Proskauer

The ERISA Litigation Newsletter

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Editor's Overview

This month's articles focus on two different, but equally important, sections of ERISA. First, Charles Seemann provides insight on the U.S. Supreme Court's decision in *Hardt v. Reliance Insurance Co.*, in which the Court resolved a split among the Circuits and ruled that a party need not be a "prevailing party" in order to obtain an attorneys' fee award in an ERISA action. In its place, the Court determined that only "some degree of success" is necessary. As Charles discusses, the Court's failure to define the scope of the "some degree of success" standard may have left us with more questions than answers.

Our second article reviews a recent decision from the U.S. District Court for the Northern District of Illinois in *Rogers v. Baxter, Int'l* in which the court granted Baxter's motion for summary judgment and concluded that the safe harbor defense found in ERISA § 404(c) warranted dismissal of plaintiff's stock-drop claims. As the authors (Myron Rumeld, Russell Hirschhorn and Kara Lincoln) discuss below, the court's ruling may provide the Seventh Circuit with an opportunity to issue the first ruling from a Circuit Court on whether Section 404(c) provides a defense to the selection of investment options under a 401(k) plan.

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

Hardt v. Reliance Standard Life Ins. Co.: The Supreme Court Resolves ERISA Fee Dispute, Answering Some Questions and Raising Others[1]

By Charles F. Seemann III

ERISA's attorney-fee provision, 29 U.S.C. §1132(g), affords a court discretion to award reasonable attorneys' fees "to either party" in an action to recover benefits. The statute does not explicitly restrict fee awards to a "prevailing party," a term of art which has been interpreted extensively in other statutory contexts. The Circuit Courts had been divided on whether a fee recovery in ERISA claims is limited to a prevailing party: the First, Fourth, Seventh and Tenth Circuits have applied a prevailing-party requirement, while the Second, Fifth and Eleventh have expressly rejected any such requirement.[2]

Recently, the U.S. Supreme Court resolved this conflict in *Hardt v. Reliance Standard Life Insurance Co.*, No. 09-448, 2010 WL 2025127 (U.S. May 24, 2010), rejecting an appellate-court decision limiting ERISA fee awards to prevailing parties. The Court's opinion leaves litigants with uncertainty, however, as to what level of success a claimant must achieve to become eligible for an award of attorneys' fees, and what criteria should be applied to that determination.

Background

Bridget Hardt was a participant in a group Long-Term Disability (LTD) insurance plan administered by her employer, Dan River. Reliance Standard Life Insurance Company insured the plan, and both determined benefit eligibility and paid benefits. After having two surgeries for carpal tunnel syndrome in her wrists, Hardt stopped working at Dan River in January 2003.

In August 2003, Hardt applied to Reliance for LTD benefits. At the request of Reliance, Hardt received a functional capacities evaluation, which confirmed major limitations in Hardt's neck, upper extremities and hands, but concluded that Hardt could perform sedentary work. Reliance denied LTD benefits on these findings, but reversed its decision after Hardt pursued an administrative appeal, and awarded Hardt temporary disability benefits for twenty-four months.

During this time, Hardt also was diagnosed with hereditary small-fiber neuropathy, a neural disorder, and applied to the Social Security Administration (SSA) for disability benefits. In support of the application, Hardt submitted two physician reports describing her symptoms and concluding that Hardt could not hold employment, even in a sedentary role, for a regular and sustained period. Both reports also explicitly opined that Hardt was not a malingerer. The SSA awarded disability benefits to Hardt, finding she could not return to her former employment or make an adjustment to perform other work.

Shortly thereafter, Reliance notified Hardt that her temporary disability benefits were about to expire. Hardt filed another administrative appeal, submitting the medical records related to her neuropathy, as well as the physician reports submitted to the SSA. Reliance asked Hardt to supplement this material with another functional capacities evaluation. Significantly, although Reliance was aware of Hardt's neuropathy diagnosis, it did not ask the evaluators to review Hardt for neuropathic pain when it referred her for the updated evaluation. Reliance obtained two evaluations, one from a physician and one from a vocational rehabilitation counselor, and based on these reports, denied Hardt's second appeal.

Hardt brought suit, alleging that Reliance wrongfully denied her claim for LTD benefits. The district court remanded Hardt's LTD claims for additional administrative review, on the ground that Reliance ignored Hardt's neuropathy and neuropathic pain in making its determinations. *See Hardt v. Reliance Standard Life Ins. Co.*, 540 F. Supp. 2d 656 (E.D. Va. 2008). The court was highly critical of the opinions on which Reliance based its decision, noting that the Reliance physician's report was "extremely vague and conclusory." The court also found that Reliance had improperly ignored or disregarded much of the evidence submitted by Hardt, and held that Reliance's denial of LTD benefits was "not based on substantial evidence." *Id.* at 663. The court also found "compelling evidence" that Hardt was totally disabled due to her neuropathy, that "the plan administrator has failed to comply with the ERISA guidelines" and that Hardt "did not get the kind of review to which she was entitled under applicable law." Accordingly, the court gave Reliance thirty days "to adequately consider[] all the evidence," failing which, the court would enter judgment for Hardt. *Id.* at 664.

Following the remand, Reliance awarded Hardt both prospective LTD benefits and accrued past benefits. Hardt moved in the district court for attorney's fees and costs under ERISA's fee provision, 29 U.S.C. § §1132(g)(1). The district court awarded Hardt's attorney's fees, applying a five-factor test developed under other federal fee-shifting statutes.[3] On appeal, the Fourth Circuit reversed the award of attorney's fees, holding that Hardt had not established that she was a "prevailing party." *Hardt v. Reliance Standard Life Ins. Co.*, 336 Fed. Appx. 332, 335-36 (4th Cir. 2009) (*per curiam*). The decision was based on the Fourth Circuit's conclusion that a fee claimant qualifies as a "prevailing party" only if it obtains an "enforceable judgment on the merits" or a "court-ordered consent decree." *Id.* at 335 (internal punctuation omitted). The Court of Appeals reasoned that, because the remand order "did not require Reliance to award benefits to Hardt," it did not constitute an "enforceable judgment on the merits," thereby precluding Hardt from establishing prevailing-party status. *Id.* at 336 (internal punctuation omitted).

The Supreme Court's Decision

Hardt filed a petition for a writ of *certiorari* seeking review of two questions. First, did the Fourth Circuit correctly hold that ERISA fee-shifting status limits fees recoveries to a "prevailing party?" Second, is an order remanding a claim for reconsideration of benefits eligibility sufficient to support a fee award under ERISA? The Supreme Court granted *certiorari* on January 15, 2010 and held oral argument on April 26, 2010.

On May 24, the Court unanimously[4] reversed the Fourth Circuit in an opinion authored by Associate Justice Clarence Thomas. The Court made short work of the Circuit Court's conclusion that ERISA's fee-shifting provision included a prevailing-party requirement, stating: "[b]ecause Congress failed to include in §1132(g)(1) an express 'prevailing party' limit on the availability of attorney's fees, the Court of Appeals' decision adding that term of art to a fee-shifting statute from which it is conspicuously absent more closely resembles inventing a statute rather than interpreting one." *Hardt*, Slip Op. at 9 (internal punctuation omitted).

The Court did not, however, relieve the participant altogether of any required showing of success. Invoking the so-called "American Rule," which posits that litigants bear their own attorney's fees unless a statute or contract provides otherwise, the Court concluded that "some degree of success on the merits" was required before a court could make a discretionary fee award. The Court then elaborated on the "some success on the merits" standard:

> A claimant does not satisfy that requirement by achieving "trivial success on the merits" or a purely procedural victor[y]," but does satisfy it if the court can fairly call the outcome of the litigation some success on the merits without conducting a "lengthy inquir[y] into the question whether a particular success was 'substantial or occurred on a 'central issue.'"

Id., Slip Op. at 12.

The Court held that Hardt satisfied this standard in light of Reliance's initial failure to conduct a review that complied with ERISA; the lower court's statement that there was "compelling evidence" that Hardt was totally disabled by her neuropathy; and Reliance's subsequent reversal of its decision and award of LTD benefits once the district court ordered a full review of Hardt's records *Id*. It therefore concluded that the district court "properly exercised" its discretion to award Hardt's attorney's fees, and reversed the Fourth Circuit's decision vacating the fee award. However, the Court declined to decide whether an order remanding a benefits claim for further administrative review would, without more, support a fee award.

In the course of the opinion, the Court also stated that application of the five-factor test applied by the district court and numerous other courts was "not required for channeling a court's discretion when awarding fees" under ERISA. The Court nevertheless indicated in a footnote that a court "may consider" these five factors after determining that a claimant has achieved enough success to be eligible for a fee award. *Id*., Slip Op. at 12 & n.8.

Proskauer's Perspective

Hardt will clearly change the law in those circuits that had imposed a prevailing-party requirement on parties seeking a fee award in ERISA cases. The decision may also influence other significant issues impacting attorney's fee awards, but as to these issues the Court's guidance is much less clear.

First, in rejecting the five-factor test as a requirement for evaluating fee requests, the Court's opinion in *Hardt* potentially untethers future ERISA fee awards from a well-understood decisional framework. In the wake of *Hardt*, courts "may consider" these five factors, but appear free to fashion their own analytical approaches.

The newly enunciated "some success on the merits" standard may create even greater confusion, by leaving open the question about what level of success is adequate to support a fee award. The potential confusion is compounded by the Court's refusal to resolve the issue of whether a remand for further administrative review, without more, makes a claimant eligible for a later fee award. In many cases, courts will order further administrative review to remedy a procedural defect, without commenting specifically on the merits of the underlying claims. The prospects for these types of remands will likely increase in the wake of the Supreme Court's recent decision in *Conkright v. Frommert*, 130 S.Ct. 1640 (U.S. Apr. 21, 2010), which held that deference to the plan administrator is required even where the administrator had already made good-faith errors in determining a claim for benefits. In those situations, one can expect claimants to argue that *Hardt* makes them eligible for a fee award as a matter of course; the plans, on the other hand, will likely seek to draw the contrary inference from *Hardt*'s refusal to state that claimants are automatically eligible for a fee recovery where a remand is followed by a benefit award.

It also is unclear whether the *Hardt* decision will have the desired effect of increasing out-of-court resolutions of benefit claims. At first blush, the decision would appear intended to do precisely that, insofar as it would appear to deter the practice of "tactical mooting" – maneuvering by plan administrators to moot a fee request by awarding benefits to those claimants who are successful in obtaining additional, court-ordered review. Both Hardt and some *amici curiae* expressed concerns that, by leaving open the prospects for such tactical mooting, the prevailing-party rule gave plan administrators an incentive to force claimants to litigate their claims. Given the uncertainty that remains, however, as to whether a participant will be entitled to attorney's fees if benefits are awarded following an ordinary remand, the *Hardt* decision may discourage administrators from awarding benefits following such remands, and may instead encourage further litigation, out of fear that a decision awarding benefits could result in substantial attorney's fee awards.

In short, while resolving one issue with respect to attorney's fees awards that had divided the courts, *Hardt* left us with many other issues, of equal or greater practice significance, that may similarly divide the courts in the future.

District Court Ruling in Stock-Drop Litigation Potentially Breathes New Life Into Section 404(c) Safe Harbor Defense[5]

By Myron D. Rumeld, Russell L. Hirschhorn & Kara Lincoln

In their continued efforts to combat the rising tide of employer stock-drop lawsuits, plan fiduciaries have frequently relied on a defense based on ERISA § 404(c), 29 U.S.C. § 1104(c). In relevant part, Section 404(c) provides that pension plan fiduciaries will be relieved of liability resulting from participants' decisions related to their plan investments where a pension plan provides for individual accounts, permits participants to exercise control over the assets in their accounts and participants actually exercise such control. [6]

Thus far, Section 404(c) has generally proven to be an ineffective means for dismissing stock-drop lawsuits at the early stages of litigation, for one or more of the following three reasons. First, some courts have declined to evaluate Section 404(c) defenses on a motion to dismiss because those courts decline to reach an affirmative defense at this stage of the litigation. *See*, *e.g.*, *In re Regions Morgan Keegan ERISA Litigation*, No. 08-CV-2192, 2010 WL 809950 (W.D. Tenn. Mar. 9, 2010). Second, some courts have found that there were factual issues as to whether the requirements for Section 404(c) status were satisfied; including whether the disclosures concerning the investment options were adequate enough to enable participants to effectively take control of their investment decisions. *See*, *e.g.*, *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511, 576 (S.D. Tex. 2003). Third, led by the Fourth Circuit's decision in *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007), and relying on a footnote to the preamble in a regulation promulgated by the U.S. Department of Labor (DOL), some courts have determined that Section 404(c) does not provide a defense to claims challenging a plan fiduciary's selection of investment options, as opposed to the participants' decision as to how to invest their assets among these options, thus rendering the defense ineffective to the basic claim for imprudent selection/maintenance of an employer stock fund. *Id.* at 418 n.3 (citing 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992) ("limiting or designating investment options which are intended to constitute all or part of the investment universe of an ERISA 404(c) plan is a fiduciary function")).

For the second time in as many years, the U.S. District Court for the Northern District of Illinois, in *Rogers v. Baxter 'International Inc.*, No. 04-CV-6476, 2010 WL 1780349 (N.D. Ill. May 3, 2010), bucked this trend and relied on Section 404(c) as the basis for dismissing, on motion for summary judgment, claims relating to the imprudent maintenance of an employer stock fund as an investment option in a 401(k) plan. *See also Lingis v. Motorola, Inc.*, 649 F. Supp. 2d 861 (N.D. Ill. 2009). If either decision is upheld on appeal or followed by other courts, they may provide additional grounds for companies to dismiss stock-drop suits.

Summary of Claims Asserted and the District Court's Ruling

Plaintiff David Rogers alleged that defendants breached their fiduciary duties of prudence and disclosure by continuing to offer Baxter stock as a plan investment during a two year period when Baxter allegedly overstated its expected returns. The district court granted summary judgment in favor of defendants on all of Rogers' claims, concluding first that the Section 404(c) safe harbor applied to Rogers' claims that defendants breached their fiduciary duties by allowing 401(k) plan assets to be invested in Baxter common stock even though the value of the stock was allegedly artificially inflated (Count I); by continuing to offer plan participants the opportunity to invest in Baxter stock (Count II); and by allowing more than ten percent of the Plan's assets to be invested in Baxter common stock (Count VI). Next, the district court concluded that it did not need to determine whether Section 404(c) applied to Rogers' claim that defendants misrepresented certain facts and failed to disclose others to plan participants (Count III) because this claim failed on its merits. Finally, the district court concluded that Rogers' secondary liability claim based on the duty to monitor the conduct of other fiduciaries (Count V) failed because all of his principal claims failed.

Criteria For ERISA § 404(c)'s Safe Harbor Defense

The district court first reviewed the requirements for satisfying Section 404(c). In pertinent part, Section 404(c) provides that where a pension plan provides for individual accounts, *i.e.*, a 401(k) plan, and permits a participant to exercise control over the assets in the account, and that participant actually exercises such control, no person who is otherwise a fiduciary shall be liable for breach of fiduciary duty for any loss that results from the participant's exercise of control. 29 U.S.C. § 1104(c)(1). Regulations promulgated by the DOL provide that, in order to qualify as a Section 404(c) plan and fall within its safe harbor, a plan must meet five requirements, several of which have numerous sub-requirements. 29 C.F.R. § 2550.404c-1(b) & (d)(2)(ii)(E)(4).

The district court observed that the parties did not dispute that the plan satisfied four of the five criteria; namely, that a plan must: (i) provide for individual accounts; (ii) allow participants the opportunity to exercise control over their accounts; (iii) provide participants with the opportunity to choose from a broad range of investment alternatives; and (iv) provide additional safeguards where the plan offers qualifying employer securities.

With respect to the fifth requirement, that a plan must give participants sufficient information to make informed investment decisions, the regulations set forth nine criteria, all of which must be satisfied for the participant to be considered to have sufficient investment information. Participants must be given: (i) an explanation that the plan is intended to be a Section 404(c) plan; (ii) a description of the plan's investment options; (iii) an identification of investment managers; (iv) an explanation of the circumstances under which participants may give investment instructions; (v) a description of transaction fees and expenses; (vi) the contact information of the plan fiduciary responsible for providing information to participants; (vii) a description of confidentiality procedures related to the purchase or sale of employer stock; (viii) materials regarding investment alternatives subject to the Securities Act of 1933; and (ix) materials related to voting, tender, and similar rights incidental to the holdings in their accounts. 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(1)(i)-(ix). In addition, each participant must be provided, on request, "extensive information on the operating expenses of the investment alternatives, copies of relevant financial information, and other similar materials." 29 C.F.R. § 2550.404c-1(b)(2)(i)(B)(2).

The only one of the nine requirements disputed by the parties was Rogers' assertion that the plan documents failed to describe the Baxter stock fund in sufficient detail (requirement (ii) above). Rogers contended that the description was deficient because it did not disclose that "Baxter had been repositioned from a value to a growth company, a material fact as to risk." The district court rejected Rogers' argument, finding, among other things, that the regulation only requires a "general description" of the investments, not a list of all material facts about the investment alternative. In so ruling, the court departed from the views expressed by other courts that declined to rule on Section 404(c)'s application because of factual issues as to whether the disclosures were adequate.

Applicability of Section 404(c) to Rogers' Claims

Having failed to convince the district court that the plan should not be able to take advantage of Section 404(c)'s safe harbor defense, Rogers next argued that the defense did not apply to his prudence claims because these claims asserted liability for losses "result[ing] from" defendants' actions, *i.e.*, the selection of investment options and the Baxter stock fund in particular, not from plan participants' exercise of control over the investment of their assets in one or more of these investment options. The district court concluded that the safe harbor applied to Rogers' prudence claims, including the claim that the defendants "failed to prevent the wasting of Plan assets" (part of Count I), because any waste was the result of individual participants' acquisitions of Baxter common stock, not of defendants' conduct. In so ruling, the district court observed that three appellate courts had stated that the Section 404(c) safe harbor defense could be applied to particular claims of imprudent investment selection, even though they did not render a definitive ruling on the question:

First, in *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009), *pet. for reh'g and reh'g en banc denied, Hecker v. Deere & Co.*, 569 F.3d 708, 710 (7th Cir. 2009), the Seventh Circuit held that Section 404(c) provided an alternative basis for dismissing plaintiffs' disclosure and imprudence claims, both of which turned on allegations that defendants failed to negotiate lower fees for the investment options available under the plan. In denying plaintiffs' motion for rehearing, the Circuit emphasized that its holding was limited to the complaint before it and that it had "refrained from making any definitive pronouncement" on whether Section 404(c) applied more generally to a fiduciary breach claim relating to the selection of investment funds. Unlike the Fourth Circuit in *DiFelice*, the Seventh Circuit declined to defer to the footnote in the preamble to the DOL's regulations. *Hecker v. Deere & Co.*, 569 F.3d at 710.

Second, in *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299, 310-11 (5th Cir. 2007), the Fifth Circuit vacated the district court's order granting class certification of plaintiff's fiduciary breach claim related to the maintenance of the EDS stock fund and concluded that it should have first considered whether the plan qualified as a Section 404(c) plan. Here too, the court declined to defer to the footnote in the preamble to the DOL's regulations because, even if it was entitled to *Chevron* deference, it was not a reasonable interpretation of Section 404(c).

Finally, in *In re Unisys Savings Plan Litigation*, 74 F.3d 420, 445 (3d Cir. 1996), the Third Circuit determined that there were genuine issues of material fact as to whether the defendants were entitled to Section 404(c)'s protections with respect to plaintiffs' imprudent investment claim and thus vacated the district court's decision granting defendants' motion for summary judgment. The DOL's regulations were not at issue in this case because the transactions at issue occurred prior to the regulation's effective date.

The *Baxter* court also acknowledged the Fourth Circuit's decision in *DiFelice*, which in dicta suggested that the Section 404(c) safe harbor may not be available as a defense to a claim for imprudent selection of investment options under an individual account plan. *See DiFelice*, 497 F.3d at 418 n.3 (citing 57 Fed. Reg. 46,906, 46,924 n.27 (Oct. 13, 1992)). The *Baxter* court observed that Rogers did not urge application of *DiFelice* in this case and, in any event, application of *DiFelice* would have been inconsistent with *Hecker v. Deere.*

Next, the district court determined that it was unnecessary to decide whether the safe harbor applied to Rogers' disclosure claim (Count III) because that claim failed on its merits. According to the court, the SPD and other plan documents adequately described the Baxter stock fund. Furthermore, the district court concluded that the plan fiduciaries could not have disclosed material facts to plan participants, but not to the public as a whole, without violating the insider trading prohibitions in federal securities laws.

Finally, with respect to Rogers' claim that defendants acquired and held more than ten percent of plan assets in employer securities in violation of ERISA's prohibited transaction rules (Count VI), the district court concluded that the evidence and relevant regulations indicated that any acquisitions that violated the ten-percent rule were caused by the sum of individual participants' choices in exercise of their control over their individual accounts, not from defendants' conduct and, as such, the safe harbor applied.

In short, the court found each of the prudence claims dismissible on the strength of the safe harbor defense, and dismissed the disclosure claim on independent grounds.

Proskauer's Perspective

The district court's decision is potentially significant because it is one of the first decisions to conclude that the Section 404(c) safe harbor provides protection to plan fiduciaries with respect to a participant's claim that the plan fiduciary breached his duty of prudence by maintaining an employer stock fund as an investment option in a 401(k) plan. If appealed, the ruling may well present the Seventh Circuit with an opportunity to address the issue it declined to address squarely in *Hecker v. Deere*. Although plaintiffs in *Lingis v. Motorola* have already appealed the district court's decision in that case, it is unclear whether the Seventh Circuit will reach the Section 404(c) issue in light of the district court's alternative holding that plaintiffs' imprudent investment claim failed on its merits.

A decision from the Seventh Circuit affirming the district court's opinion would likely create tension with the Fourth Circuit's dicta, given the ruling in *DiFelice* that, consistent with the DOL's regulations, Section 404(c) should not provide plan fiduciaries with a defense to such claims. For that reason, we would expect that the appeal would draw amicus briefs from the DOL, as in *Lingis v. Motorola* (*see* http://www.dol.gov/sol/media/briefs/lingis(A)-05-14-2010.htm), as well as from pro-employer organizations that are looking for new opportunities to rely on the Section 404(c) defense.

At the root of the debate is the meaning and function of Section 404(c). If Section 404(c)'s status is conditioned on satisfying disclosure requirements beyond those imposed by the Section 404(c) regulations, or if the DOL's view prevails, and fiduciaries retain ongoing responsibility for evaluating the prudence of participants' decisions to invest in an employer stock fund, then the statute will have little impact on the defense of stock drop suits. As a practical matter, adjudication of the Section 404(c) defense will occur in conjunction with a determination of the underlying prudence and disclosure claims. But if the disclosure requirements and the DOL's view are rejected, as they appear to have been in *Baxter*, then Section 404(c) could substantially enhance the opportunity for dismissal, before trial, of stock-drop complaints.

Rulings, Filings and Settlements of Interest

- In *Golden Gate Restaurant Assoc. v. City and County of San Francisco*, No. 08-1515 (U.S.), the U.S. Solicitor General requested that the Supreme Court deny *certiorari* in light of the recent enactment of the Patient Protection and Affordable Care Act

(PPACA). The Solicitor General argued that the question presented — whether ERISA preempts the provisions of San Francisco's Health Care Security Ordinance mandating that covered employers spend a specified amount for health care benefits for their covered employees — was less important now because the PPACA "significantly changed the legal landscape governing health care spending requirements" and "reduce[d] substantially the likelihood that state and local governments will choose to enact new employer spending requirements like those contained in San Francisco's HCSO." A detailed description of the Ninth Circuit's ruling in this case and the San Francisco ordinance at issue is available in the November 2008 *Newsletter*.

- The U.S. Supreme Court denied a petition for *certiorari* in *Standard Insurance Co. v. Lindeen*, U.S. No 09-885, *cert denied,* May 17, 2010. As reported in the November 2009 *Newsletter*, the Ninth Circuit had held that a Montana statute banning discretionary clauses from certain plans was saved from preemption. The May 2008, April 2009, June 2009, August 2009, and January 2010 Newsletters discuss other similar rulings.
- In *In re JDS Uniphase Corp. ERISA Litig.*, No.03 Civ. 4743 (N.D. Cal. Oct. 15, 2009), the court approved a $3 million settlement of plaintiffs' stock-drop claims.
- In *Figas v. Wells Fargo & Co.*, et al., 08-cv-4546 (D. Minn. Apr. 6, 2010), a participant in Wells Fargo's 401(k) plan filed a class action complaint alleging, among other things, that the plan's investment in Wells Fargo Funds Management constituted a prohibited transaction under ERISA § 406. The court determined that the claim was time-barred under ERISA § 413, because plaintiff knew of the alleged ERISA violation more than three years prior to the lawsuit. In so ruling, the court rejected plaintiff's continuing violation theory and found it irrelevant that other transactions had allegedly occurred more recently.
- In *Central States v. Waste Management of Michigan, Inc.*, 2010 WL 2035709 (N.D. Ill. May 19, 2010), the Central States, Southeast and Southwest Areas Pension Fund and its trustees brought an ERISA lawsuit against a contributing employer, claiming that the employer failed to contribute to the fund pursuant to the collective bargaining agreement and trust agreement. In response to the fund's motion for summary judgment, the employer sought discovery regarding the trustees' potential conflict of interest against contributing employers and the fund's "historical" interpretations of similar trust agreements. The court first determined that it would review the fund's decision under an arbitrary and capricious standard of review, reasoning that, even though the principles that underlie *Firestone* were not applicable in this case, Waste Management agreed to be bound by the terms of the trust agreement and that agreement authorized the trustees to resolve disputes arising from the agreement. Next, the court determined whether to allow

> Waste Management the discovery it sought. Relying on the Supreme Court's decision in *MetLife v. Glenn* to employ a relaxed version of the standard set forth the Seventh Circuit had set forth several years ago in *Semien v. Life Ins. Co. of America*, 436 F.3d 805 (7th Cir. 2006) (allowing discovery into a conflict of interest only in "exceptional circumstances"), the court required the trustees to produce information regarding steps it took to address any conflicts of interest. It reasoned that after *Glenn* decision-makers are "learning to incorporate in administrative records some evidence of their "active steps to reduce potential bias and to promote accuracy" and that "this information is probably readily available." However, the court determined that Waste Management did not satisfy its prima facie showing that limited discovery would have revealed a procedural defect in the trustees' interpretation of the agreement necessary to entitle it to broader discovery even though it had identified a conflict of interest (*i.e.*, the Fund's inherent bias in collecting contributions).

In *Johnson v. Radian Group, Inc*., No 08-2007 (E.D. Pa. May 26, 2010), the court granted defendants' motion to dismiss plaintiff's stock-drop claims. In so ruling, the court applied the *Moench* presumption of prudence and determined that plaintiff failed to show that the company had experienced a "monumental liquidity crisis" and, even if it had, the alleged problems only affected a small part of the company. With respect to plaintiff's disclosure claim, the court found, among other things, that participants were adequately warned of the riskiness of the stock fund.

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[2] See, e.g., Cottrill v. Sparrow, Johnson & Ursillo, 100 F.3d 220, 225 (1st Cir. 1996); Tate v. Long Term Disability Plan for Salaried Employees of Champion International Corp. #506, 545 F.3d 555, 564 (7th Cir. 2008); Graham v. Hartford Life and Accident Insurance Co., 501 F.3d 1153, 1162 (10th Cir. 2007); Miller v. United Welfare Fund, 72 F.3d 1066, 1074 (2d Cir. 1995); Gibbs v. Gibbs, 210 F.3d 491, 503 (5th Cir. 2000); Freeman v. Continental Insurance Co., 996 F.2d 1116, 1119 (11th Cir. 1993).

[3] The "five-factor test" weighs (1) the relative bad faith or culpability of the party from whom fees are sought; (2) that party's ability to satisfy a fee award; (3) the deterrent effect of a fee award; (4) the extent to which the party seeking fees sought to benefit other plan participants or resolve a significant legal issues; and (5) the relative merits of the parties' positions. *See generally* Sacher, et al., Employee Benefits Law (BNA 2d ed.) at 947.

[4] Justice John Paul Stevens concurred in part, criticizing the Court's reference to *Ruckelshaus v. Sierra Club*, 463 U. S. 680 (1983) in which the Court, in his view, rendered a "mistaken interpretation" of the fee-shifting provisions in the Clean Air Act and thus should not serve as precedent for interpreting ERISA in Hardt.

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[6] Plan fiduciaries also frequently argue that they are entitled to a presumption of prudence in connection with their decision to maintain an employer stock fund investment option in the plan. *See*, *e.g.*, Bloomberg Law Reports, Employee Benefits, Myron D. Rumeld & Russell L. Hirschhorn, *Employer Stock Drop Litigation . . . And the Beat Goes On*, Vol. 3, No. 7 (Mar. 29, 2010).

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