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The ERISA Litigation Newsletter

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Editor's Overview

This month was a busy one for developments in fee litigation. The lead article discusses the Eighth Circuit's ruling in *Braden v. Wal-Mart*, in which the court reinstated fiduciary breach claims against Wal-Mart. It remains to be seen whether the Eighth Circuit's decision will be viewed as distinguishable on its facts from the Seventh Circuit's decision in *Hecker v. Deere*, which dismissed similar claims. Another article addresses the latest decision in the fee litigation saga of *Haddock v. Nationwide Financial Services Inc*. In a controversial decision, the *Haddock* district court certified a class of trustees of approximately 24,000 plans that held group or individual variable annuity products with Nationwide Financial Services. Finally, the *Rulings, Filings and Settlements of Interest* section discusses the first settlement of a large plan fee litigation claim, i.e., the $16.5 million settlement proposed in *Martin v. Caterpillar*.

Two articles address decisions rejecting participants' claims that their respective plans violated ERISA's anti-cutback rule. In both cases, *Wetzler v. Illinois CPA Society & Foundation Retirement Income Plan* and *Tasker v. DHL Retirement Savings Plan*, the courts ruled that there was no violation, based on guidance issued from the Treasury. Plan sponsors and fiduciaries should take comfort that, in navigating through the highly complex world of ERISA, they can rely on the plain reading of the Treasury's guidance in structuring and operating their plans.

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

Plausibility Is in the Eye of the Beholder: Eighth Circuit Reverses Dismissal of Fee Litigation Claims in *Braden v. Wal-Mart*

By Robert Rachal

In *Braden v. Wal-Mart*, 2009 WL 4062105 (8th Cir. Nov. 25, 2009), the Eighth Circuit became the second court of appeals to consider on a motion to dismiss whether plaintiffs pled a plausible fiduciary breach claim challenging the fees paid by large 401(k) plans. Unlike the Seventh Circuit, which rejected similar claims in *Hecker v. Deere*, 556 F.3d 575 (7th Cir. 2009), the Eighth Circuit in *Wal-Mart* held that plaintiff pled a plausible claim.

The Eighth Circuit first addressed whether the plaintiff had standing to challenge actions occurring before he became a participant in the plan, and concluded that it was plausible that earlier actions may have caused him harm (*e.g.*, earlier selections of allegedly imprudent funds that were still in place when the plaintiff became a participant). The court stated, however, that the plaintiff will eventually need to prove evidence of injury to maintain standing on these pre-participation claims.

On the merits, plaintiff alleged that: (i) the Wal-Mart plan was large enough to qualify for cheaper institutional share classes, yet offered mostly retail funds; (ii) the majority of funds offered charged 12b-1 marketing fees, and more expensive funds were kept despite underperforming their market benchmarks; and (iii) the funds made revenue-sharing payments to the trustee that were not for services rendered, but to be included in the plans. The Eighth Circuit held these allegations were sufficient to state a plausible claim that the selection process was flawed, and that overpriced funds were selected despite the availability of better options. In so ruling, the Eighth Circuit observed that although there may be lawful reasons why these funds were selected, a plaintiff did not need to plead facts to rebut possible lawful explanations, at least if the lawful explanations were not obvious and more likely.

In concluding that these allegations stated a plausible claim, the Eighth Circuit distinguished *Hecker v. Deere* on the grounds that the plan in that case offered access to more than 2,500 mutual funds, whereas in *Wal-Mart* the plan offered a "far narrower range of investment options," which under the pled facts made it more plausible that this plan was imprudently managed. The Eighth Circuit also noted that ERISA was a remedial statute and that the Secretary of Labor (who had filed an amicus brief on behalf of plaintiffs) had warned of imposing "unnecessarily high pleading standards" in ERISA cases. Finally, the Eighth Circuit noted that while ERISA plaintiffs are required to plead sufficient facts to show that the case is not a fishing expedition or strike suit, plaintiffs often lack the information necessary to make out their claims until discovery commences.

On the disclosure claim, the Eighth Circuit made a rather unusual ruling to the effect that if plaintiff's inferences of improper selection criteria and conflicts of interest turn out to be true, then those alleged facts should have been disclosed to the participants. It thus appears that the Court made the disclosure claim derivative of plaintiff's imprudent selection claim.

Finally, the Eighth Circuit denied defendants' motion to dismiss plaintiff's claim that revenue sharing payments to the trustee, Merrill Lynch, constituted a prohibited transaction. The Eighth Circuit held that plaintiff stated a plausible claim of unreasonable compensation under ERISA Section 406(a)(1)(C), and that plaintiff did not need to plead specific facts showing the unreasonableness of the compensation, at least where, as here, the fiduciary defendants allegedly asserted that the amounts paid on revenue sharing were secret pursuant to Wal-Mart's trust agreement with Merrill Lynch.

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Wal-Mart and *Deere* appear to use different approaches to determine what constitutes a plausible claim in fee litigation. *Deere* built on the premise that the 401(k) market is very competitive to conclude that, absent allegations of improper conduct, it was implausible to infer that the Deere fiduciaries overpaid on plan fees. The court in *Wal-Mart* was willing to assume the viability of such a claim, even while noting there may have been many lawful reasons for selecting the funds at issue. The divergent approaches of the two courts also may be explained, however, by the significant factual distinctions between the two cases. First, the Deere plan provided a brokerage window offering access to over 2,500 mutual funds. Second, Deere involved negotiated bundled arrangements with Fidelity for which Deere negotiated the administrative costs borne by Deere and the asset-based fees borne by the plan. By contrast, the trustee for the Wal-Mart plan, Merrill Lynch, is alleged to have collected revenue sharing payments from outside mutual funds as the price to participate in the Wal-Mart plan. The Eighth Circuit's suspicion of these arrangements appeared to be heightened by defendants' contention that the amount of these payments were confidential and need not be disclosed.

District Court Certifies a Class of 24,000 Plan Trustees in the *Haddock v. Nationwide* Revenue Sharing Litigation

By Robert Rachal

In the most recent ruling in *Haddock v. Nationwide Financial Services Inc.*, 2009 WL 3762339 (D. Conn. Nov. 6, 2009), the district court certified a class action of trustees of approximately 24,000 plans that held group or individual variable annuity products with Nationwide. Plaintiffs contend that Nationwide used its aggregation of plan investments to extract revenue sharing payments from mutual funds in exchange for investing the plan assets with those mutual funds. According to plaintiffs, Nationwide was a plan fiduciary because, even though the plan trustees selected the funds to offer in each plan, Nationwide acted as a gatekeeper in fund selection by determining the pool of mutual funds from which the plan trustees could select. Plaintiffs further argue that Nationwide's contractual right to delete mutual funds was sufficient to make it a fiduciary, regardless of whether Nationwide ever exercised this right.

On the class issues, the district court first held that a plan trustee had standing to sue on behalf of thousands of other plans for which he was not a trustee. With respect to typicality and adequacy, the court held the annuity contracts were sufficiently similar (or any differences could be dealt with class wide) to justify a class. Nationwide also pointed out that it gave notice of the revenue sharing payments to the plan trustees, who had to approve the changes to the group annuity contracts to permit these payments. Although the district court agreed that this raised ratification issues, and may subject the plan trustees to Nationwide's counter-claim for breach of fiduciary duty, the court reasoned that these issues did not defeat certification because they would apply class-wide.

Finally, the district court certified the class under Rule 23(b)(2). Under the Second Circuit's test in *Robinson v. Metro-North Commuter Railroad Co.*, 267 F.3d 147 (2d Cir. 2001), a Rule 23(b)(2) class can be appropriate if the declaratory or injunctive relief predominates over the monetary relief. In finding this standard was satisfied under the ad hoc test applicable in its circuit, the district court appeared to be persuaded that plaintiffs' request for disgorgement (*i.e.*, Nationwide's profits from revenue sharing) avoided individualized damage inquires that would otherwise be required to prove the losses to each of the 24,000 plans. The court questioned whether Nationwide could offset plan services in figuring out its profits from revenue sharing, and stated that if this became relevant and resulted in individualized inquires on the services provided for each plan, it could de-certify the class for the damages phase.

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Whether a class of plan trustees can be certified is a controversial issue in ERISA litigation. For example, in *Ruppert v. Principal Life Insurance Company*, 252 F.R.D. 488, 499 (S.D. Iowa, 2008), the district court refused to certify a class of plan trustees in a suit asserting very similar revenue-sharing claims. The court found that there was a host of individualized fact issues for each plan, including the role of the plan administrator and any advisor in relation to Principal's role. In contrast, the district court in *Haddock* seemed to assume that all plan trustees (and any of their advisors) played a uniform, passive role in relation to plan management and administration, despite being informed of and having had to approve Nationwide's receipt of the revenue sharing payments. Whether other courts will agree that this is a valid, or even a permitted, assumption for plan administrators is an open question.

Seventh Circuit Rules No Anti-Cutback Violation In Limiting The Availability Of A Lump Sum Distribution

By Russell L. Hirschhorn

The Seventh Circuit, in *Wetzler v. Illinois CPA Society & Foundation Retirement Income Plan*, 2009 WL 3735771 (7th Cir. Nov. 10, 2009), ruled that a plan amendment that expressly limited the circumstances under which a lump sum distribution would be available to highly compensated employees (HCEs) did not violate ERISA Section 204(g), ERISA's anti-cutback rule.

In order to comply with Code Section 401(a), a plan must not discriminate significantly in favor of HCEs. Where, as here, the plan was underfunded, a lump sum distribution to a HCE would violate Code Section 401(a) and the applicable Treasury Regulation, Sections 1.401(a)(4)-5(b)(2) and (3). In 2004, upon discovering that an HCE had been improperly paid a lump sum benefit in violation of this regulation, the Society's plan was amended to ensure compliance with the Code by providing that all plan distributions would be subject to this regulation.

Plaintiff Wetzler was a HCE who, at the time of his retirement in 2006, had worked for his employer for twenty-two years and was a vice-president. Upon retirement, Wetzler requested a lump sum distribution of his pension benefit. The parties agreed that, at all relevant times, the plan was underfunded, so a lump-sum distribution would have violated Code Section 401(a). Wetzler argued that the 2004 plan amendment constituted an illegal cutback in violation of ERISA Section 204(g). The court first concluded that the plan administrator's decision to construe the plan (which was explicitly intended to be a tax qualified plan) as subject to and consistent with the tax qualification prohibition against these types of lump sum distributions to be "well reasoned." The court also held that the 2004 plan amendment "did not eliminate or affect any lump-sum option that was previously available to plan members" and there was thus no cutback in benefits.

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The Seventh Circuit's decision should provide comfort to plan sponsors that they can rely on the Treasury's guidance in structuring, maintaining, and interpreting complex ERISA plans.

District Court Applies Treasury Regulation To Conclude That The Elimination of Fund Transfer Feature in a Floor-Offset Arrangement Was Not a Prohibited Cutback in Benefits

By Brian Neulander

In *Tasker v. DHL Retirement Savings Plan*, No. 1:09-cv-10198-NG (D. Mass. Nov. 20, 2009), the district court addressed an issue of first impression regarding ERISA's anti-cutback rule: whether a plan amendment eliminating the right to transfer funds between the employer's defined benefit and defined contribution plans improperly reduced plaintiff's protected benefits in violation of ERISA Section 204(g).

Plaintiff worked for Airborne Express, Inc. for thirty-two years, and was a participant in Airborne's defined contribution and defined benefit plans. In what is known as a "floor-offset" arrangement, the defined contribution benefit reduced the benefit received under the defined benefit plan. Airborne allowed plan participants to transfer their defined contribution funds to the defined benefit plan, which enabled participants to collect a larger combined total benefit than if they elected to receive separate benefits from each plan. Airborne was acquired by DHL in 2003; DHL subsequently merged the former Airborne plans into the existing DHL defined benefit and defined contribution plans. During the plan mergers, DHL eliminated the option of transferring funds between plans. Plaintiff asserted claims under ERISA Sections 502(a)(1)(B), 502(a)(2), and 502(a)(3), claiming, in pertinent part, that elimination of the right to transfer benefits between the plans reduced his expected total benefit because the transfer would have taken advantage of favorable actuarial assumptions used by the defined benefit plan.

Relying on 26 C.F.R. § 1.411(d)-4, Q&A-2(b)(2)(viii), the court granted defendant's motion to dismiss because that Treasury regulation allows plans "to eliminate provisions permitting the transfer of benefits between and among defined contribution plans and defined benefit plans." In reaching its conclusion, the court observed that: (i) the reasonableness of the regulation was not at issue; (ii) plaintiff's argument regarding the statutory text protecting "optional forms of benefit" was unfounded because the statute also explicitly grants the Secretary of the Treasury the authority to exclude from protection optional forms of benefits; and (iii) the applicable regulation creates an exception to the general anti-cutback rule, i.e., the text of the regulation unambiguously permits the reduction of "protected benefits" by eliminating the transfer of funds between plans.

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Like the Seventh Circuit's decision discussed above, this decision is helpful for plan sponsors and other ERISA defendants insofar as the court was willing, at the motion to dismiss stage, to enforce the plain text of the applicable Treasury regulation. This decision also should provide some comfort to plan sponsors that they can rely on Treasury's guidance in structuring, maintaining and interpreting complex ERISA plans.

Rulings, Filings and Settlements of Interest

- In *Sunder v. U.S. Bancorp Pension Plan*, 2009 WL 3714430 (8th Cir. Nov. 9, 2009), the Eighth Circuit held that U.S. Bancorp's cash balance plan did not violate ERISA's anti-cutback rules when it used a rate other than the Code Section 417(e) rate to determine the present value for purposes of setting the opening account balance in the cash balance plan. In so ruling, the court found nothing in the plan or ERISA, prior to the enactment of the Pension Protection Act of 2006, that prescribed the interest rate to be used.
- Plaintiffs in the *Monster Worldwide* and *Marsh & McLennan* stock-drop litigations sought court approval of their settlements for $4.25 million and $35 million, respectively. *See Taylor v. McKelvey,* 06 Civ. No. 8322 (S.D.N.Y.); *In re Marsh ERISA Litig.,* 04 Civ. No. 8157 (S.D.N.Y.).
- In *Martin v. Caterpillar, Inc.,* 07 Civ. No. 1009 (C.D. Ill.), plaintiffs claimed that Caterpillar violated ERISA when it mismanaged the administration of four of its 401(k) plans by, *inter alia*, maintaining imprudent investment options, holding an excessive amount of cash in its company stock fund, and paying excessive fees to

its subsidiary, Caterpillar Investment Management, Ltd. On November 5, 2009, the parties filed a joint motion for preliminary approval of a settlement pursuant to which the company will pay $16.5 million into a settlement fund, from which $5.5 million in attorneys' fees and $325,000 in litigation costs will be awarded.

- In *Longaberger Co. v. Kolt,* 2009 WL 3806079 (6th Cir. 2009), the Sixth Circuit ruled that The Longaberger Company was entitled to reimbursement of a participant's medical expenses from Kolt, the plan participant's attorney, who had held the participant's personal injury settlement award in escrow. In so ruling, the court rejected Kolt's argument that the company was not seeking equitable restitution because he had dispersed the majority of the settlement award prior to the company initiating the lawsuit. Observing that the plan contained "clear and unambiguous reimbursement provisions" and provided that the plan "shall have a first priority lien upon the proceeds of any recovery," the court determined that the plan's lien attached to the settlement fund at the time it was identified and received, and not as of the time the lawsuit was commenced. Thus, Kolt could not avoid a lien simply by transferring the money out of his escrow account.

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