian held a 46% equity interest during the class period, faced a "monumental liquidity crisis" as alleged, the allegations did not show Radian's viability was threatened); *In re Avon Products, Inc.*, 2009 WL 848017, *adopted*, 2009 WL 884687, at *1 (S.D.N.Y. Mar. 30, 2009) (plaintiffs allegations were insufficient where the company was earning hundreds of millions of dollars in profits and paying dividends for many years before, during and after the class period); *see also In re Huntington Bancshares ERISA Litig.*, 620 F. Supp. 2d 842, 852 (S.D. Ohio 2009) (dismissing fiduciary breach claims for continuing to offer 401(k) plan participants company stock fund irrespective of whether *Moench* applied, upon observing that stock price, which declined from $22 to $7 per share, "moved in tandem with the other regional banks in Huntington's geographic footprint over the Class period").

[vii] *See Benitez*, 2009 WL 3166651, at *7-8 (the existence of internal control and old software problems that caused the miscalculation of prescription drug plans and projected earnings did not trigger a duty to investigate); *Rogers v. Baxter Int'l, Inc.*, 2009 U.S. Dist. LEXIS 89565 (N.D. Ill. Sept. 28, 2009) (no reason to investigate based on company's financial restatement arising out of problems with a Brazilian subsidiary)

[viii] *See Jones v. Novastar Financial, Inc.*, 2009 WL 331553 (W.D. Mo. Feb. 11, 2009).

[ix] *See Sims v. First Horizon Nat'l*, 2009 WL 3241689, at *23-24 (W.D. Tenn. Sept. 30, 2009) (allegations that the stock price declined 90% were sufficient to make requisite "showing" to survive dismissal); *In re Merck & Co., Inc.*, 2009 WL 2834792, at *3 (D.N.J. Sept. 1, 2009) (defendants knew, or should have known, about adverse clinical research regarding best-selling drug (Vytorin)); *Shanehchian v. Macy's Inc.*, 2009 WL 2524562, at *8-10 (S.D. Ohio Aug. 14, 2009) (defendants failed to disclose problems integrating May's into Macy's); *In re Pfizer Inc. ERISA Litig.*, 2009 WL 749545, at *11 (S.D.N.Y. Mar. 20, 2009) (relying on dated case law, court concluded that *Moench* presumption was evidentiary standard not properly decided at pleadings stage).

[x] *In re Harley Davidson*, 2009 WL 3233747, at *12; *Benitez*, 2009 WL 3166651, at *10-11; *Johnson*, 2009 WL 2137241, at *18-21; *Shirk*, 2009 WL 692124, at *17-19.

[xi] *Jones*, 2009 WL 331553, at *6; *Shanehchian*, 2009 WL 2524562, at *7; *In re Merck & Co., Inc.*, 2009 WL 2834792, at *4. *But see In re Washington Mutual, Inc. Sec., Derivative & ERISA Litig.*, No. 2:08-md-1919, 2009 WL 3246994, at *9 (dismissing plaintiffs' disclosure claim because plan fiduciaries had "no obligation to engage in a broad discussion of WaMu's stock health").

[xii] *Sims*, 2009 WL 3241689, at *22.

[xiii] *See In re Merrill Lynch & Co. Securities, Derivative & ERISA Litig.*, No. 07-9633 (S.D.N.Y.); *Alvidres v. Countrywide Fin. Corp.*, No. 07-05810 (C.D. Cal. 2009); *Overby v. Tyco Int'l Ltd.*, No 02-1357 (D.N.H.); *Cavalieri v. Gen. Elec. Co.*, No. 05-00315 (N.D.N.Y.); *In re JDS Uniphase ERISA Litig.*, No.03 Civ. 4743 (N.D. Cal. Oct. 15, 2009); *Page v. Impac Mortgage Holdings*, No. 07-1447 (C.D. Cal.).

Related Professionals

??Russell L. Hirschhorn
Partner