Proskauer

The ERISA Litigation Newsletter

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Editors' Overview

This month we highlight an impending decision from the Sixth Circuit, *Tullis v. UMB Bank*, that could have far-reaching implications regarding the application of the ERISA § 404(c) defense and the scope of a directed trustee's duties. In their article, the authors discuss the parties' arguments on appeal, as well as those made in *amicus* briefs filed by the Department of Labor and the American Bar Association. The *Tullis* decision will be the first by the Sixth Circuit to weigh in among the conflicting circuit views on § 404(c), and may offer some much-needed clarity regarding the duties of directed trustees.

A second article looks back at some significant decisions from 2010 in retiree benefit cases. Plan sponsors frequently target retiree health benefits for reduction or elimination as a means of reducing health care costs, and disappointed retirees just as frequently bring class action lawsuits to challenge these decisions. With the potential for ever-increasing health care costs under Obama Healthcare, this type of litigation is expected to remain prevalent and costly for employers.

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

Preview: Watch for the discussion in our next Newsletter of the Seventh Circuit's recent decisions in *Spano v. Boeing Co.* and *Beesley v. International Paper* (consolidated cases), Nos. 09-3001 & 09-3018 (7th Cir. Jan. 21, 2011). In these cases, the Seventh Circuit vacated the certification of two classes of defined-contribution plan participants as to "excessive-fee" breach of fiduciary duty claims under ERISA Section 502(a)(2) and remanded for further proceedings. The Seventh Circuit also rejected the argument that the Supreme Court's 2008 decision in *LaRue v. DeWolff, Boberg & Assoc.*, 552 U.S. 248 (2008), entirely precludes 401(k) plan participants from bringing class actions.

Pending Sixth Circuit Case Has Implications for Directed Trustees, Participant-Directed Plans[1]

Contributed by Charles F. Seemann III & Aaron A. Reuter

In *Tullis v. UMB Bank, N.A.*,[2] a federal district court rejected claims that a directed trustee violated ERISA when it executed investment instructions from an investment intermediary that it allegedly knew was engaging in fraud. In doing so, the district court invoked the protections available to plan fiduciaries under ERISA § 404(c), 29 U.S.C. § 1104(c), and embraced, at least implicitly, the fundamental distinctions between the duties of directed trustees and those of other plan fiduciaries.

Plaintiffs have appealed the district court's ruling. The parties have submitted briefs, and the case awaits oral argument.[3] As suggested by amicus curiae filings by the Department of Labor (DOL) and the American Bankers Association (ABA), the Sixth Circuit's decision could have far-reaching implications, both for the application of Section 404(c) and for directed trustees providing services to ERISA plans.

Background

Plaintiffs Tullis and Mack were participants in the Toledo Clinic Employees' 401(k) Profit Sharing Plan (Plan). The Plan afforded participants the opportunity to direct the investment of their retirement accounts through one or more outside investment managers, including Continental Capital Corporation (Capital). In the early 1980s, Tullis and Mack selected Capital as their investment manager, and executed forms appointing William Davis (Davis), a Capital employee, as their account manager.

In 1989, UMB Bank (UMB) became the Plan's directed trustee. Unlike discretionary trustees, "directed" trustees have significantly limited duties under ERISA, because they are generally obligated to implement directions by participants and plan fiduciaries.[4]

In 1999, the U.S. Securities and Exchange Commission (SEC) brought an enforcement action against Capital, alleging that some of its brokers were defrauding customers.[5] In an unrelated action in 2001, UMB was a plaintiff in a suit against Capital and Davis, alleging that several investments made for Plan participants (other than Tullis and Mack) were improper or fraudulent. According to UMB, its role in the suit was nominal: it did not initiate the suit as a result of its own investigation; rather, a participant had directed it "to join [the suit] as a party-plaintiff as trustee on [the participant's] behalf."[6]

The SEC action forced Capital's closure in 2003. UMB claimed it did not learn of the SEC action before this time. In the ensuing bankruptcy proceedings, plaintiffs learned that Davis had stolen virtually all of the assets in their respective plan accounts.

The Tullis Litigation

Plaintiffs sued Davis, Capital, UMB, and others in state court, but this action was stayed pending completion of the bankruptcy proceedings. Plaintiffs then requested that the plan administrator bring an ERISA action against UMB for failing to disclose the 2001 lawsuit, and for continuing to follow directions from Davis to invest their account assets. The plan administrator declined, citing an indemnification provision in the trust agreement between the Plan and UMB. Plaintiffs then sued UMB directly, asserting that UMB breached its fiduciary duties under ERISA, including a claim that UMB had caused a prohibited transaction under ERISA (*i.e.*, executed fraudulent investment instructions that benefitted Capital and Davis). The district court initially dismissed the action on standing grounds, but the Sixth Circuit reversed and remanded for further proceedings.[7]

On remand, the district court granted summary judgment to UMB, holding that the claimed losses resulted from participant direction, which in turn absolved UMB of liability pursuant to ERISA § 404(c). Section 404(c) of ERISA provides fiduciaries with an affirmative defense against investment losses resulting from participant control over their own investments. The DOL's interpretive regulations provide that for purposes of Section 404(c), meaningful, independent control exists when a participant may select from a broad range of investment options, the participant can make investment directions with a frequency appropriate to the type of investment, and the participant has sufficient information to make an informed decision.[8] The court reasoned that participants had exercised investment control, because the plan documents conferred on plaintiffs the exclusive power and duty to "establish, monitor and police limitations and restrictions" on their investments.

In so ruling, the court rejected plaintiffs' contention that UMB had a duty to decline investment instructions from Davis, given UMB's involvement in the 2001 lawsuit and its alleged corresponding awareness of the potential for fraud by Capital and/or Davis. The district court reasoned:

> [A]lthough several prohibited transactions may have occurred, [UMB] simply did not cause the plan to engage in those transactions. As [p]laintiffs' agent, Mr. Davis caused the plan to engage in transactions used for the benefit of a party-in-interest, Mr. Davis himself. Plaintiffs exercised individualized control over their own assets and selected Mr. Davis as their agent, and therefore . . . [UMB] cannot be held liable for breach that occurs as a result of such individualized control.[9]

The court also noted that the applicable DOL regulation did not *require* UMB to refuse directions resulting in prohibited transactions; rather, the regulation gave UMB the *option* to decline to carry out the directions.[10] Accordingly, the court found that UMB did not *cause* the plan to engage in the transactions at issue and, therefore, Section 404(c) relieved UMB of ERISA liability.

The court also rejected plaintiffs' assertion that UMB's knowledge of the SEC action and UMB's earlier lawsuit gave rise to an affirmative duty for UMB to warn plaintiffs about Davis and Capital. After reviewing authorities recognizing a plan fiduciary's duties of disclosure, the court concluded that a duty to disclose material, nonpublic facts would arise only upon inquiry by plaintiffs. Finding no evidence of any such inquiry, the court held that UMB's failure to warn plaintiffs about the litigation involving Davis and Capital did not prevent application of Section 404(c). It also rejected plaintiffs' alternative contention that Section 404(c) protections did not apply because UMB had concealed material, nonpublic information about Davis and Capital, finding that the alleged conduct did not amount to active concealment.

The Pending Appeal

Plaintiffs appealed to the Sixth Circuit in October 2009. Relying on the DOL regulations, plaintiffs claim in their appeal that Section 404(c) should not absolve a fiduciary of liability where the underlying action involves either the selection of investment managers available to participants, or the ongoing determination that the managers are suitable for appointment as participant investment managers. Plaintiffs also re-assert that UMB had an affirmative duty to alert them regarding fraudulent activity by Capital and Davis, or at least to investigate the directions received from Davis and Capital.

Noting that it did not become the Plan's trustee until several years after plaintiffs had selected Davis as their investment manager, UMB spends little time arguing whether Section 404(c) applied to the alleged breaches involving selection and monitoring. UMB focuses instead on the disclosure issues, arguing that applicable regulations did not mandate disclosures regarding Capital or Davis, but merely prohibited UMB from actively concealing such information.[11] Noting that its duties run to the Plan as a whole, UMB also argues that disclosure of a single participant's unproven allegations regarding his own account to other participants might lead the other participants to take ill-advised action based on information that is later proven false or incomplete.

Amicus Filings

In an *amicus* brief, the DOL expresses an interest in ensuring that 404(c) was interpreted in accordance with its regulation. Noting that Section 404(c) protections are limited to situations where a participant has all material information, the DOL brief argues that UMB should have warned participants that: (1) Davis defrauded other plan participants, (2) the SEC obtained injunctive relief against Capital and (3) UMB had participated in a lawsuit against Davis and Capital. The DOL contends that, because UMB did not alert plaintiffs about the prior misconduct by Davis and Capital, plaintiffs' losses were sustained as a result of UMB's breach, not as a result of the participants' independent investment choices. The DOL brief posits: "[a]llowing a fiduciary to engage in such conduct that directly contributed to the participants' losses renders hollow ERISA's fiduciary provision in Section 404(a) and reads the causation limitation implicit in the 'results from' language in Section 404(c) out of the Act."[12]

The ABA has taken the opposite view, relying on the express language of the statute: "[N]o person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control."[13] The ABA characterizes the DOL's position as creating an "activity-based exception" to the otherwise-broad reach of Section 404(c), and notes that the DOL's position has been rejected by the Third, Fifth, and Seventh Circuits.[14] Noting the limited capacity of a directed trustee, the ABA also contends that ERISA does not impose on directed trustees a duty to oversee and monitor an investment adviser chosen by a participant, because trustees have little or no basis upon which to evaluate the actions of a participant's investment adviser.

Proskauer's Perspective

The Sixth Circuit's decision in *Tullis* is potentially important in several respects. First, the *Tullis* case represents the first case in the Sixth Circuit where the scope of Section 404(c) is squarely at issue. At present, the federal circuits have taken diverging views of the scope of protection afforded under that provision. The Third and Fifth Circuits have recognized that if a plan has complied with the terms of Section 404(c), a fiduciary can be relieved of liability for the selection and/or monitoring of investment options. This is consistent with the plain language of the statute insofar as it applies to "any loss" from "any breach." The Fourth Circuit has rejected this interpretation, and embraced the view that Section 404(c) will not absolve fiduciaries of liability for imprudent selection of investment options.[15] This is consistent with the position advanced by the DOL in such cases.

Until recently, the Seventh Circuit's approach, as stated in *Hecker v. Deere & Co.*,[16] appeared to be consistent with the position in the Third and Fifth Circuits. However, in its recent decision in *Howell v. Motorola Inc.*, a different Seventh Circuitpanel explicitly adopted the DOL view that Section 404(c) does not apply to the selection of investment options.[17] The DOL's view was confirmed in its final amendments to implementing regulations on Section 404(c) in October 2010, which state explicitly that Section 404(c) does not relieve an ERISA fiduciary from its duty to prudently select and monitor service providers or designated investment alternatives offered under the plan.

Second, if the Sixth Circuit affirms the district court's ruling, it could effectively extend Section 404(c)'s protection against liability for "any breach" to conduct that is arguably actionable as a prohibited transaction under ERISA Section 406. Although it is unclear from the record the extent to which plaintiffs rely on Section 406, UMB could face some colorable ERISA exposure for facilitating a prohibited transaction, unless the Sixth Circuit affirms the district court's ruling.

Aside from the Section 404(c) issues, the *Tullis* case also presents an opportunity to clarify the scope of a directed trustee's "significantly limited" duties – specifically, when a directed trustee has a duty to warn participants, or to investigate facially valid investment directions, based on an alleged awareness of unproven allegations of misconduct by the directing authority. While a minority of courts have required directed trustees to investigate or disregard facially valid directions,[18] a ruling for plaintiffs would represent a shift away from established law that a directed trustees' duties are "significantly narrower" than those imposed on other fiduciaries.[19]

Given the multiplicity of cutting-edge issues that the Sixth Circuit will be confronting, we can expect that once rendered, the decision will provoke considerable commentary and speculation as to its implications. Stay tuned for a reaction in this column.

Retiree Rights Roundup 2010[20]

Contributed by Heather G. Magier

With healthcare costs rising and continued increases expected, plan sponsors frequently target retiree health benefits for reduction or elimination, as these benefit costs tend to be particularly large and easily segregated. Because welfare benefits are not subject to any vesting requirements under ERISA, there is no statutory impediment to elimination or reduction of these benefits. However, disappointed retirees frequently mount challenges to the reduction of elimination of these benefits by bringing class actions predicated on contractual or common law principles that they seek to incorporate into ERISA.

As the U.S. Court of Appeals for the Seventh Circuit recently observed, an employer's commitment to pay lifetime health benefits to retirees may have severe consequences and lead to "desperate arguments:" In fact, "that commitment in the UAW's collective bargaining agreements with the Detroit automakers helped drive those companies to the brink of bankruptcy – and General Motors and Chrysler over the brink." *Boeing Co. v. International Union of United Automobile, Aerospace & Agricultural Implement Workers of America (UAW)*, 600 F.3d 722, 726 (7th Cir. 2010).

Given the high stakes-nature of these claims, we take this opportunity to review some notable decisions in retiree benefit cases from this past year. Three discuss contractual vesting claims in the collective bargaining arena; two involve efforts by plan sponsors to obtain declaratory judgment relief; and one addresses the statute of limitations for retiree benefit claims.

Contractual Vesting Claims in the Collective Bargaining Area

The collective bargaining arena presents unique issues with respect to retiree benefit claims, typically when provisions for retiree benefits do not continue from one collective bargaining agreement to the next. As in previous years, the case law from this past year generated mixed results.

- Caps on employer contributions survive expiration of collective bargaining agreements

In *Wood v. Detroit Diesel Corp.*, 607 F.3d 427 (6th Cir. 2010), the Sixth Circuit held that caps on retiree health care contributions that were agreed to in earlier collective bargaining agreements continued to apply beyond 2004 for employees who retired between 1993 and 2004, even though the agreements capping the benefits were not renewed in the 2004 bargaining cycle. In so ruling, the Court reasoned that this was “the most sensible reading” of the original agreements, accounting obligations, and precedents.

The caps were originally implemented in 1993 as a result of the promulgation of FAS 106, which required companies to account for retiree health care costs on an accrual basis and to recognize a liability for the present value of future retiree health expenditures, among other things. To avoid the large liability that would result from FAS 106 if the collective bargaining agreements (CBAs) were not amended, Detroit Diesel and the UAW implemented a cap in 1993, established a Voluntary Employee Benefit Association (VEBA), and entered into subsequent cap agreements, the latest of which expired in 2004. In the 2004 CBA, the parties implemented a new health care program for post-2004 retirees, but did not enter into additional agreements for caps or relating to employer contributions to the VEBA. Retirees who had retired between 1993 and 2004 were notified they would have to pay for above-cap health care costs beginning in January 2006, resulting in monthly costs of up to $800 for some retirees. The retirees sued in 2005 under the LMRA and ERISA, contending that they were entitled to fully funded, lifetime health benefits.

The Sixth Circuit held that the "only coherent reading" of the agreements was that they were intended to effect a "broad shift" away from entitlement to fully funded, lifetime health care benefits, to a capped dollar benefit. In reaching this result, the Court applied the Circuit's *Yard-Man* inference, pursuant to which a court presumes that the parties intended retiree welfare benefits to continue for life, notwithstanding the expiration of a CBA. *See UAW v. Yard-Man*, 716 F.2d 1476, 1482 (6th Cir. 1983). Although normally this inference tends to favor the participant's claim, in this instance the Court held that someone who had already retired under a cap agreement was vested only in benefits under that agreement, despite the subsequent expiration of the CBA. The absence of any statement in the cap agreement that retirees might have to pay out-of-pocket costs did not change the Court's opinion, as the burden of proving intent to vest rested on plaintiffs.

- Seventh Circuit finds intent to vest but remands for further factual development

In *Temme v. Bemis Co.*, 622 F.3d 730 (7th Cir. 2010), a class of retirees sued under the LMRA and ERISA with respect to their medical benefits, after Bemis changed the insurance provider, deductibles, and co-pays, and later discontinued all prescription coverage. The district court granted summary judgment in favor of defendants, finding that that a 1985 plant closing agreement (PCA) did not include a promise of lifetime retiree medical coverage.

On appeal, the Seventh Circuit determined that the PCA, when read in conjunction with the 1985 (last effective) CBA, showed an intent to vest lifetime retiree medical benefits, but remanded the case for further proceedings instead of ruling outright for the plaintiffs.

The Seventh Circuit determined that the PCA must be read in conjunction with the CBA because it was a necessary document in gaining a complete understanding of the agreement between the parties. After reviewing both documents, the Court determined that the PCA was negotiated with the purpose of creating enduring rights, had no termination date, and specified no method through which retiree benefits could end. The Seventh Circuit nevertheless remanded to the district court to determine: (i) whether the insurance contract referred to in the CBA included an express reservation of rights to modify or terminate the benefits, and, if so, whether the parties intended that clause to be abrogated or modified by the vested nature of the benefits; (ii) the precise nature of the 2005 and 2007 modifications; and (iii) whether plaintiffs could meet the burden of showing that the modification "brought their benefits below a level reasonably commensurate with the coverage they had enjoyed" from 1985 to 2005. The Court noted that it was likely that the parties intended that Bemis would continually provide medical coverage at a level "substantially commensurate" with the benefits provided under the CBA, but with freedom to impose cost-saving measures that did not substantially reduce benefits.

- Ninth Circuit concludes that early retirees' rights to fully paid medical coverage to age 65 survived expiration of collective bargaining agreements

In *Alday v. Raytheon Co.*, 620 F.3d 1219 (9th Cir. 2010), the Ninth Circuit held that a series of CBAs that provided for payment of health insurance premiums for early retirees until age 65 survived the expiration of the CBAs because the CBAs included a specific duration to pay this obligation, but did not specify a similar duration for other coverages. In so ruling, the court rejected Raytheon's reliance on reservation of rights clauses in the plan documents, holding that "[w]hatever termination rights Raytheon reserved for itself in the Plans with respect to benefits do not apply to Raytheon's existing obligation to provide premium-free medical insurance coverage."

Efforts by Plan Sponsors to Obtain Declaratory Judgment Relief

Not surprisingly, given the stakes of "guessing wrong" with respect to the legality of plans to reduce or terminate retiree benefits, some plan sponsors try to obtain advice guidance from the courts through declaratory judgment actions. Courts have generally limited the opportunity to use this vehicle by closely scrutinizing the jurisdictional basis for such actions.

- District court determines it lacks jurisdiction over ERISA declaratory judgment action and transfers case to venue chosen by "natural plaintiffs"

In *Newpage Wisconsin System Inc. v. United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial & Service Workers International Union, AFL-CIO/CLC*, No. 10-CV-41, 2010 BL 162198 (W.D. Wis. July 16, 2010), an employer and retiree health plan sought a declaratory judgment that changes to retiree benefits did not violate ERISA, the LMRA, or the CBAs. The suit was asserted against a defendant class of retirees and the union. The court concluded that it lacked subject matter jurisdiction over the ERISA claims, and dismissed the LMRA claims in favor of a pending Ohio action brought by the union and retirees against the company. With respect to the ERISA claims, the district court held that declaratory-plaintiffs may not bring claims seeking a declaration that ERISA plan amendments comply with ERISA, because such a suit does not implicate the enforcement of ERISA rights, and thus ERISA jurisdiction does not exist. Although the court acknowledged that it had jurisdiction over the LMRA claim, it rejected the employer's suggestion that it exercise its discretion under the declaratory judgment act to retain the case and extend "supplemental jurisdiction" over the ERISA claim, noting that the declaratory judgment claim was neither a state law nor a federal law claim. The court concluded that the case should proceed in the Ohio court, the chosen forum of the "natural plaintiffs."

- District court sets stage for trial regarding modification of benefits

In *Maytag Corp. v. International Union, UAW*, No. 08-CV-291, 2008 BL 270156 (S.D. Iowa Nov. 10, 2010) (unpublished), the district court denied Maytag's motion for summary judgment seeking a declaration that its unilateral modification of retiree medical benefits would not violate its collective bargaining obligations. The court determined that there were material issues of disputed fact concerning: (i) which plan documents it could consider to evaluate the existence of reservation of rights language; (ii) whether the supplemental insurance agreements (SIAs) included unambiguous vesting language in specific clauses, *e.g.,* in a durational clause, a coordination of benefits clause, and a substitution of benefits clause; (iii) whether the SIAs, considered in their entirety, could resolve the ambiguity in those clauses regarding intent to vest; and (iv) whether extrinsic evidence showed that the parties did not intend to vest retiree medical benefits. The court also rejected the union's argument that there was no genuine controversy between it and the company, and that the company thus had no standing in this declaratory judgment action, finding that the parties had asserted adverse positions regarding the company's right to modify retiree benefits.

Statute of Limitations for Retiree Benefit Claims

The case discussed below demonstrates the potential efficacy of a statute of limitations defense in retiree benefits claims.

- Sixth Circuit concludes that the statute of limitations barred claim of subclass

In *Winnett v. Caterpillar, Inc.*, 609 F.3d 404 (6th Cir. 2010), the Sixth Circuit held that retiree claims against Caterpillar for allegedly breaching its promise to provide "lifetime cost-free retiree health care" were barred by the applicable six year statute of limitations. The Court concluded that, even though the challenged benefit caps did not become operative until 2004, the claims accrued by 1998 or 1999, when the retirees had notice of changes to the collective bargaining agreement that prospectively authorized the benefit caps.

Proskauer's Perspective

Given the state of the economy, and the potential for increased health care costs arising from Obama Healthcare, we would expect employers to look with increased frequency for opportunities to reduce costs by cutting retiree health care benefits. As a result, we would expect class action lawsuits by retirees challenging changes to their health care benefits to remain prevalent and costly for employers. Litigation outcomes will remain unpredictable due to splits among the courts as to the enforceability of "lifetime" promises, the scope of documents relevant to determine the parties' intent, and whether retiree benefits are presumed to be "vested." As is typically the case with ERISA litigation, the best defense is through preventive maintenance – in this case, careful plan draftsmanship. Plan sponsors should strive to avoid language that can give rise to expectations of lifetime benefits and to insert effective reservation-of-rights clauses. Insofar as the exposure to retiree benefit claims may already exist due to pre-existing plan language, employers should stay abreast of the evolving law in this area, so they can best assess their risks and make informed judgments. Even seemingly "desperate arguments" may give rise to useful defenses.

Rulings, Filings, and Settlements of Interest

- In *Miller v. American Airlines, Inc.*, No. 10-1784, 2011 WL 208291 (3rd Cir. Jan. 25, 2011), the Third Circuit concluded that it was unreasonable for American Airlines to terminate a participant's disability benefits for anxiety disorder and brief reactive psychosis, considering that no new evidence was relied upon to terminate the benefits; American apparently relied on the participant's failure to obtain an FAA medical certification, which was not a requirement under the plan; the notice of denial to the participant did not give specific reasons for the denial or address each diagnosis; and American operated under a conflict of interest.
- In *DuPerry v. Life Insurance Co. of North America*, No. 10-1089, 2011 WL 199087 (4th Cir. Jan. 24, 2011), the Fourth Circuit determined there was no reasonable basis for LINA to deny disability benefits to a participant with fibromyalgia and arthritis. In reaching this conclusion, the court applied an eight-factor test to consider the reasonableness of the plan administrator's decision, which included LINA's "structural conflict of interest" based upon the fact that LINA insures *and* administers the plan. The court's decision that the plan administrator's denial was unreasonable was based on evidence establishing that the plaintiff suffered from chronic diseases that are potentially debilitating, and that the plaintiff presented substantial evidence from her physicians that these diseases do, in fact, prevent her from working, as well as her own declaration and declarations from her family

and even her former employer confirming the severity of her symptoms. The court found the evidence submitted by LINA contained no significant basis to support a conclusion that the plaintiff's symptoms, either by themselves or combined with the symptoms from her other conditions, were not sufficiently severe as to prevent her from enduring the rigors of her workweek.

- In *Einhorn v. M.L. Ruberton Construction Co.,* No. 09-4204-cv (3rd Cir. Jan. 21, 2011), the Third Circuit vacated a district court's grant of summary judgment in favor of the defendant M.L. Ruberton Construction Co., dismissing the plan administrator's claims that the defendant should be liable for the unpaid contributions owed to the multi-employer pension and welfare funds by a company whose assets were purchased by the defendant. The district court reasoned that the defendant was not a continuation of the company that owed the contributions to the funds, and under the law of successorship, was not liable to the funds. The Third Circuit disagreed, reasoning that because the defendant had notice of the company's liability to the funds at the time of the asset sale and continued similar operations, the defendant could be found liable for delinquent contributions under ERISA. The Court stated: "In sum, we hold that a purchaser of assets may be liable for a seller's delinquent ERISA fund contributions to vindicate important federal statutory policy where the buyer had notice of the liability prior to the sale and there exists sufficient evidence of continuity of operations between the buyer and seller." The case was remanded to the district court for further proceedings consistent with the court's opinion.
- In *Feinberg v. RM Acquisition LLC*, 10-1890-cv (7th Cir. Jan 16, 2011), the Seventh Circuit affirmed the district court's dismissal of the claims of several former executives of Rand McNally & Co., who sought benefits under Rand McNally's top-hat plan after RM Acquisition LLC purchased all of Rand McNally's assets. The executives sued RM Acquisition LLC claiming that, as a successor to Rand McNally, it was liable for payment of benefits owed to them under the top-hat plan. The Seventh Circuit ruled otherwise, holding that RM Acquisition LLC's acquisition of Rand McNally's assets did not mean that RM Acquisition LLC took on its liabilities. The court reasoned that "RM did not assume the top hat plan's liabilities; nor, so far as appears, did it connive with Rand McNally to deprive participants of their top hat benefits; nor was it a mere continuation of Rand McNally under another name." The court also noted that in this case there was no valid ERISA § 510 claim for interference with benefits because "RM wasn't trying to interfere with any rights that the plaintiffs may have had under the top hat plan."
- In *Alday v. Raytheon Co.*, Nos. 08-16984 & 08-16985 (9th Cir. Jan. 14, 2011), the Ninth Circuit granted rehearing in a dispute over whether Raytheon could charge retirees for their health insurance premiums, which Raytheon paid entirely until

2004. In September, the Ninth Circuit affirmed summary judgment for the retirees in *Alday v. Raytheon Co.*, 620 F.3d 1219 (9th Cir. 2010) (*see above*), concluding that Raytheon expressly agreed to continue to pay premiums for medical insurance for the plaintiffs until retirees and their spouses reached age 65. The Ninth Circuit's decision relied in part on a promise in the collective bargaining agreement of "Plan coverages" with "no weekly premium/charge" despite a subordination provision in the CBA that provided benefits are subject to the plan documents. The plan documents contained a reservation of rights clause that provided benefits could be terminated. Defendants requested rehearing, contending the September ruling was contrary to other circuit court decisions where the plans' reservation of rights clauses controlled. The Ninth Circuit order granting rehearing suggested that the parties focus their arguments on the subordination provision and the significance of the terms "coverage" and "benefits."

- In *Price v. Board of Trustees of the Indiana Laborer's Pension Fund*, Nos. 09-3897/09-420409-4204, 2011 WL 93043 (6th Cir. Jan. 12, 2011), the Sixth Circuit held that the application of the "*Yard-Man*" inference (pursuant to which a court presumes that the parties intended benefits to continue for life, notwithstanding the expiration of a CBA) is limited to retiree health benefits, and thus did not apply to occupational benefits, because (1) retiree health benefits are a form of delayed compensation or reward for past compensation, and (2) retiree health benefits are unique in that unions do not owe retired persons any obligation to bargain for their continued benefits, and therefore, it is more likely that the parties would intend the retiree benefits to vest to avoid the benefits being left to future negotiations. According to the court, unlike retiree health benefits, occupational disability benefits cannot be considered a form of delayed compensation, are more appropriately characterized as an uncertain potentially realized benefit, and are not necessarily left open to unrepresented future negotiations because an occupationally disabled person might expect to recover at some point and return to a position of union representation. The Sixth Circuit therefore vacated the district court's summary judgment decision applying the "*Yard-Man*" inference to find that the plaintiff's occupational disability benefit vested, and remanded the case for further proceedings consistent with this opinion.
- In *Wilson v. Venture Financial Group, Inc*., 2011 WL 219692 (W.D. Wash. Jan. 24, 2011), a district court preliminarily approved a $750,000 settlement of a stock-drop class action, in which it was alleged that it was imprudent for the plan to continue to invest in Venture Bank stock where the bank was heavily invested in risky real-estate-related investments. The bank was eventually closed by state banking regulators in September 2009 in the wake of the mortgage crisis.

- In *Moore v. Comcast Corp.*, No. 08-773 (E.D. Pa. Jan. 24, 2011), the district court approved a $5,000,000 settlement of an action brought by participants inComcast's 401(k) plan who invested in Comcast Corporation Stock. The plaintiffs alleged that the defendants breached their fiduciary duties under ERISA by continuing to offer Comcast Corporation Stock in the 401(k) plan when they knew that the stock was artificially inflated. The settlement requires Comcast to provide investment advisory services to the class members for three years, provide an annual diversification notice to participants holding more than 10% of their 401(k) assets in Comcast Corporation Stock, offer annual fiduciary training for members of the plan's investment committee, and permit participants to sell Comcast Corporation Stock with no limitations for three years.
- In *Teamsters Joint Council No. 83 of Virginia Pension Fund v. Empire Beef Co.,* No. 08-CV-340 (E.D. Va., Jan. 20, 2011), a district court held that, in connection with assessing withdrawal liability, a multi-employer pension fund could not disregard a composition agreement entered into by Empire Beef Co. ("Empire"), which restructured the assets of Empire by transferring ownership of Empire from the owner to his father. The fund contended that Empire's motivation to enter into the agreement was to avoid paying the remaining withdrawal liability due to the fund. Accordingly, the fund sought to hold the owner's father liable for the remainder of the withdrawal liability. The court held that "evading withdrawal liability" was not "a principal purpose of the Agreement" and that the fund "must honor the Compensation Agreement when assessing and collecting withdrawal liability."
- In *In re IndyMac ERISA Litigation*, No. 08-04579 (C.D. Cal. Jan. 19, 2011), the district court approved a $7,000,000 settlement for "stock-drop" claims brought against IndyMac by participants in its 401(k) plan. The participants alleged that IndyMac acted imprudently by offering company common stock in its 401(k) plan when fiduciaries were aware of IndyMac's involvement with high-risk mortgages that fueled the subprime mortgage crisis. According to the complaint, IndyMac stock declined 99.7 percent in value before the bank was closed in July of 2008.
- In *United States v. Sims*, No. 8:10-cr-379-T-33TGW (M.D. Fla. Jan. 18, 2011), a pastor for the Crossroads Church of Dade City, Florida was sentenced to 30 months imprisonment after he pleaded guilty to embezzling approximately $813,000 from the International Brotherhood of Electrical Workers Local 915's health and welfare, pension, and vacation funds. The pastor, who was in charge of managing the funds, diverted the money to the church's financial accounts and then disbursed the embezzled money for his own personal benefit and for the use of his parishioners and associates. In addition to his 30-month prison sentence, the court also entered an order for reimbursement of the stolen funds.

- In *Groussman v. Motorola, Inc.*, No. 10 C 911, 2011 WL 147710 (N.D. Ill. Jan. 18, 2011), the district court denied the defendants' motion to dismiss stock drop claims upon finding that it was premature at the pleadings stage to decide issues such as whether: defendants were fiduciaries, defendants were responsible for imprudent investment offering decisions and the extent of any imprudence, defendants possessed negative information about the company, and fiduciaries had a duty to communicate certain business information to plan participants. The plaintiffs alleged that the defendants breached their fiduciary duties by continuing to offer Motorola stock as an investment option in the company's 401(k) plan at a time when the defendants allegedly possessed negative information about Motorola's business yet failed either to act based on such information in administering the plan or communicate such information to the plan participants.
- In *Winnett v. Caterpillar Inc.*, No 3:06-cv-0235, 2011 WL 98586 (M.D. Tenn. Jan. 12, 2011), the district court issued a combined decision on two related, but not consolidated, cases, *Winnett* and *Kerns*, alleging breaches of an agreement to provide "lifetime cost-free retiree health care." In both cases, Caterpillar moved for reconsideration of the district court's opinion denying in part its motion for summary judgment after the Sixth Circuit ruled that the claims of a certain subclass of plaintiffs were time-barred. The difference between the two subclasses of plaintiffs was that the subclass in *Winnett* asserted their claims under a 1988 collective bargaining agreement, whereas the class in *Kerns* sought relief under a 1998 collective bargaining agreement. The district court granted Caterpillar's motion for reconsideration in *Winnett*, but denied Caterpillar's motion for reconsideration in *Kerns*. The district court held that the *Winnett* plaintiffs' claims under the 1988 collective bargaining agreement were time-barred based on the Sixth Circuit's decision, which held that Caterpillar had given this class notice of "major changes" to health care benefits more than six years prior to filing their claims. According to the court, "the assorted changes … announced in the 1998 CBA and further explained in the 1999 SPD as 'major changes' to the plan benefits …should have alerted the … subclass that the promise of 'free lifetime health care' under the 1988 CBA was repudiated." In addition, the 1999 SPD contained a reservation-of-rights clause that gave Caterpillar an "unfettered" right to terminate the plan." The court found that the subclass' claims in *Kerns*, however, were not time-barred because notice of the 1998 collective bargaining agreement occurred within the limitations period.

In *Wright v. Medtronic, Inc.*, 09-CV-0443, 2011 WL 31501 (D. Minn. Jan. 5, 2011), the district court dismissed the plaintiffs' ERISA stock drop claims. The plaintiffs alleged that the defendants breached their fiduciary duties by imprudently permitting plan participants to invest in Medtronic stock when the company faced financial difficulties due to problems with certain products, including the recall of its Fidelis implantable heart defibrillator. Relying on *Moench v. Robertson*, 62 F.3d 553 (3rd Cir.1995) and *Quan v. Computer Sciences Corp.*, 623 F.3d 870, 882 (9th Cir.2010), the court noted that the "plaintiffs' prudence claim can survive only if they have alleged sufficient facts to demonstrate that they have a non-speculative claim that investing in Medtronic stock during the class period was so risky that no prudent fiduciary would have invested any Plan assets in Medtronic stock." In this case, the court concluded that the plaintiffs' allegations of stock price declines of 19% and 16% were insufficient to satisfy the pleading standards. The court also dismissed the plaintiffs' disclosure claim, finding that allegations regarding the failure to disclose material corporate information must be redressed under securities laws, not ERISA.

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[2] 640 F. Supp. 2d 974 (N.D. Ohio 2009).
[3] *Tullis v. UMB Bank, N.A.*, No. 09-CV-4370 (6th Cir.).
[4] *See generally* ERISA § 403(a)(1), 29 U.S.C. § 1103(a)(1); Department of Labor, Field Assistance Bulletin 2004-03 (Dec. 17, 2004) (hereafter "FAB 2004-03").
[5] Plaintiffs contended that Davis was one of the brokers targeted by the SEC, but UMB denied this assertion. The district court did not adopt either party's position.
[6] Brief of Appellee UMB Bank, N.A. at 13, *Tullis v. UMB Bank*, No. 09-CV-4730 (6th Cir. May 17, 2010).
[7]*Tullis v. UMB Bank, N.A.*, 515 F.3d 673 (6th Cir. 2008).
[8] *See* 29 C.F.R. § 2550.404c-1(b).
[9] *Tullis*, 640 F. Supp. 2d at 980-81.
[10] *See* 29 C.F.R. § 2550.404c-1(b)(2)(ii)(B)(1). Under ERISA, directed trustees are typically not required to investigate the merits of facially valid directions. *See* FAB 2004-03 at 2-3. Consistent with this premise, many courts, including the Sixth Circuit, have opined that a directed trustee has no discretion with respect to investment directions and thus must execute them. *See, e.g., Grindstaff v. Green*, 133 F.3d 416, 425-26 (6th Cir. 1998) (noting that directed trustee has no duty to investigate merits of a directive). Whether an action is required or simply permitted is potentially an important distinction, since a person can become a "de facto" ERISA fiduciary by voluntarily undertaking a duty it does not already have. The district court seems to have tacitly accepted the premise that UMB was entitled to preserve its "limited" duties as a directed trustee.
[11] *See* 29 C.F.R. § 2550.404c-1(c)(2)(ii).
[12] Brief of the Secretary of Labor as Amicus Curiae in Support of Plaintiffs-Appellants at 7, *Tullis v. UMB Bank*, No. 09-CV-4730 (6th Cir. Apr. 15, 2010).
[13] 29 U.S.C. § 1104(c)(1)(B).

[14] *See In re Unisys Savings Plan Litigation*, 74 F.3d 420 (3d Cir. 1996) (holding that Section 404(c) may be a defense to a claim regarding the selection of investment options); *Langbecker v. Electronic Data Systems Corp.*, 476 F.3d 299 (5th Cir. 2007) (rejecting DOL view that Section 404(c) does not apply to fiduciary investment selection).
[15] *See DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007).
[16] *Hecker v. Deere & Co.*, 556 F.3d 575 (7th Cir. 2009) (stating that Section 404(c) can be a defense to fiduciary selection of investment options).
[17] *Howell v. Motorola Inc.*, Nos. 07-CV-3837, 09-CV-2796, 2011 BL 16211, at *34 (7th Cir. Jan. 21, 2011) (stating that "the selection of plan investment options and the decision to continue offering a particular investment vehicle are acts to which fiduciary duties attach, and [the Section 404(c)] safe harbor is not available").
[18] *See, e.g., In re Enron Corp. Securities, Derivative & ERISA Litigation*, 284 F. Supp. 2d 511 (S.D. Tex. 2003); *In re WorldCom ERISA Litigation*, 263 F. Supp. 2d 745 (S.D.N.Y. 2003); *Koch v. Dwyer*, No. 98-CV-5519 (S.D.N.Y. July 22, 1999).
[19] *See, e.g.*, FAB 2004-03 at 2. Indeed, a directed trustee may violate ERISA by ignoring or disobeying a valid instruction from the directing fiduciary. *See, e.g., Benefits Committee of Saint-Gobain Corp. v. Key Trust Co.*, 313 F.3d 919, 932 (6th Cir. 2002) (finding that directed trustee could not disregard direction from a duly authorized committee).
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