Proskauer

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in this issue

A report to clients and friends of the firm

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Editor's Overview

This month, we include a look back at the most significant ERISA litigation decisions of the past year and what they portend for 2012. The article addresses the implications of two major Supreme Court decisions, *Cigna Corp. v. Amara* and *Walmart Stores, Inc. v. Dukes*, and developments in 401(k) plan excessive fee and employer stock drop cases.

We also focus on a recent Second Circuit decision addressing the issue of when the statute of limitations on benefits claims commences, and its potential implications for both individual and class action benefit claims.

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

2011 – The Year in Review: Last Year's Most Significant ERISA Litigation Opinions and What They Foreshadow for 2012 [1]

Contributed by Howard Shapiro

There were many important opinions issued in 2011 that will influence ERISA litigation trends this year. Among them were two major Supreme Court opinions: *CIGNA Corp. v. Amara*[2] and *Wal-Mart Stores, Inc. v. Dukes*.[3] Although it is not an ERISA case, *Dukes* may have significant implications for class certification battles. *Amara* will be critical as to elements of proof of reliance, causation, and harm going forward.

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[2] 131 S. Ct. 1866 (2011).

[3] 131 S. Ct. 2541 (2011).

Supreme Court Opinions

Cigna Corp. v. Amara was a long awaited Supreme Court holding that dealt with various reliance principles.[4] The case focused upon Summary Plan Description (SPD) language that misled participants into thinking their benefits consisted of a frozen benefit plus a new cash balance plan formula, instead of the greater of the two formulas. The Supreme Court held that the terms of an SPD were not enforceable as a plan document, recognizing the important distinctions between the plan and an SPD. However, the Court also held that equitable relief was appropriate here under ERISA § 502(a)(3). The Court recognized three forms of equitable relief: estoppel, surcharge, and reformation. As to each aspect of relief, the Court suggested a plaintiff may have to show harm, causation, and damages.

Plaintiffs and defendants will find elements of the case helpful. In the coming year, plaintiffs will rely upon *Amara* to contend that remedies under ERISA § 502(a)(3) have expanded. Defendants will rely upon *Amara* to contend that equitable relief requires the showing of reliance, causation, and harm. Defendants will also rely upon *Amara's* requirement of harm and causation to negate commonality and typicality for class certification.

In the employment discrimination world, *Dukes* was a significant defendant triumph. The Ninth Circuit approved a class consisting of 1.5 million women under Fed. R. Civ. P. 23(b)(2) based upon the allegation that company management subjectively preferred men to women in promotion and pay decision-making. Reversing, the Supreme Court held that commonality is not satisfied by posing a common question; instead, there must be a common answer. The Court also held that Rule 23 cannot override the rights of defendants to assert individual defenses as to each class member's claim.

The question is whether and how this landmark opinion will impact ERISA litigation. ERISA plaintiffs will argue that *Dukes* is irrelevant because class actions are brought on behalf of the plan under ERISA § 502(a)(2) and may be certified under Fed. R. Civ. P. 23(b)(1) or (b)(3). Defendants will see more cautious judicial trends as to class certification. Also, *Dukes*, when coupled with *Amara's* requirement of harm and causation, may allow defendants to defeat class claims based upon communications to a purported class and any alleged ERISA violation that involves some form of reliance, harm or causation, as these claims implicate individualized and particularized plaintiff conduct. Finally, *Dukes* may permit defendants to assert that the ERISA § 404(c) defense blocks class certification.[5]

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[4] *See* ERISA Litigation Newsletter, June 2011.

[5] For another example of how to defeat ERISA class certification, *see Langbecker v. Electronic Data Sys. Corp.*, 476 F.3d 299 (5th Cir. 2007), decided prior to *Amara* and *Dukes*.

401(k) Plan Excessive Fee Decisions

Two cases affirmed motions to dismiss: *Renfro v. Unisys Corp.*,[6] and *Loomis v. Exelon Corp*.[7] However, one court reversed summary judgment in favor of the defendants and remanded for trial.[8]

In *Renfro,* the Third Circuit joined the Seventh Circuit as the first two appellate courts that have affirmed motions to dismiss excessive fee cases. *Renfro* relied upon a prior Seventh Circuit opinion, *Hecker v. Deere & Co.*[9] Affirming a motion to dismiss, the *Renfro* Third Circuit panel rebuffed plaintiffs' challenge to the payment of alleged excessive fees for "retail" mutual funds held in a 401(k) plan. The Court held that there is no *per se* violation by holding such "retail" funds in a 401(k) plan. The Court focused upon the reasonable range of available investment options, featuring a wide variety of risk profiles, investment strategies, and associated fees. As to the fiduciary/plan sponsor, the Court noted that there was a wide mix and range of 73 investment options. As to the directed trustee, the Court held no fiduciary status existed because the trust agreement provided the authority to the plan fiduciaries to select investment vehicles.

In *Loomis v. Exelon Corp.*, the Seventh Circuit followed its prior decision in *Hecker v. Deere & Co.* and affirmed the district court's opinion granting a motion to dismiss.[10] Plaintiffs challenged the payment of alleged excessive fees for "retail" mutual funds held in a 401(k) plan. The Court rejected plaintiffs' contention that the plan sponsor should have paid plan fees instead of the participants. The Court described plaintiffs' position as an effort to foist upon the plan sponsor fiduciary functions and held that in establishing this type of plan design, Exelon acted as a settlor. The Court also derided plaintiffs' preference for institutional funds, as compared to "retail" funds. The Court held that the participants actually may prefer "retail" funds because of their liquidity and daily transfer features. Citing ERISA § 404(c), the Court held that the plan offered a mix of high-expense, high-risk, and low-expense, low-risk, investment options.

In *George v. Kraft Foods Global, Inc*.,[11] the Seventh Circuit issued a less defendant-friendly opinion, reversing summary judgment on two issues while

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[6] --- F.3d ---, 2011 WL 3630121, 2011 BL 215021 (3d Cir. Aug. 19, 2011). *See* ERISA Litigation Newsletter, April 2011.

[7] 658 F.3d 667 (7th Cir. 2011).

[8] *George v. Kraft Foods Global, Inc.*, 641 F.3d 786 (7th Cir. 2011).

[9] 556 F.3d 575, *reh'g denied, reh'g en banc denied*, 569 F.3d 708 (7th Cir. 2009) (affirming motion to dismiss, and holding directed trustee was not a fiduciary; fees directed trustee received from plan were no longer plan assets; no misrepresentation by plan sponsor because participants knew the total fee costs; and no breach of fiduciary duty because plan provided a broad range of investment vehicles, including access to a brokerage window with 2,500 options, allowing participants to select from a broad range of investments with high and low fees and high and low risk factors). *But see Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009) (reversing motion to dismiss in excessive fee case and holding district court erroneously applied a summary judgment standard at an improper stage of case).

[10] *See* ERISA Litigation Newsletter, October 2011.

[11] 641 F.3d 786 (7th Cir. 2011).

affirming summary judgment for the plan's trustee. Opposing summary judgment, the plaintiffs presented expert testimony opining that unitized funds caused losses to the plan in the form of investment and transactional drag. Plaintiffs' expert witness defined investment drag as the result of the unitized fund holding some amount of cash for liquidity purposes, causing the stock's failure to track its share price on the open market. Plaintiffs' expert witness also criticized the transactional drag that occurred because the fees for all participant trades were paid by the entire plan, instead of those traders who made trades. Plaintiffs' expert witness opined that this favored "day-traders" and forced all participants to cover the costs for such trading conduct. Plaintiffs contended the plan should have avoided excessive fees by using a real-time trading platform instead of a unitized fund. The Court reversed summary judgment for the fiduciaries, holding there was no evidence of record to the effect that the fiduciaries actually considered the impact of investment and transactional drag on the costs of operating the plan.

On the second issue, the summary judgment record indicated that the recordkeeper was paid an average of $43-$65 per participant a year for recordkeeping services. Plaintiffs' expert witness opined that the appropriate cost for recordkeeping services was $20-$27 per participant a year. The appellate panel held that this created an issue of material fact unsuitable for summary judgment.

Finally, the trustee was sued because of the fees it derived from the "float" on deposits it held pending clearance of checks written on plan assets. The Court affirmed summary judgment on this issue because plaintiffs failed to present record evidence showing that the fiduciaries failed to review the prudence of this "float" arrangement.

Judge Cudahy issued a robust dissent.[12] He described the unitized fund platform as the ultimate hedge because the cash component shields fund participants from the highs and lows of stock share price performance. He found no provision of ERISA on which to base a claim for breach of fiduciary duty for failing to select between a unitized fund and a real-time trading platform. Also, he noted that unitized trading was a universally accepted investment practice. Judge Cudahy acknowledged that the recordkeeping fee issue was a closer question. However, he suggested that fiduciaries should not have to bear the burden of litigation costs merely because plaintiffs find an expert witness to opine that recordkeeping costs are too high. He decried the suggestion that all plan services should be auctioned off to the lowest bidder.

Grouping these opinions together, it is difficult to synthesize the three cases. Clearly the motions to dismiss in *Renfro* and *Loomis* focus on the plethora of investment options made available to the participants. Both decisions focus on the concept that providing a broad mix of risk-reward and fee structures, so that participants have an array of investment choices, assists in the motion to dismiss

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[12] 641 F.3d at 801-03 (Cudahy, J., dissenting).

analysis. *George* is a more difficult decision for defendants to deal with. *George* suggests that expert witness testimony may yield success at the summary judgment stage. As Judge Cudahy pointed out in his dissent, this could have a significant impact on litigation costs, as it will be easy for plaintiffs' counsel to find an expert witness who will say anything.

401(k) Plan Employer Stock Drop Litigation

The body of case law in this area has become more robust now that the presumption of prudence established by the Third Circuit in *Moench v. Robertson*[13] has been recognized in four appellate circuits: the Third,[14] Fifth,[15] Seventh,[16] and Ninth.[17] Additionally, the Sixth Circuit has applied the *Moench* presumption in ESOP litigation.[18]

The Second Circuit has now endorsed application of the *Moench* presumption at the motion to dismiss phase. *In re Citigroup ERISA Litigation.*[19] The Second Circuit held that the fiduciaries could be liable only if a dire situation existed that could not be foreseen by the settlor of the plan. The Court explained that stock fund fluctuations that trend downwards did not equate to a dire situation. While noting that sub-prime loans were bad business decisions, such decisions did not create a duty to override the plan provisions.

In re Citigroup ERISA Litigation also dealt with two other issues. The district court motion to dismiss was predicated, in part, on the concept that there was no actionable breach of fiduciary duty claim because the employer stock fund was "hard-wired" into the plan. That is, the plan document required that an employer stock fund be maintained, leading the district court to conclude that only the settlor could alter the plan provisions and that there could be no breach of fiduciary duty claim as the fiduciaries could not amend the plan. The Second

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[13] 62 F.3d 553 (3d Cir. 1995) (reversing summary judgment for defendants, but holding that investments in employer stock are presumed to be prudent and the presumption can be overcome if a fiduciary has knowledge of changed circumstances, such as the impending collapse of the employer).

[14] *Edgar v. Avaya, Inc*., 503 F.3d 340 (3d Cir. 2007) (affirming motion to dismiss, and holding that claims alleging corporate officers knew of adverse information that would negatively impact the stock was insufficient to establish dire circumstances required to overcome *Moench* presumption).

[15] *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008) (affirming summary judgment applying *Moench* presumption).

[16] *Pugh v. Tribune Co.*, 521 F.3d 686 (7th Cir. 2008) (affirming motion to dismiss and applying *Moench* presumption).

[17] *Quan v. Computer Sciences Corp.*, 623 F. 3d 870 (9th Cir. 2010) (adopting *Moench* presumption at the summary judgment stage because no showing that company faced the risk of precipitous decline, bankruptcy, or serious mismanagement).

[18] *Kuper v. Iovenko*, 66 F.3d 1447, 1459 (6th Cir. 1995) (*Moench* presumption shielded fiduciaries who failed to sell company stock while awaiting the trust-to-trust transfer of employer securities for employees who transferred to new company).

[19] 662 F.3d 128 (2d Cir. 2011). A motion for *rehearing en banc* is pending. Petitioners include plaintiffs and the Department of Labor. Note that this decision was a 2-1 split featuring a vigorous dissent by Judge Straub. *See* 662 F.3d at 146-66.

Circuit disagreed on this point and held that a fiduciary has the discretion to override plan terms in appropriate circumstances.

In re Citigroup ERISA Litigation also featured misrepresentation claims predicated on the theory that defendants were aware of nonpublic material information and had the obligation to reveal that information to participants. The Court held that as a matter of law there is no duty to provide plan participants material nonpublic information as to investment options. Dismissing the misrepresentation claims, the Court also held that a duty to inform exists only where necessary to correct previous fiduciary misstatements or to avoid misleading participants.

Battleground 2012

Of the developments surveyed above, without question *CIGNA Corp. v. Amara* will provoke the most jurisprudential consideration. The courts will be left to consider what the nature of a remedy is for an ERISA § 502(a)(3) claim. The courts also will be left to consider what level of reliance, causation, and harm are required to prove such a claim. The Supreme Court has provided little guidance as to how these concepts should be applied.

The excessive fee cases seem to be waning and fewer of these cases have been filed recently. However, two cases are pending that may add to the jurisprudence. In *Tibble v. Edison International*,[20] the court held that fiduciaries breached their duties when a plan offered more expensive retail mutual funds instead of cheaper institutional class funds. That case is now on appeal before the Ninth Circuit. Also pending in the Western District of Missouri is *Tussey v. ABB, Inc.*,[21] a case that was tried in January 2010 and remains under submission.

Finally, the standards for 401(k) plan employer stock drop litigation seem more settled. While we have to pay attention to the rehearing application in the *Citigroup ERISA Litigation,* there are still four Circuits that subscribe to the *Moench* presumption, either at the motion to dismiss or summary judgment phase. These cases seem to be waning as well and fewer of these cases have been filed recently.

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[20] No. 07-CV-5359, 2010 WL 2757153, 2010 BL 170372 (C.D. Cal. July 8, 2010).

[21] No. 06-CV-4305, 2008 WL 379666, 2008 BL 26791 (W.D. Mo., February. 11, 2008) (issues at trial include fees paid by fiduciaries and potential liability of directed trustee).

Second Circuit's Recent ERISA Statute of Limitations Ruling Continues Favorable Trend Toward Dismissing Suits Brought Long After Participants Commence Receipt of Benefits[22]

Contributed by Russell Hirschhorn

ERISA plan fiduciaries sometimes find themselves in litigation defending the interpretation or legality of plan terms that were applied years, if not decades, earlier to calculate a participant's benefits. How is it that a participant, who has been receiving his or her benefits for years, could one day simply decide to challenge the calculation of his benefits without any regard to the applicable statute of limitations or the fact that he or she sat on his or her rights for years? The answer lies in the fact that although it is well-established that courts apply the most analogous state statute of limitations to claims of this nature (generally the period applicable to breach of contract actions), there has been a lack of clarity as to when such claims accrue, *i.e.*, when the statute of limitations is triggered. Although most courts have held that a participant's claim for benefits accrues under ERISA § 502(a)(1)(B)[23] upon "a clear repudiation by the plan that is known, or should be known, to the plaintiff — regardless of whether the plaintiff has filed a formal application for benefits,"[24] there has been a lack of clarity in the courts' rulings on how the statute of limitations may be triggered short of a formal benefit claim denial. The U.S. Court of Appeals for the Second Circuit has now gone a long way toward addressing this issue.

In *Novella v. Westchester County*, 661 F.3d 128 (2d Cir. 2011), the Second Circuit held that the statute of limitations for a claim under Section 502(a)(1)(B)[25] of ERISA based on a miscalculation of benefits will start to run "when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation." In so ruling, the Court observed that receipt of a lower pension payment was not in this instance enough to put a pensioner on notice of a miscalculation, but that actual notice to a pensioner of the method used to calculate his pension would put him on notice. The Court observed that this rule may require a claimant-by-claimant factual inquiry into each pensioner's accrual date, and that the need for such inquiries very well may limit the availability of class actions in this type of litigation.

Background

Plaintiff Carlo Novella performed various jobs as a carpenter from 1962 through 1995. With the exception of certain periods between 1981 and 1987 when he was not working, his employers were required, pursuant to collective bargaining agreements, to make contributions on his behalf to a pension fund. In 1995, Novella became disabled as a result of a work-related injury and he applied for

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[23] 29 U.S.C. § 1132(a)(1)(B).

[24] *Carey v. Electrical Workers Local 363 Pension Plan*, 201 F.3d 44, 46-47 (2d Cir. 1999).

[25] 29 U.S.C. § 1132(a)(1)(B).

and received a disability pension. Novella's benefits were not calculated using the pension rate in effect in 1995, but rather using two different rates for his two periods of service. The rate applicable in 1995 was applied to benefits for work performed between 1987 and 1995, and the lower rate in effect in 1981 was applied to benefits for work performed between 1962 and 1981 ("two-rate formula"). The use of the 1981 rate for the earlier period resulted in a much lower aggregate monthly pension payment.

The District Court's Decisions

After exhausting his administrative remedies, Novella filed suit in the U.S. District Court for the Southern District of New York on his own behalf and on behalf of a putative class of pensioners whose benefits also were allegedly miscalculated based on the use of the two-rate formula. Novella asserted a potpourri of claims alleging violations of ERISA. The district court agreed with Novella that, regardless of whether it reviewed his claim under a *de novo* standard of review or the more deferential arbitrary and capricious standard of review, his disability pension had been miscalculated and the use of two rates in calculating disability pensions was not supported by the plan documents. In light of this ruling, the district court also awarded Novella prejudgment interest. It did not reach Novella's other claims.

Novella subsequently sought class certification on behalf of two classes: one limited to disability pensioners, like himself, whose benefits were calculated using multiple rates, and another, broader class that included recipients of various types of pensions whose benefits were affected by the same practice. The district court declined to certify the broader class in light of the fact that Novella's success was limited to his disability pension benefit claim. With respect to the proposed class of disability pensioners, the district court first concluded that the commonality, typicality, and adequacy-of-representation requirements of Rule 23 of the Federal Rules of Civil Procedure were met. However, it determined that an evidentiary hearing was necessary to determine whether, in light of defendants' statute of limitations arguments, Novella could satisfy the numerosity prong of Rule 23. After conducting the evidentiary hearing, the court concluded that the proposed class of twenty-four met the numerosity requirement. In so ruling, the court determined that the statute of limitations applicable to their claims did not begin to run "until a prospective class member inquires about the calculation of his benefits and the Plan rejects his claim that the benefits were miscalculated."[26]

The parties then cross-moved for summary judgment on the class claims. The district court granted the plaintiff class's motion upon recommendation from the magistrate judge and entered judgment in favor of the class. The court concluded, as it did with respect to Novella's individual claim, that defendants' interpretation of the plan to apply multiple rates in calculating Novella's pension benefit was arbitrary and capricious.

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[26] *Id.*

The Second Circuit's Decision

On appeal, the parties, having agreed that New York's six-year statute of limitations for breach of contract actions governed the claim for benefits and that the relevant date for fixing the accrual of a miscalculation claim is when a plaintiff was put on notice that defendants believed the method used to calculate his disability pension was correct, focused their dispute on the time at which a pensioner can be considered to have been put on such notice.

Defendants argued that the Court should adopt the standard applied by the Third Circuit in *Miller v. Fortis Benefits Insurance Co.*, 475 F.3d 516 (3d Cir. 2007), *i.e.*, a strict first-payment approach under which the limitations period for a miscalculation claim would begin to run when the pensioner receives his or her first check. Novella contended that the Court should adopt the district court's bright-line rule that requires a formal denial of a miscalculation claim to trigger the running of the statute of limitations.

The Second Circuit first affirmed the district court's decision that defendants' two-rate formula calculation of Novella's disability pension was arbitrary and capricious and affirmed its entry of summary judgment with respect to Novella's individual claim for benefits. In so ruling, the Court agreed that the plan terms did not support the plan's interpretation that a disability pension may be calculated using two different benefit rates when a participant has had a break in service.

The Court, however, declined to affirm the district court's decision to certify a class and award summary judgment in favor of the class. As discussed above, the decision to certify a class, and in particular the question of whether the certified class satisfied Rule 23(a)'s numerosity requirement, hinged on whether each class member's claim was timely. The Court rejected both parties' views regarding the accrual date of the claim, and concluded that "notice of a miscalculation can be imputed to a pensioner — and the statute of limitations will start to run — when there is enough information available to the pensioner to assure that he knows or reasonably should know of the miscalculation." The Court reasoned that this approach "best balances a pension plan's legitimate interest in predictability and finality with a pensioner's equally legitimate interest in having a fair opportunity to challenge a miscalculation of benefits once it becomes known — or should have become known — to him."

Turning to the factual record before it, the Court was unable to determine whether, and if so when, each class member had information by which he knew or should have known of the miscalculation. The Court thus vacated the district court's decision certifying a class and remanded for further fact-finding. In so ruling, the Court provided some insight on what it would and would not deem to be sufficient notice to trigger the limitations period:

> We note that . . . simply receiving a lower pension payment is not enough to put a pensioner on notice of a miscalculation. Conversely, actual notice to a pensioner that a double rate method was used would put him on notice. Similarly, informing a pensioner of the correct rate-times-units calculation, so that any difference between the putative calculation and

> the actual amount of the check would be obvious, is also probably enough.[27]

In rendering its ruling, the Court observed that the Third Circuit endorsed a similar reasonableness standard in *Miller* by concluding that the limitations period for a miscalculation claim starts to run when the calculation or repudiation is "both clear and made known to the beneficiary and that this ordinarily will be when the beneficiary first receives his miscalculated benefit award because, at that point, the beneficiary should be aware that he has been underpaid and that his right to a greater award has been repudiated."

In addition, although apparently not raised by either party, the Court rejected the continuing violation theory under which each payment based upon an alleged miscalculation constitutes a new breach and thus gives rise to a separate cause of action, an approach that had been adopted by some courts. The Court determined that this theory is appropriate only "where separate violations of the same type, or character, are repeated over time." Benefit miscalculation claims, however, "are based on a single decision that results in lasting negative effects."

Lastly, the Court observed that the standard it adopted may require a claimant-by-claimant inquiry to determine when a pensioner knew or reasonably should have known that his benefits were miscalculated. "And this fact-dependent inquiry into each pensioner's accrual date may in turn lessen the value, and indeed the availability, of class actions in this kind of litigation."[28]

Proskauer's Perspective

The Second Circiut's decision has at least two significant implications for benefit claim litigation. First, the Court's ruling is a welcome addition to recent decisions in which courts have shown a greater willingness to find that the limitations period has run as of the time a participant commences receipt of his or her benefit payments. In addition to the Third Circuit's decision in *Miller* (discussed above), the Seventh Circuit recently ruled in *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son*[29] that the receipt of a lump sum distribution constituted an "unequivocal repudiation of any entitlement to benefits beyond the account balance" because information circulars previously circulated "confirmed that after a lump sum distribution, no additional benefits would be forthcoming."[30] These decisions will hopefully reduce the opportunities for participants to litigate claims long after their benefits commence. It remains to be seen whether the

[27] *Id*.

[28] With respect to Novella's cross-appeal, the Second Circuit rejected his argument that the certified class was too narrow and should not have been limited to disability pensioners. The Court reasoned that it was Novella's choice to proceed individually first and only later move for class certification, and by the time he moved for class certification, his individual claims no longer matched the claims of the putative broader class and he was therefore no longer an appropriate class representative. In addition, the Court found no abuse of discretion in the district court's award of prejudgment interest to Novella individually or in its selection of the appropriate rate.

[29] *See* ERISA Litigation Newsletter, August 2011.

[30] *Thompson v. Retirement Plan for Employees of S.C. Johnson & Son*, 651 F.3d 600, 606 (7th Cir. 2011).

courts will eventually apply the logic of the Second Circuit's ruling to commence the limitations period even before the receipt of benefits where the participant has been placed on adequate notice of his or her claim beforehand, as some court have done in the independent contractor cases.[31]

Second, the Court's decision is likely to reduce the number of benefit claim litigations that can be successfully prosecuted on a class-wide basis. Where, as in *Novella*, absent class members started receiving their pension distributions at varying times, it very well may be necessary to conduct a fact intensive participant-by-participant inquiry to determine whether such claims are timely. And, as the Second Circuit recognized, such inquiries ought to preclude a finding of commonality and typicality among the claims and ultimately preclude class certification.

The Court's ruling emphasizes the need to provide participant communications, *e.g.*, summary plan descriptions and benefit statements, that clearly describe how participants' benefits are calculated, and to maintain records of such communications. Plan fiduciaries should consider reviewing their plan communications and the plan's document retention policies related to such communications. To be able to take full advantage of a potential statute of limitations defense, it will be important to have provided clear and unambiguous participant communications, including with respect to the method for calculating plan benefits, and to have held on to such records.

Rulings, Filings, and Settlements of Interest

Supreme Court Sets Argument Regarding Affordable Care Act:

> As reported in the December 2011 edition of this *Newsletter,* the U.S. Supreme Court granted the petitions for *writs of certiorari* with respect to the Eleventh Circuit cases challenging the Affordable Care Act. *Florida v. United States Dep't of Health and Human Servs.*, 648 F.3d 1235 (11th Cir. 2011), *petition for cert. granted, Nat'l Fed'n of Indep. Bus. v. Sebelius*, --- S. Ct. ----, 2011 WL 5515162 (2011) (No. 11-393); *Dep't of Health and Human Servs. v. Florida*, --- S. Ct. ----, 2011 WL 5515164 (2011) (No. 11-398), and *Florida v. Dep't of Health and Human Servs. v. Florida*, --- S. Ct. ----, 2011 WL 5515165 (2011) (No. 11-400). On December 19, 2011, the Court announced that oral arguments in these cases will take place on March 26-28, 2012. Over these three days, the Court plans to hear five and a half hours of oral argument, with one hour dedicated to the issue of whether the Anti-Injunction Act bars plaintiffs' challenge to the Affordable Care Act's individual mandate, two hours allotted to the issue of the individual mandate's constitutionality, and two and a half hours assigned to the issue of whether, if a provision of the Act is determined to be unconstitutional, the lack of a severability clause in the

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[31] *See*, *e.g., Brennan v. Metropolitan Life Insurance Co.*, 275 F. Supp. 2d 406, 409 (S.D.N.Y. 2003) (holding that plaintiffs' claims for benefits under Section 502(a)(1)(B) were time-barred because it was undisputed that all of the plaintiffs knew from their first day of work that they were working as freelancers and would not be entitled to benefits). The Seventh Circuit ruling in Thompson indicates that this may be the case.

Act invalidates the entire Act. For a more detailed description of these issues, please see the December 2011 edition of *ERISA Litigation Newsletter.*

Breach of Fiduciary Duty:

> In *Plasterers' Local Union No. 96 Pension Plan v. Pepper*, --- F.3d ---, No. 10-1364, 2011 WL 6000580 (4th Cir. Dec. 1, 2011), the Fourth Circuit held that ERISA's duties of prudence and diversification require more than a showing of a failure to investigate or diversify to equate to causation of loss and therefore liability. In *Pepper*, former trustees of a multiemployer pension plan invested exclusively in Certificates of Deposit and one- to two-year Treasury Bills from the mid-1990s until 2005 without investigating other investment options. Reasoning that ERISA requires an independent finding of causation or loss prior to incurring liability for breach of fiduciary duty, the Fourth Circuit vacated the district court's decision, finding that it failed to establish causation or loss prior to holding the former trustees liable in damages for the difference between the plan's actual and hypothetical investment values. The court criticized the district court's finding that the former trustees failed to diversify plan assets because it failed to determine whether, under the circumstances, it was clearly imprudent not to diversify plan assets. The Fourth Circuit also found that the district court committed reversible error by admittedly picking the time frame for calculating damages "out of the air." The Fourth Circuit remanded the case to the district court to determine whether the former trustee's failures to investigate or diversify were objectively imprudent and, if so, to articulate a reasoned basis for awarding damages based on a particular time period.

ERISA Preemption:

> In *Kunda v. C. R. Bard, Inc*., --- F.3d ---, No. 09-1809, 2011 WL 6636703 (4th Cir. Dec. 23, 2011), the Fourth Circuit held a former employee's claim that the forfeiture provision in her former employer's long-term profit sharing plan violated state law was not preempted by ERISA because the employee's lawsuit was directed at the legality of the plan and not at the interpretation of the plan. Following termination without cause, Kunda filed suit under Maryland and New Jersey state laws asserting that the plan's forfeiture provision was unenforceable. The court held that because Kunda was not claiming that she had been denied a right or benefit under the plan, exhaustion of the plan's administrative remedies would have been futile and therefore Kunda's state law claims were not preempted by ERISA. The Fourth Circuit also held that the Maryland Wage Payment and Collection Law (MWPCL) is not a fundamental public policy of Maryland and therefore the New Jersey choice-of-law provision in the plan was enforceable.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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