newsletter

ERISA Litigation

A report to clients and friends of the firm

Edited by **Charles F. Seemann III** and **Bridgit M. DePietto**

January 2013

in this issue

Editors' Overview

This month's issue covers two emerging areas of employee-benefits law. Our lead article considers the implications of a forthcoming decision in *Comcast Corp. v. Behrend*, a case currently pending in the Supreme Court. The federal circuits have heretofore split on whether federal district courts must determine the admissibility of expert evidence during the class-certification phase of class litigation. In *Comcast*, the Court is expected to resolve this split in the antitrust context, although the Court's decision will likely apply in other types of litigation, as well. Our author examines the role of expert evidence in class certification issues arising in ERISA litigations, and identifies particular areas where the *Comcast* ruling may have significant implications for ERISA practitioners.

Our second article, the "View from Proskauer," is another installment in a series of articles covering the sweeping changes wrought by the Affordable Care Act (ACA). We have previously covered other aspects of the ACA in our May, July, August and November 2012 issues. In this issue, our authors consider cost-control strategies for employers as they struggle with retiree-medical expenditures in the era of the ACA. They conclude with practical advice for employers hoping to reduce retiree-medical costs while minimizing abrupt changes to coverage.

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

The Future Role of Experts in ERISA Class Actions*

Contributed by Nicole A. Eichberger

The Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes* impacted not only employment class actions but the viability of class certification in ERISA cases. The Supreme Court's grant of certiorari last term in *Comcast Corporation v. Behrend* has the potential to similarly impact the future availability of class certification in ERISA actions. The Supreme Court granted Comcast's petition for certiorari with respect to the following question on which the federal circuit courts have been divided since *Dukes*:

> Whether a district court may certify a class action without resolving whether the plaintiff class has introduced admissible evidence, including expert testimony, to show that the case is susceptible to awarding damages on a class-wide basis.

Although *Comcast* is an antitrust lawsuit, the Supreme Court's decision could affect certification decisions in ERISA class actions, since the evaluation of class certification motions in ERISA cases often involves an assessment of the parties' respective expert analyses.

Experts have always played a significant role in complex class action litigation, including ERISA lawsuits, but the courts' views as to the role of experts at the class certification stage were inconsistent at best. The Supreme Court's decision in *Dukes* arguably affected the analysis, insofar as the Court set forth a "significant proof" standard for satisfying Fed. R. Civ. P. 23. As part of the "significant proof" discussion, the Supreme Court stated in *dicta* that the admissibility standard for expert evidence set forth in *Daubert v. Merrell Dow Pharmaceuticals Inc.*,[1] should apply at the class certification stage. After *Dukes*, the circuit courts have divided on whether a ruling on the admissibility of expert evidence is a prerequisite to a class certification ruling. The Supreme Court's ruling in *Comcast* should resolve this split and, in so doing, significantly impact the outcome of class action litigation, including ERISA litigation.

Role of Experts in ERISA Class Actions Pre-*Dukes*

To appreciate the significant role experts can play in class certification, it is helpful to consider the courts' approaches to class certification in ERISA lawsuits. The propriety of class-wide resolution is particularly important in the ERISA context, since courts apply class certification criteria both to suits brought on behalf of a class of plan participants and to suits brought "on behalf of" an ERISA plan.[2] These decisions typically emphasize the due process considerations underlying Rule 23's procedural protections for absentee plan participants.

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* This article originally appeared in the January 2013 issue of the Employee Benefit Plan Review.

1 509 U.S. 579 (1993).

2 See, e.g., *Coan v. Kaufman*, 457 F.3d 250 (2d Cir. 2006); *Langbecker v. Electronic Data Systems Corp*., 476 F.3d 299 (5th Cir. 2007).

As in all class actions, the plaintiff in an ERISA class action must satisfy Rule 23(a)'s requirements of numerosity, commonality, typicality, and adequacy. In addition, the plaintiff must satisfy at least one of Rule 23(b)'s requirements. Before *Dukes*, commonality requirements were satisfied readily in ERISA 401(k) excessive fee claims and prudence claims based on alleged breaches in selecting investment options. In contrast, ERISA putative classes alleging misrepresentation and/or estoppel claims generally were not certified because of the predominance of individualized issues. Regardless of the type of claims involved, the courts have reached inconsistent results regarding the proof needed to sustain a showing of commonality, including the need for expert evidence and the circumstances under which such evidence should be considered.

For example, in *Langbecker*, plaintiffs brought a class action alleging breach of fiduciary duty claims, including prudence and disclosure claims, stemming from the company's offering of a 401(k) plan in which the employer stock fund was an ESOP. The district court certified the prudence claim for class treatment, notwithstanding an expert analysis offered by defendants to demonstrate that plaintiffs could not satisfy their Rule 23 burden of proof.[3] On appeal, the Fifth Circuit decertified the prudence claims. In so ruling, the Fifth Circuit stated that a district court's analysis under Rule 23 required an inquiry into the merits to determine whether sufficient admissible evidence had been presented, and that this inquiry should include consideration of the admissibility of the expert evidence.[4]

In parallel class action challenges to administrative fees levied against ERISA plans, the Seventh Circuit found class resolution improper[5] based in part on expert testimony proffered by defendants, which demonstrated that damages could not be awarded on a class-wide basis. In so ruling, the court rejected plaintiffs' arguments that they did not have to offer evidence in advance of trial to show that damages could be awarded on a class-wide basis.

Contrasting these rulings is the district court's ruling in *Brieger v. Tellabs*.[6] In *Brieger*, plaintiffs filed a putative class action alleging that Tellabs and various individual defendants breached their fiduciary duties of prudence and disclosure because Tellabs common stock was offered as an investment option in the company's 401(k) plan. In granting plaintiffs' motion for certification, the district court rejected defendants' proffered expert opinion, holding that it need not consider expert reports at the certification stage.

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[3] *In re Electronic Data Sys. ERISA Litig.*, 224 F.R.D. 613 (E.D. Tex. 2004).

[4] *Langbecker, supra*, 476 F.3d at 313-318.

[5] *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011).

[6] 245 F.R.D. 345 (N.D. Ill. 2007).

The Supreme Court's Ruling in *Wal-Mart v. Dukes*

Although the Supreme Court's ruling in *Dukes* did not rule on the admissibility of expert evidence at the class certification stage, many of the Court's pronouncements may be relevant to the issue. Plaintiffs in *Dukes* filed a Title VII class action suit on behalf of past, present, and future female employees of Wal-Mart's retail stores in the United States. Plaintiffs alleged that the company systematically paid women less than their male counterparts and promoted men to higher positions at faster rates than women, in violation of Title VII. The district court granted class certification, and the Ninth Circuit affirmed.

At the outset of the opinion, the Supreme Court held that Rule 23 is not a mere pleading standard. Rather, a party seeking class certification "must affirmatively demonstrate his compliance with the Rule—that is, he must be prepared to prove that there are in fact sufficiently numerous parties, common questions of law or fact, etc.," and the moving party's burden is one of "significant proof." The Court confirmed its prior rulings that class certification is not the rule but the exception. When assessing class certification, a district court may not refuse to consider the merits of plaintiffs' underlying claims that bear on whether they have satisfied Rule 23. The *Dukes* Court stated if plaintiffs lack "significant proof" that a question central to establishing liability for each class member can be answered in the same way for each class member, the case is not proper for class certification. Thus, when discussing what constitutes "significant proof," the majority suggested in *dicta* that the admissibility standards enunciated in *Daubert* should be applied to expert evidence offered at the class certification stage.

Under the "significant proof" burden, the *Dukes* Court concluded that plaintiffs could not satisfy either Rule 23(a) or 23(b), and the class never should have been certified.

Role of Experts in ERISA Class Actions Post-*Dukes*

Following *Dukes*, courts have divided as to whether the admissibility of expert evidence must be decided when ruling on class certification motions. This division has manifested itself to some extent in the ERISA arena as well, insofar as courts have differed as to the need to evaluate expert testimony at the class certification stages and, in some instances, have conditioned that evaluation on a determination of the admissibility of the expert testimony.

Courts within the Seventh and Eleventh Circuits have considered, and been guided by, expert testimony at the Rule 23 stage. For example, in *Groussman v. Motorola, Inc.*,[7] plaintiffs moved to certify a class of 401(k) plan participants whose accounts included investments in employer stock. Relying on defendants' brief and attached expert report, the court ruled that plaintiffs' employer stock claims failed to satisfy Rule 23(a)'s commonality and typicality requirements because of the individualized inquiries needed to determine each class member's

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[7] No. 10 C 911, 2011 WL 5554030 (N.D. Ill. Nov. 15, 2011).

understanding of the company's financial state when making investment decisions.[8]

In *Sher v. Raytheon Co.*,[9] the Eleventh Circuit held that the district court erred in certifying a class where it failed to weigh conflicting expert testimony presented by both parties at the class certification stage. Furthermore, the court held that the district court must conduct a *Daubert* admissibility analysis of the proffered expert testimony at the Rule 23 stage, especially when conflicting expert reports are presented and those opinions are critical to the certification issues.

Following *Sher*, the district court in *Bacon v. Stiefel Labs., Inc.*[10] held that the plaintiffs failed to satisfy Rule 23(b)(3)'s predominance and superiority requirements in a putative ERISA class action. In *Bacon*, plaintiffs filed a class action, alleging a common scheme to defraud ESOP participants by concealing the true value of the company's stock, which was alleged to have been done to reap a windfall by acquiring stock from the participants at an artificially reduced price prior to a proper fair market valuation of the company. Relying in part on defendants' expert reports, the court rejected plaintiffs' argument that a presumption of reliance, without further proof, should flow from the alleged common scheme of misstatements and omissions. The court concluded that plaintiffs failed to sustain their burden of demonstrating that common questions as to reliance and damages predominated.

Other courts have declined to resolve the admissibility of expert evidence at the Rule 23 stage. For example, in *Cox v. Zurn Pex, Inc.*,[11] the Eighth Circuit affirmed class certification, rejecting defendants' contention that the district court should have undertaken a *Daubert* admissibility analysis prior to class certification. In so ruling, the court held that a *Daubert* analysis was not necessary at this stage, but was instead more appropriate at trial. Similarly, in *Churchill v. CIGNA Corp.*,[12] the district court certified a class in a case challenging CIGNA's national policy as to coverage of autism spectrum disorder. In its opinion, the court rejected defendants' argument that plaintiffs had not provided sufficient evidence—including expert evidence—that damages could be awarded on a class-wide basis. In rejecting this argument, the court concluded that plaintiffs need only show by a preponderance of the evidence that they would satisfy Rule 23's commonality and typicality requirements at trial, and that plaintiffs had made a sufficient showing in their certification briefs, notwithstanding the contrary testimony of defendants' experts.

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[8] See also *George v. Kraft Foods*, No. 08 C 3799, 2011 WL 5118815 (N.D. Ill. Oct. 25, 2011) (denying class certification because plaintiffs failed to proffer required proof of class certification criteria under *Dukes,* and holding that defendants' admissible expert evidence demonstrated irreconcilable class conflicts).

[9] 419 F. App'x 887 (11th Cir. 2011).

[10] 275 F.R.D. 681 (S.D. Fla. 2011).

[11] 644 F.3d 604 (8th Cir. 2011).

[12] No. 10-6911, 2011 WL 3563489 (E.D. Pa. Aug. 21, 2011).

Thus, at the time the Supreme Court granted certiorari in the *Comcast* case, the state of the law with respect to the role of experts at the Rule 23 stage was uncertain in ERISA complex class actions.

***Comcast Corp. v. Behrend*: Expert Admissibility at Class Certification Stage**

The Supreme Court's grant of certiorari in *Comcast Corp. et al. v. Behrend*[13] picks up where the Supreme Court left off in *Dukes*. As noted above, the *Dukes* Court suggested in *dicta* that the *Daubert* admissibility standard should apply at the class certification stage. In *Comcast*, the Supreme Court will have the opportunity to consider whether to convert that *dictum* to a holding.

Factual and Procedural History

Comcast is an antitrust class action brought on behalf of select Comcast customers against Comcast Corp., alleging class action antitrust claims under Sections 1 and 2 of the Sherman Act. The plaintiffs alleged the company obtained a monopoly via a series of transactions and/or acquisitions with competitors for allocation of regional cable markets, and that conduct excluded and prevented competition. The parties exchanged competing expert reports at the class certification stage and Comcast submitted a *Daubert* challenge as to the admissibility of plaintiffs' class expert. The district court granted plaintiffs' motion for class certification and certified a class under Fed. R. Civ. P. 23(b)(3). In its opinion, the district court stated that the plaintiffs proved by a preponderance of the evidence that they would satisfy Fed. R. Civ. P. 23's commonality required at trial and that it need not decide *Daubert* admissibility issues until trial.

Following the district court's decision, defendants filed a Fed. R. Civ. P. 23(f) petition to appeal the district court's order granting class certification. On June 9, 2010, the Third Circuit granted Comcast's Rule 23(f) petition. Following briefing and oral argument, the Third Circuit affirmed the district court's decision to grant class certification. The Third Circuit held that the district court did not abuse its discretion in declining to resolve expert admissibility at the certification stage and concluding, instead, that plaintiffs' class certification evidence was susceptible to proof at trial. Although the Third Circuit held that Fed. R. Civ. P. 23 requires a rigorous analysis including a preliminary inquiry into the merits, it held that it was "precluded from addressing any merits inquiry unnecessary to make a Rule 23 determination."

Certiorari Granted

Following the Third Circuit's decision to affirm the district court's opinion, Comcast petitioned for certiorari before the Supreme Court as to the following question:

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[13] 655 F.3d 182 (3d Cir. 2011), *cert. granted*, No. 11-864 (June 25, 2012).

> Whether a district court may certify a class action without resolving merits arguments that bear on Fed. R. Civ. P. 23's prerequisites for certification, including whether common issues predominate over individual ones under Rule 23(b)(3).

The Supreme Court granted Comcast's petition for certiorari, but on a narrower question as to whether a district court must resolve whether the plaintiff has introduced admissible evidence, including expert testimony, that damages can be awarded class wide.

The parties have now briefed the issue to the Supreme Court, eliciting various *amicus* briefs in support of both positions, and held oral argument on November 5, 2012.

Future Role of Experts in ERISA Class Actions

The role of experts in resolving class certification issues is particularly pronounced in ERISA class action litigation. Among other things, expert opinions help to determine whether the claims are sufficiently uniform to permit class certification under Rule 23. In the past, this issue has been presented in claims arising from investment losses or alleging excessive fees, where different participants may have experienced different outcomes, which in turn could give rise to conflicts defeating class certification. In light of the Supreme Court's recent ruling in *CIGNA Corp. v. Amara*,[14] which recognizes the viability of claims for recovery of monetary relief in claims alleging communications violations, it is likely that these issues will extend to many other types of cases. As courts are presented with arguments as to whether ERISA claims are sufficiently uniform to proceed as class actions, they will inevitably confront issues as to the admissible evidence required of plaintiffs to satisfy Rule 23's requirements, and whether the application of the *Daubert* expert evidence admissibility standard is implicated.

For these reasons, the ERISA community should view favorably the Supreme Court's decision to grant certiorari in *Comcast*. The outcome will hopefully resolve one aspect of the complex class certification process that has been particularly inconsistent in ERISA class action litigation.

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[14] 131 S. Ct. 1866 (2011).

View from Proskauer: Health Insurance Exchanges and Retiree Medical Exits—Five Ways to Make Sure It's Really a "Soft Landing"*

By James R. Napoli and Kara L. Lincoln

As employers look to trim retiree medical obligations, they are considering whether to establish health reimbursement arrangements (HRAs) for retirees to buy insurance from insurance exchanges established under the Patient Protection and Affordable Care Act (PPACA)—a so-called "soft landing." The exchanges raise new issues, however, that require close consideration.

Employer-provided retiree medical coverage has been on the wane for some time. The introduction of insurance exchanges is expected to expedite the curtailment and elimination of these benefits, because individuals will have full access to individual health insurance policies through the exchanges. Although coverage through the exchanges should be available at least by 2014, there are possible impediments to such a strategy.

New Legal Issues with the Exchanges

The typical design for limiting retiree medical exposure under the "soft landing" approach is for the employer to establish HRAs for its retirees and credit those HRAs with a specified contribution amount. The retirees are then free to use the amounts credited to their HRAs to purchase coverage through the exchanges or otherwise offset their medical costs. Nobody really knows how the exchanges will work, though. New issues could lead to litigation—under the Employee Retirement Income Security Act, the Labor Management Relations Act, and state laws. Employers and other plan sponsors could face various issues in implementing a "soft landing" strategy, including:

Exchanges Are Untested

Many experts predict the public exchanges will be confusing, complex, and burdened with regulations. The coverages offered under the exchanges may not be "affordable" even if they only provide "essential health benefits." In fact, it is generally accepted that the cost of coverage will go up before it trends down over the years following implementation of the exchanges.

Private exchanges are being advertised as more competitive, efficient, and user-friendly than their public counterparts. They promise more assistance to ease transitions, and to be available sooner—in 2013. They may also suffer from conflicts of interest, though, to the extent they are run by private sector consulting firms, industry groups, or even insurance carriers that may also have economic interests in securing contracts or improving profitability.

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Duties as to Selecting, Implementing, and Monitoring the Exchanges

If a fiduciary chooses a particular private exchange, it will want the best option possible for its retirees, who could be unhappy with an exchange viewed as inferior to the competition or the public exchanges. Further, such a selection could trigger claims for breach of the fiduciary duty of prudence, as the selection of any third-party service provider can do. In this rapidly-evolving market, fiduciaries could need to keep up with the latest developments and adjust accordingly.

Courts are starting to consider whether changes to medical benefits are "reasonable" in light of the health care market, the retirees' current benefits, and the other benefits the employer offers. An employer could be expected to make sure the chosen exchange offers comparable coverage, with only "reasonable" modifications to existing coverages provided under the employer-sponsored plan.

It is unclear how much responsibility employers will have after the retirees' accounts are established and the exchange has been selected. Employers may want to ensure the transition goes smoothly and the exchange is monitored, to make sure the chosen exchange remains the best option for retirees. If an employer knows or should have known of problems with the exchange, it might want to make sure they are fixed, or consider other options.

Potential Communication Breakdowns

Retirees are likely to be confused about the exchanges, at least at first. They will seek advice from employers and current insurers, and need reliable information.

Information will come from multiple sources, and it is unclear who will be responsible for which communications and for assuring a uniform message with respect to the transition to the "soft landing" design. Employers will need to communicate the changes to retirees and address transition issues. Exchanges should inform of policies and services. Individual insurance carriers provide benefits information. Unions may also seek to communicate with retirees who were members of a collectively bargained unit prior to retirement.

In all the confusion, retirees may receive conflicting, misleading, or inaccurate information. Or they may receive no information, and have no idea how to even obtain coverage.

State Laws Could Apply

For complaints about an exchange or "garden-variety" negligence, it is possible that neither ERISA nor the LMRA will preempt state laws. Employers could face varying responsibilities, expanded remedies, and greater exposure.

If an exchange fails, retirees will likely look to employers and insurance carriers. Public exchanges could leave retirees with no recourse except from their employer.

Five Ways to Give Retirees a "Soft Landing"

Every situation is different, but there are at least five ways to help make sure the transition is smooth and exposure is limited.

(1) Prudent Investigation, Selection, and Implementation

> Review governing documents to determine the extent to which benefits have vested, whether reservation of rights clauses are included, and whether modifications can be made.

> Consider whether a suit seeking declaratory judgment is available to clarify what your documents mean and how coverage can be modified.

> Research the exchanges, carefully consider conflicts of interest, and obtain other outside opinions.

> Consider offering choices, or an agreement with retirees or unions.

(2) "Reasonable" Modifications

> Compare your old coverage to what the exchanges offer.

> Consider other health care benefits you're offering, including any disparities between retirees' and active employees' benefits.

> Know what your retirees actually use and expect, and whether it is available from exchange-based coverage.

> Know what competitors and industry leaders are doing.

> Consider whether transition periods could make modifications more reasonable.

(3) Proper Documentation

> Keep records of the investigation and communications with the exchanges and advisers.

> Document the considerations, pros and cons, and reasons for decisions.

> If you are amending a plan, memorialize that the amendment process was according to the requisite procedure.

(4) Thorough Communication and Successful Implementation

> Decide what the exchange, the employer, and the insurer will communicate to retirees, and document that it was communicated.

> For retirees' questions, there should be a hotline, website, and address—and records of inquiries and responses.

> Surveys can help ensure retirees receive material information and are not confused or misinformed.

> Issues should be monitored and addressed as they arise, so they do not recur—either to multiple retirees, or to one retiree multiple times.

(5) Expert Consultation

- As always, with any big transition, obtain independent advice from qualified advisors and consultants at every step of the way.

Rulings, Filings, and Settlements of Interest

Contributed by Anthony S. Cacace, Brian S. Neulander, Kara L. Lincoln, Page W. Griffin, and Jacklina A. Len

Affordable Care Act

> Several federal appellate courts reached different results on constitutional challenges to the Affordable Care Act (ACA), where secular employers argued that ACA's mandate to cover contraceptive services violates their religious freedoms under the First Amendment and the Religious Freedoms Restoration Act. First, the U.S. Court of Appeals for the District of Columbia Circuit in *Wheaton College v. Sebelius*, Nos. 12-5273 & 12-5291, 2012 WL 6652505 (D.C. Cir. Dec. 17, 2012), ruled that lawsuits brought by two non-profit religious colleges were premature, despite the court's finding that the colleges' employees could sue under ERISA to enforce their rights to contraceptive coverage, because the mandate is not being enforced against *non*–profit secular employers and final agency guidance on the mandate's application to such employers is not expected until August 2013. Second, in *Hobby Lobby Stores, Inc. v. Sebelius*, No. 12-644, 2012 WL 6698888 (Dec. 26, 2012) and No. 12-6294 (10th Cir. Dec. 20, 2012), the U.S. Supreme Court and the Court of Appeals for the Tenth Circuit refused to issue a preliminary injunction pending appeal to prevent enforcement of the mandate as to Hobby Lobby, a closely held, for-profit corporation claiming religious freedoms based on its owners' beliefs. In *Hobby Lobby*, the district court held the mandate would not substantially burden the owners' exercise of religion. Third, the U.S. Court of Appeals for the Seventh Circuit issued a preliminary injunction to prevent enforcement of ACA's mandate as to a small, family-run, for-profit business in *Korte v. Sebelius*, No. 12-15488, 2012 WL 6757353 (7th Cir. Dec. 28, 2012), reasoning that the mandate would preclude the owners from operating the business according to their Catholic beliefs.

Benefits Litigation

> In *Carr v. Anheuser Busch Co.*, No. 12–1224, 2012 WL 6685323 (8th Cir. Dec. 21, 2012), the Eighth Circuit affirmed summary judgment dismissing an ERISA Section 502(a)(1)(B) claim for severance benefits, finding that the plaintiff was terminated for misconduct, thereby disqualifying him from receiving benefits under the terms of the plan. Plaintiff was terminated for attempting to take audio equipment from his office building. Although plaintiff was confronted by a security guard after unscrewing stereo speakers from an office wall, he claimed that he was merely moving them from one office to another—not taking them from the building. Following termination, the plan administrator denied plaintiff's claim for severance benefits because of his "willful misconduct." The plan contained *Firestone* language bestowing discretionary authority on the plan administrator, and the court reviewed the benefit denial under the arbitrary and capricious standard of review. In doing so, the court rejected plaintiff's claims of procedural irregularities during the administrative exhaustion process. Although the court found that the district court erred in considering an after-the-fact affidavit from the plan administrator explaining its decision because this material was outside the

administrative record, the evidence in the administrative record regarding plaintiff's violation of company policy was found sufficient to conclude that the benefit denial was reasonable under terms of the plan.

Employer Stock

> In *Slaymon v. SLM Corp.*, 2012 WL 6684564 (2d Cir. Dec. 26, 2012), the Second Circuit Court of Appeals affirmed dismissal of an employer-stock class action in a summary order. Plaintiffs were employees of SLM Corp. (also known as Sallie Mae) who alleged that the fiduciaries of two Sallie Mae retirement plans breached fiduciary duties by offering company stock as a plan investment option, at a time the company adopted less conservative student-lending practices and increased its exposure to "subprime" borrowers. The district court dismissed. In affirming, the Second Circuit noted that the plans' terms called for investment in Sallie Mae stock, which triggered a presumption of prudence. The court concluded that an 85% decline in share price did not suffice to establish the "dire circumstances" needed to rebut that presumption, in spite of additional allegations regarding a failed acquisition attempt. In affirming the dismissal of various disclosure claims, the court noted that plan fiduciaries typically have no duty to disclose investment information beyond ERISA's affirmative requirements, and held that a general warning regarding the risks of undiversified stock investments satisfied these requirements. The court also held that participants of one plan lacked constitutional standing to pursue claims on behalf of the other plan, despite some overlap among the plans' fiduciaries. The court noted that a favorable ruling against one plan's fiduciaries would not guarantee a similar result to participants of the other plan, and thus would afford no relief.

Statutory Violations

> In *First Unum Life Insurance Co. v. Wulah*, No. 10-3786, 2012 WL 6621281 (2d Cir. Dec. 20, 2012) (by summary order), the Second Circuit found that the participant's bankruptcy discharge encompassed the monetary judgment his disability insurer obtained against him, thus rendering moot his appeal of that judgment. The Second Circuit also affirmed the magistrate judge's grant of summary judgment in favor of the insurer on the participant's counterclaim for benefits, holding that the participant failed to show how the insurer's alleged failure to provide a summary plan description prejudiced him.

> In *Kifafi v. Hilton Hotels Retirement Plan*, --- F.3d ---, No. 11-7113, 2012 WL 6216631 (D.C. Cir. Dec. 14, 2012), the D.C. Circuit affirmed a judgment holding that Hilton violated ERISA's anti-backloading provisions, despite a subsequent amendment purporting to cure the violation in response to plaintiffs' claims. Under the terms of the pre-1999 plan, the plan calculated normal retirement benefits as a function of compensation and years of service, less benefits payable to the participant under another pension plan or government-sponsored system, such as Social Security. The pre-1999 plan expressly stated an intent to comply with backloading rules by employing the so-called "133-1/3 rule" when computing a participant's accrued benefit. Plaintiffs brought a class action, alleging the plan failed to credit all years of service when calculating early retirement benefits, and impermissibly

backloaded benefit accruals to later years of service in violation of the 133-1/3 rule. After granting summary judgment to plaintiffs on both claims, the district court ordered Hilton (1) to amend the benefit accrual formula to comply with the 133-1/3% rule and (2) to administer a claim procedure for the purpose of calculating years of union service for vesting purposes. On appeal, Hilton argued that its promise of compliance made the court's chosen remedy unnecessary, and that the amendment cured the alleged violations. The court rejected Hilton's argument, noting that defendants could not divest the court of jurisdiction merely by promising to abstain from future ERISA violations. The court also rejected Hilton's argument that the lower court's remedial order was improper, in that it required the plan to comply with the 133-1/3 rule, as opposed to other modes of complying with ERISA's backloading rules. Affirming the ordered remedy of compliance of the 133-1/3% rule, the court reasoned that once the district court "determined the plan violated ERISA, it entered the world of equity," and held that the remedy need not be "a reflection of the legal violations supporting the remedy." Finally, the court rejected plaintiffs' argument that the district court improperly excluded nonunion nonparticipating years of service from the class. The court reasoned that even if plaintiffs' complaint properly pled a claim for nonparticipating years of service for nonunion employees, Hilton's alleged failure to count nonunion nonparticipating service affected individuals other than those affected by its failure to count union service, and thus raised separate questions of fact and potential remedies. Accordingly, the court concluded, these claims would not be appropriate for inclusion into the union service class.

Class Actions

> In *Johnson v. Meriter Health Services Employee Retirement Plan*, No. 12-2216, 2012 WL 6013457 (7th Cir. Dec. 4, 2012) (J. Posner), the Seventh Circuit affirmed the lower court's grant of class certification of ERISA claims for declaratory relief under Fed. R. Civ. P. 23(b)(2), while acknowledging that individualized issues may preclude certification of claims for monetary relief In so ruling, the Court held that the mere fact that some of the class members already retired and were receiving benefits did not alter the conclusion that their claims were properly characterized as claims for declaratory and injunctive relief. With respect to the claims for individual monetary relief, however, the Court recognized that individual issues and defenses (including, for example, the statute of limitations defense) may preclude class certification. The Court stated that certification under Rule 23(b)(2) would be warranted only if the award of monetary relief is just "a matter of laying each class member's pension-related employment records alongside the text of the reformed plan and computing the employee's entitlement by subtracting the benefit already credited [] to him from the benefit to which the reformed plan document entitles him," since then "the monetary relief will truly be merely 'incidental' to the declaratory and (if necessary) injunctive relief (necessary only if defendant ignores the declaration)." The Court also left open the prospects of certifying clams for individual monetary relief under Rule

23(b)(3) if individual issues with respect to the calculation of benefits precluded certification of monetary relief claims under Rule 23(b)(2).

Section 510 Claims

> In *Gaglioti v. Levin Group, Inc*., No. 11–3744, 2012 WL 6217365 (6th Cir. Dec. 13, 2012), the Sixth Circuit affirmed summary judgment dismissing ERISA Section 510 and disability discrimination claims, but reversed as to age discrimination claims. Upon hiring, Plaintiff was immediately given health benefits. A few months later, shortly after disclosing health problems regarding his wife, plaintiff was terminated. To support his ERISA Section 510 claim, Plaintiff averred that disclosure of his wife's health information triggered his termination because of defendant's fear that health benefit expenses would increase. Defendant asserted that plaintiff was a temporary employee and hired to work on short-term matters that were completed. The court noted that plaintiff's theory of the case depended on inferential evidence, and ruled that his evidence fell short of showing the specific intent needed to establish his benefit interference claim. In contrast, the court ruled that inferences of discrimination are sufficient to meet plaintiff's burden for prima facie age discrimination claims, and that genuine issues of material fact surrounded the proffered reason for termination.

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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