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# The ERISA Litigation Newsletter

**April 2011**

**Editor's Overview**

This month, we highlight the *Renfro v. Unisys* class action pending before the Third Circuit. The *Renfro* plaintiffs challenged the reasonableness of retail mutual funds as 401(k) plan investment options, as well as the applicability of the Section 404(c) defense to fiduciary breach claims. The Third Circuit heard oral argument on March 7, and its impending decision is expected to have far-reaching implications with respect to what types of investment vehicles 401(k) plan sponsors will be able to offer, and the scope and application of the Section 404(c) safe harbor.

A second article examines the viability of "hybrid" lawsuits in which plaintiffs seek relief for alleged violations of the Fair Labor Standards Act, while also asserting that the alleged compensation errors deprived them of the full value of ERISA plan benefits, thus giving rise to an ERISA claim for breach of fiduciary duty. Permitting these "hybrid" actions to proceed could lead to a substantial expansion in the scope of ERISA fiduciary responsibilities because imposing a fiduciary duty to monitor compensation could extend, not merely to FLSA issues, but to other statutory issues as well, such as employment discrimination.

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

## ***Renfro v. Unisys*: What's at Stake?[1]**

Contributed by Amy R. Covert

Currently pending before the Third Circuit Court of Appeals is plaintiffs' appeal of the district court's decision in *Renfro v. Unisys*, No. 07-2098, 2010 WL 1688540 (E.D. Pa. Apr. 26, 2010).[2] *Renfro* is one of over a dozen nearly identical putative class actions that were commenced in 2006 by the same law firm against some of the nation's largest employers, their 401(k) plans, and the fiduciaries of those plans. As in the other actions, plaintiffs in *Renfro* assert that Unisys Corporation and Fidelity Management Trust Company breached their fiduciary duties under ERISA by offering investment options with allegedly excessive fees in participant-directed 401(k) plans. As with many of the other suits, plaintiffs complain that defendants did not take advantage of the plan's large size to obtain lower fees or increased services for plan participants.

On April 29, 2010, United States District Judge Berle M. Schiller of the United States District Court for the Eastern District of Pennsylvania dismissed the putative class action complaint, holding that Unisys did not breach its fiduciary duties and that Fidelity was not a fiduciary under ERISA. As suggested by the seven *amicus curiae* filings, including briefs submitted by the Department of Labor (DOL), the Chamber of Commerce of the United States, the Investment Company Institute, and the Securities Industry and Financial Markets Association, the Third Circuit's decision could have far-reaching implications, in terms of both the types of investment vehicles that plan sponsors will be able to offer in participant-directed 401(k) plans, and the scope and application of the defense afforded to plan fiduciaries under ERISA Section 404(c).[3]

**Background**

Plaintiffs were participants in the Unisys Corporation Savings Plan (Plan), which provides individual accounts for each Plan participant. As is typically the case with 401(k) plans, a participant’s benefits under the Plan are determined by the amounts contributed to his or her account and any income, gains, and losses that may be allocated to the account as a result of the participant’s investments. Plan participants decide how to allocate their money among the different investment options in the Plan after receiving detailed information about the investments’ historical performance, the managers’ investment strategies, and the associated fees and expenses. During the period in question, the Plan offered over 70 investment options with varying fees, risks, and potential rewards, including commingled pools, index funds, bond funds, funds representing parts of the global economy, and a money market fund. The funds offered had fees ranging from as little as 0.10% to as high as 1.21%. From 2000 to 2007, the total assets in the Plan exceeded $2 billion, with the total number of Plan participants exceeding 30,000.

Pursuant to the agreement entered into with Fidelity Management Trust Company (FMTC), FMTC agreed to provide a wide variety of services, including recordkeeping, participant education and communication, reviews with plan sponsors, and trustee services such as facilitating the monetary inflows and outflows of the Plan. FMTC delegated certain of these tasks to its affiliate, Fidelity Investments Institutional Operations Company, Inc. The trust agreement stipulated that the only mutual funds that could be offered to Plan participants were those advised by Fidelity Management & Research Company; however, Unisys could add additional investment options with FMTC’s consent.

**The Renfro Litigation**

Plaintiffs filed a putative class action complaint against Unisys and its Plan fiduciaries (collectively, the Unisys Defendants) and FMTC and affiliated entities (collectively, the Fidelity Defendants). The complaint alleged that defendants breached their fiduciary duties by including retail mutual funds as investment options in the Plan. Plaintiffs contended that participants and beneficiaries were forced to pay excessive administrative and investment management fees, and complained that Defendants did not take advantage of the Plan’s large size to negotiate lower fees or increased services for Plan participants and beneficiaries.

Both the Unisys and Fidelity Defendants moved to dismiss the complaint. Unisys also moved in the alternative for summary judgment. The district court granted all motions in Defendants' favor.

In their motion to dismiss, the Unisys Defendants argued that the Complaint failed to state a plausible claim for relief under *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007), for purportedly forcing participants to pay excessive fees by offering retail mutual funds in the Plan. Relying in part on the Seventh Circuit's decision in *Hecker v. Deere & Co.*, 556 F.3d 575, 586 (7th Cir. 2009), the district court concluded that because the Plan "offered a sufficient mix of investments," no rational trier of fact could find that the Unisys Defendants breached their fiduciary duties. Agreeing with the Seventh Circuit's opinion in *Hecker*, the court held that, because Unisys negotiated a trust agreement that provided Plan participants with investment options that were not unreasonable on their face, the complaint failed to state a plausible claim that the Unisys Defendants breached their fiduciary duties under ERISA. In so ruling, the court determined, like *Hecker*, that prudence did not require a plan fiduciary to select the cheapest fund available. The court noted that by offering more than 70 funds, the Plan provided participants with "a number of investment options with varying fees, risks and potential rewards," and that the fees charged by the funds in the plan were "disclosed to investors who could choose from among the investment options to create a portfolio tailored to meet their investment objectives."

As in *Hecker*, the court found that, because the funds offered in the Plan were also offered to investors in the general public, "the expense ratios necessarily were set against the backdrop of market competition." The court observed that "plan sponsors, when negotiating with potential trustees, would seek out the best deal possible for plan participants and would negotiate lower investment fees or administrative fees based on their market power if possible" and that "labor market forces are better positioned than courts to determine if plan sponsors can use the size of their plan as a bargaining chip to elicit lower prices or better services for plan participants." The court inferred from these circumstances that the Plan's fee agreement "was an arm's-length bargain and therefore needs less judicial oversight to ensure fairness to plan participants and beneficiaries."

The district court also granted the Unisys Defendants' alternative motion for summary judgment, which contended that any losses allegedly suffered by Plaintiffs were the result of their individual investment decisions and that ERISA Section 404(c) shielded Defendants from any liability. The court held that the Unisys Defendants met their burden of demonstrating compliance with Section 404(c), in that the plan provided participants and beneficiaries (1) an opportunity to exercise control over the assets in their individual accounts, and (2) an opportunity to choose from a broad range of investment alternatives. Relying on the Third Circuit's decision in *In re Unisys Savings Plan*, 74 F.3d 420, 445 (3d Cir. 1996), the court rejected Plaintiffs' contention that Section 404(c) does not insulate fiduciaries from liability in connection with the selection and monitoring of investment options. Plaintiffs argued that *Unisys Savings Plan* is no longer good law because that case dealt with conduct that predated the effective date of the DOL's Section 404(c) regulations and that the court should defer to the agency's interpretation of the statute pursuant to *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.,* 467 U.S. 837, 842-43 (1984). The court rejected this argument, holding that the DOL's regulations are not entitled to *Chevron* deference because the Third Circuit's decision in *Unisys Savings Plan* was based on the "plain language" of the statute. The court in *Unisys Savings Plan* stated that ERISA's "unqualified instruction that a fiduciary is excused from liability for 'any loss' which 'results from [a] participant's or [a] beneficiary's exercise of control' *clearly indicates* that a fiduciary may call upon section [404(c)'s] protection where a causal nexus between a participant's or a beneficiary's exercise of control and the claimed loss is demonstrated." The district court concluded that since Congress had issued such a clear directive and the statutory language is not ambiguous, full blown *Chevron*-deference was not applicable.

The court also dismissed the claims against the Fidelity Defendants, holding that they were not fiduciaries with respect to the selection of plan investment options, and thus could not be liable for breach of fiduciary duty. In so ruling, the court rejected Plaintiffs' argument that Fidelity was a fiduciary by virtue of its "veto power" over the selection of any non-Fidelity funds as investment options, noting that the trust agreement did not limit Unisys's ability to establish another trust to offer Plan participants the opportunity to invest in non-Fidelity mutual funds.

**The Pending Appeal**

In their appeal to the Third Circuit, Plaintiffs argue again that the district court incorrectly held that retail mutual funds are reasonable Plan investment alternatives "on their face." Plaintiffs reassert that because mutual funds are more expensive than other institutional investment alternatives, Defendants breached their fiduciary duties of loyalty and prudence by limiting the Plan to only Fidelity investment vehicles, the majority of which were retail mutual funds. Plaintiffs contend that the court's reliance on *Hecker*'s "backdrop of market competition" theory to make mutual fund fees reasonable for large 401(k) plans was undermined by the Supreme Court's ruling in *Jones v. Harris Assoc. L.P.*, 130 S. Ct. 1418 (2010), which, Plaintiffs argue, rejected the Seventh Circuit's reliance on the "market" to ensure mutual funds comply with the Investment Company Act of 1940. Plaintiffs also contend that the district court erred in entering summary judgment based on ERISA Section 404(c). Relying on the DOL's interpretation of Section 404(c) as set forth in a footnote in the preamble to the 404(c) regulations,[4] Plaintiffs argue that Section 404(c)'s safe harbor applies only to breaches of fiduciary duty that are the direct and necessary result of participant control over their individual accounts and should not shield fiduciaries from liability for imprudently and disloyally selecting the investments available under the Plan. Plaintiffs also reassert their arguments that FMTC was a fiduciary and that the other Fidelity Defendants are liable in restitution to disgorge the purportedly excessive fees they received as a result of Defendants' alleged breaches of fiduciary duty.

In response, the Unisys Defendants contend that it is undisputed that Unisys complied with Section 404(c)'s requirements and that Defendants are therefore shielded from liability for the supposedly excessive fees. Defendants contend that the participants themselves determined those fees by their individual investment decisions and that any alleged losses were necessarily determined by the participants' control. The Unisys Defendants contend that the Third Circuit's decision in *Unisys Savings Plan*, which held that the "plain" terms of the statute excuse a breaching fiduciary from liability where the claimed loss stemmed from the participants' investment allocations, is controlling and mandates dismissal of Plaintiffs' claims.

The Unisys Defendants argue, in the alternative, that even if Section 404(c) does not shield Defendants from liability, Plaintiffs failed to state a plausible claim that retail mutual funds are imprudent. The Unisys Defendants contend that *Jones v. Harris* has no relevance because it involved claims under the Investment Company Act, not ERISA, and did not involve funds competing for business from 401(k) plans.

The Fidelity Defendants argue that FMTC is not a fiduciary for purposes of selecting the investments offered in the Plan, as the trust agreement makes clear that the Unisys fiduciaries have exclusive authority over investment selections. The fact that FMTC must consent to the addition of investment options to the trust agreement does not give FMTC control over the addition of options to the Plan as Unisys is free to add options to the Plan, administered by another trustee, if FMTC does not consent to add options to the trust agreement.

**Amicus Filings**

In an *amicus* brief submitted in support of Plaintiffs, the DOL argues that Section 404(c) does not immunize fiduciaries from losses caused by their own imprudence in the selection and monitoring of investment options available under a plan.[5] The DOL contends that *Unisys Savings Plan* is not binding because that court's statements were *dicta* and, in any event, when properly read, that decision is consistent with the Secretary's regulatory interpretation of Section 404(c). The DOL further argues that the district court erred in holding that deference to the Secretary's regulatory interpretation was inappropriate under *Chevron*.

The DOL also argues that the complaint adequately states a claim that the fees charged by many of the Plan's investments were excessive compared to the services provided and that the investments were imprudently selected. In this regard, the DOL contends that the complaint is akin to the complaint that the Eighth Circuit held sufficient to state a fiduciary breach claim in *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009), and is distinguishable from the complaint that was dismissed by the Seventh Circuit in *Hecker.*

The Chamber of Commerce, in the *amicus* brief it submitted in support of Defendants, takes the opposite view, arguing that the district court's ruling is correct on the law based on the plain language of the statute and controlling precedent.[6] The Chamber further argues that the court's decision should be affirmed in all respects "because it provides protection against unfettered litigation over liability for a participant's investment decision, squarely places the responsibility for such investment decision-making on the participant, and advances one of the ERISA purposes highlighted by the Supreme Court in *Conkright v. Frommert*, 130 S. Ct. 1640, 1648-49 (2010): To encourage employers to create and maintain ERISA plans." The Chamber warned that the costs associated with this type of litigation, if allowed to proceed, would have a chilling effect on the establishment and maintenance of 401(k) plans.

**Proskauer's Perspective**

The decision in *Renfro* is potentially important in a number of respects. First, it will be the first decision in the Third Circuit to address squarely the scope of Section 404(c) since the effective date of the Section 404(c) regulations. As noted, the Third Circuit previously ruled in *Unisys Savings Plan* that Section 404(c), if properly complied with, could relieve plan fiduciaries of liability for the selection of investment options. The Fifth Circuit reached the same conclusion in *Langbecker v. Elec. Data Sys. Corp.*, 467 F.3d 299, 309 (5th Cir. 2007). However, the Fourth Circuit, consistent with the position advanced by the DOL, has held that Section 404(c) does not shield fiduciaries from liability for imprudent selection of investment options. *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007). Until recently, the Seventh Circuit, in *Hecker*, appeared to side with the position of the Third and Fifth Circuits, but a more recent decision in *Howell v. Motorola, Inc.*, Nos. 07-3837, 09-2796, 2011 U.S. App. LEXIS 1193 (7th Cir. Jan. 21, 2011),[7] decided by a panel that included two of the three judges who decided *Hecker,* explicitly adopted the DOL's view that Section 404(c) does not apply to the selection of investment options. As we previously reported, this issue is also currently on appeal to the Sixth Circuit in *Tullis v. UMB, N.A*, No. 09-CV-4370 (6th Cir.). Thus, the Third Circuit will have an opportunity to render a ruling on an issue on which the circuit courts appear to be greatly divided.

*Renfro* also presents an opportunity for the Third Circuit to consider the viability of claims attacking the offering of retail mutual funds in 401(k) plans, and specifically whether these claims should be rejected outright where the fees charged for these funds are bargained for at arm's-length and are consistent with the fees charged to other investors. With respect to the claims against Fidelity, the Court also will have the opportunity to opine on the boundaries between what is and is not a fiduciary role in servicing an ERISA plan.

**Hitching a Ride on the Wage and Hour Gravy Train: A Primer on ERISA Lawsuits Seeking Relief Based on Alleged Violations of the FLSA**[8]

Contributed by Christopher L. Williams

In recent years, some plaintiffs seeking relief for alleged violations of the Fair Labor Standards Act (FLSA) have also asserted claims against their employer under ERISA in conjunction with their wage claims. In these "hybrid" lawsuits, plaintiffs allege not only that are they entitled to additional pay, but also that they should recover under ERISA because the employer's alleged failure to compensate them deprived them of the full value of their plan benefits.

Ordinarily, plaintiffs in these cases assert that the employer breached its fiduciary duties under ERISA by using incorrect compensation information to calculate their plan benefits. In addition, plaintiffs often allege that their employer violated ERISA § 209(a)(1), 29 § U.S.C. 1059(a)(1), by failing to maintain adequate personnel records to determine the benefits due to their employees. In most instances, plaintiffs bring both their breach of fiduciary duty claims and recordkeeping claims under ERISA's "catchall" provision, § 502(a)(3), 29 U.S.C. § 1132(a)(3). The claims for breach of fiduciary duty are derivative of, and dependent upon, the underlying causes of action under the FLSA, which typically involve allegations of misclassification or a failure to pay overtime.

Because ERISA specifically contemplates that employers may wear two hats – that of an employer and a plan fiduciary – a key "threshold question" in these cases is whether the employer "was acting as a fiduciary (that is, was performing a fiduciary function) when taking the action subject to complaint[,]" *Pegram v. Herdrich*, 530 U.S. 211, 225-226 (2000), or whether the employer was simply making a business decision.

Permitting plaintiffs to maintain *independent* causes of action under ERISA for an employer's *alleged* violations of the FLSA could have far-reaching implications. Theoretically, it could lead to a substantial expansion in the scope of fiduciary responsibilities by requiring plan administrators to independently monitor the appropriateness of the compensation received by plan participants whenever this compensation factors into benefit calculations. Indeed, the duty to monitor compensation could extend, not merely to FLSA issues, but to other statutory issues as well, such as employment discrimination.

For these reasons, and given the lack of consensus on the viability of ERISA claims predicated on alleged FLSA violations, we take the opportunity to review some of the competing case law.

**Decisions Suggesting That Employees May Maintain ERISA Claims Based on Alleged FLSA Violations That Impact Plan Benefits**

Several district courts have issued opinions holding that plaintiffs can state cognizable claims under ERISA § 502(a)(3) based on allegations that an employer's alleged improper payroll practices reduced available plan benefits. For example, in *Rosenburg v. IBM*, 2006 U.S. Dist. LEXIS 41775, *7 (N.D. Cal. June 12, 2006),[9] in addition to seeking recovery for unpaid overtime under the FLSA, plaintiffs asserted claims under ERISA § 502(a)(3) for (1) failing to maintain adequate records of their overtime hours, and (2) failing to credit all of the hours (including any overtime pay) required to be credited under the terms of their benefit plans. *Id.* at *8.

IBM moved to dismiss the ERISA claims, arguing that its decision to classify plaintiffs as exempt from the FLSA's overtime requirements was a business decision and therefore not subject to ERISA's fiduciary standards. *Id.* at *9-10. In response, plaintiffs argued that IBM's decision "not to credit, or to investigate crediting, unpaid overtime hours as compensation under the terms of the Plans" was a fiduciary act giving rise to liability under ERISA. *Id.* at *11-12. While recognizing that the issue was "a close call," the court held that whether IBM "was wearing its employer or its plan administrator hat" would require factual inquiry and "[wa]s therefore inappropriate for resolution on a motion to dismiss." *Id.* at *15.

Under similar reasoning, the court in *In re Farmers Ins. Exch. Claims Representatives' Overtime Pay Litigation*, 2005 U.S. Dist. LEXIS 42706, *16 (D. Or. Aug. 15, 2005),[10] refused to dismiss plaintiffs' ERISA § 502(a)(3) claims for failing to credit unpaid overtime hours and keep accurate records. After recognizing that plaintiffs' claims relied on a "novel theory" that drew "a very fine line between business and fiduciary decisions," the *Farmers* court nonetheless determined that plaintiffs' ERISA allegations could not be dismissed at the pleading stage. *Id.*

The *Rosenburg* and *Farmers* decisions did not go so far as to affirmatively endorse plaintiffs' theory of ERISA liability. Rather, the rulings were characterized as preliminary, and limited by the standards for adjudicating motions to dismiss. *Id.*; *Rosenburg*, 2006 U.S. Dist. LEXIS 41775 at *15.

Several courts have gone further and seemingly endorsed the viability of ERISA claims predicated on alleged wage and hour violations. For example, in *Stickle v. SCI Western Mkt. Support Ctr., L.P.*, 2008 U.S. Dist. LEXIS 83315, *53 (D. Ariz. Sept. 29, 2008),[11] in denying defendants' motion to dismiss plaintiffs' ERISA § 502(a)(3) claims for breach of fiduciary duty and improper recordkeeping, the court stated that "[u]nder ERISA, crediting hours is a fiduciary function, independent of the payment of wages, [that is] necessary to determine participants' participation, vesting and accrual of rights" and, consequently, that such actions were "subject to ERISA's strict fiduciary standards" and, if improperly conducted, were grounds for imposing fiduciary liability on the employer. *Id.*

The court in *Gerlach v. Wells Fargo & Co.*, 2005 U.S. Dist. LEXIS 46788, *7-8 (N.D. Cal. June 13, 2005), similarly permitted plaintiffs to maintain breach of fiduciary duty and recordkeeping claims under ERISA § 502(a)(3) in conjunction with their FLSA claims. In *Gerlach*, plaintiffs asserted that defendants improperly reduced their pension benefits by failing to take into account allegedly unpaid overtime compensation. *Id.* at *4. In denying defendant's motion to dismiss, the *Gerlach* court stated that it would be inequitable to preclude plaintiffs from recovering under ERISA as such a result would allow employers "to create the illusion of establishing a pension benefit plan under ERISA, only to avoid thereafter the obligation to pay benefits by violating federal law." *Id.* at *8.

**Decisions Dismissing ERISA Claims Based on Alleged Violations of the FLSA**

A number of federal courts to have addressed the issue have concluded that alleged violations of the FLSA do not give rise to separate and distinct ERISA claims because an employer's compensation decisions are not fiduciary functions, but rather business decisions unrelated to the administration of an ERISA plan.

The court's decision in *LePage v. Blue Cross & Blue Shield of Minnesota*, 2008 U.S. Dist. LEXIS 49298 (D. Minn. June 25, 2008),[12] is instructive. In *LePage*, the district court held that plaintiffs' ERISA claims stemming from alleged FLSA misclassification violations were outside the intended scope of ERISA. *Id.* at *22. While the court acknowledged that the employer's decision not to pay overtime may have impacted plaintiffs' right to benefits, that decision still did not pertain to the administration of the pension plan, and therefore could not support a viable claim for breach of fiduciary duty under ERISA. *Id.* at *19-20. In reaching this decision, the *LePage* court unequivocally rejected plaintiffs' argument that "a plan administrator has a fiduciary duty to second guess the employer's classification of all of its employees as exempt or nonexempt." *Id.* at *22. Indeed, *LePage* observed that to impose "[s]uch a far-reaching duty would send the administration of the plan into gridlock and dramatically increase the cost of administering the plan." *Id.*

Just weeks after the *LePage* decision was entered, another district court confronting substantially similar allegations relied on *LePage* in holding that plaintiffs' allegations did not state a cognizable ERISA claim because they were outside the statute's intended scope. *Steavens v. Elec. Data Sys. Corp.*, 2008 U.S. Dist. LEXIS 61581, *9 (E.D. Mich. Aug. 12, 2008).[13] In reaching its decision, *Steavens* observed that

> [t]he practical effect of the duty proposed by [the] [p]laintiffs (*i.e.*, automatically crediting employees for wages that should have been paid but were not) is that an ERISA fiduciary would have to oversee employers' business decisions to ensure that those decisions did not deprive any employee of a wage that should have been paid. Thus, if [the] [p]laintiffs' claim were to stand, an ERISA fiduciary would be required to regulate purely corporate behavior, a result Congress did not intend.

*Id.* at *14.

A number of other recent district court opinions have followed the reasoning set forth in *LePage* and *Steavens*. For example, in *Zipp v. World Mortg. Co.*, 632 F. Supp. 2d 1117, 1124 (M.D. Fla. 2009), the court recognized that "the business decision whether to classify employees as 'exempt' or 'nonexempt' for FLSA overtime purposes may have an impact on an ERISA plan, but that does not render the claims based on that classification decision ERISA claims." Accordingly, the *Zipp* court dismissed plaintiffs' claims seeking pension plan credits based on allegedly unpaid overtime work. *Id.* at 1125.

Likewise, the court in *Barrus v. Dick's Sporting Goods, Inc.*, 732 F. Supp. 2d 243, 258 (W.D.N.Y. 2010), held that plaintiffs' allegations that defendants "failed to credit *or even investigate* crediting overtime pay as compensation used to determine benefits" did not state a plausible claim under ERISA § 502(a)(3). In reaching this decision, *Barrus* found that defendants were not acting as fiduciaries when they determined compensation policies or reported employees' hours of service. *Id.* In addition, the *Barrus* courtrejected as "unpersuasive" plaintiffs' arguments that defendants had a legal duty as ERISA fiduciaries to investigate crediting overtime pay. *Id.*

Some courts dismissing these types of ERISA claims also premise their decision on the fact that the plan language purports to condition benefits on compensation paid, *not* on compensation to which the participant might have been entitled. *See, e.g., Henderson v. UPMC,* 2010 U.S. Dist. LEXIS 1759, *9-11 (W.D. Pa. Jan. 11, 2010);[14] *Maranda v. Group Health Plan, Inc.*, 2008 U.S. Dist. LEXIS 41500, *3-5 (D. Minn. May 20, 2008);[15] *Mathews v. ALC Ptnr., Inc.*, 2009 U.S. Dist. LEXIS 106423 (E.D. Mich. Nov. 16, 2009).[16] These decisions hold that because plan benefits are pegged solely to wages actually paid, there is no fiduciary duty under ERISA to credit the employees' retirement accounts by all hours actually worked.

In a very recent decision, the court in *Desilva v. N. Shore-Long Island Jewish Health Sys.*, 2011 U.S. Dist. LEXIS 27138, *115 (E.D.N.Y. Mar. 16, 2011),[17] found that "the terms of the controlling plan documents" were the dispositive consideration as to whether plaintiffs stated a viable ERISA claim for breach of fiduciary duty on behalf of a purported class of 38,000. Although the court denied defendants' motion to dismiss because the plaintiffs claimed that only excerpts, rather than the complete text, of the applicable plan documents had been submitted, the court nonetheless agreed with defendants' contention that "if the controlling plan documents reveal that benefits are tied to compensation actually paid – rather than to hours worked or compensation earned through hours worked – then plaintiffs have failed to state an ERISA cause of action." *Id.* at *132-133. While directing the parties to engage in limited discovery regarding how the plan benefits are paid, the reasoning set forth in *Desilva* is entirely consistent with the authorities cited above dismissing ERISA breach of fiduciary duty claims when the plan documents determine benefits based only on compensation *paid*, not on what allegedly *should* have been paid.

**Proskauer's Perspective**

In light of the conflicting rulings by the district courts, and the absence of any appellate authority,[18] there is currently great uncertainty as to the ultimate viability of claims seeking independent relief under ERISA based on alleged violations of the FLSA. However, there are some reasons to be cautiously optimistic that courts will embrace those decisions declining to extend ERISA's fiduciary responsibilities into this realm.

To begin with, the judicial opinions permitting litigants to pursue ERISA causes of action in conjunction with claims under the FLSA contain very little substantive analysis to justify their conclusions, as they are generally in the form of summarily written denials of motions to dismiss. In contrast, the majority of decisions concluding that these claims are not viable include extensive, well reasoned discussions of the pertinent issues.

Secondly, there would appear to be little need for the courts to extend ERISA's fiduciary rules to FLSA violations because employees who prevail on their FLSA claims would presumably recover plan benefits, either as part of their FLSA relief, or pursuant to a subsequent claim for benefits.

Finally, the case law dismissing ERISA claims predicated on *alleged* FLSA violations is consistent with, and supported by, the Congressional desire "not to create a system that is so complex that administrative costs, or litigation expenses, unduly discourage employers from offering welfare benefit plans in the first place." *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996). In this regard, parallels can be drawn to "stock drop" litigation, in which many courts have declined to regulate under ERISA allegedly misleading corporate disclosures about the value of stock just because plan participants are among the shareholders.

As in the stock drop cases, opening ERISA's doors to what is on its face a corporate breach of duty would have profound consequences for plan administration that are at odds with congressional intent. This result would effectively place plan fiduciaries in the role of super-personnel departments, with a duty to oversee and double-check employers' business decisions. Such a far-reaching duty would dramatically increase the costs of plan administration, ultimately harming plan participants who typically pay for such costs. Furthermore, extending ERISA's scope in such a manner would create substantial uncertainty regarding the division of labor between employer and fiduciary functions. ERISA's legislative purpose and public policy considerations militate against the judicial imposition of such an expansive fiduciary duty.

**Rulings, Filings, and Settlements of Interest**

**Class Certification**

- In *In re Lockheed Martin Corp.*, Nos. 09-8019, 09-8022, 2011 WL 880760 (7th Cir. Mar. 15, 2011), the court granted defendants' Fed. R. Civ. P. 23(f) petition to decertify a class of ERISA 401(k) plan participants who alleged that defendants breached their fiduciary duties by causing the plan to pay excessive fees. The Seventh Circuit found that because the district court's class certification determinations raised issues substantially similar to those addressed in *Spano v. The Boeing Co.,* Nos. 09-3001 & 09-3018, 2011 WL 183974 (7th Cir. Jan. 21, 2011) and *Howell v. Motorola, Inc.*, Nos. 07-3837 & 09-2796, 2011 WL 183966 (7th Cir. Jan. 21, 2011), additional proceedings in the district court were necessary on the question of class certification, and the case was therefore remanded to the district court.
- In *Wilson v. Farmers Group Inc. Employees' Profit Sharing Savings Plan Trust*, No. 10-cv-05089 (C.D. Cal. Feb. 18, 2011), the district court certified a class of profit-sharing plan participants with respect to their claims that the plan should have

credited them for the overtime they were awarded in a separate wage and hour litigation. In so ruling, the court rejected the argument that the participants who had withdrawn assets from the profit-sharing plan were not proper class members, while limiting the class to the participants who had not released their claims.

- In *Clemons v. Norton Health Care Inc. Retirement Plan*, --- F.R.D. ----, No. 08-69-C, 2011 WL 652470 (W.D. Ky. Feb, 23, 2011), the district court certified a class of retirement plan participants as to claims that their benefits were miscalculated by using a non-increasing annuity, failing to offer a "212" alternative form of lump-sum benefit, and improperly reducing early retirement benefits. The court also refused to dismiss the claims based on the participants' failure to exhaust their administrative remedies, ruling that exhaustion would have been futile because the plan failed to respond to the named plaintiffs' claims for recalculation of their benefits.
- In *Shanehchian v. Macy's Inc.*, No. 07 Civ. 0828, 2011 WL 883659 (S.D. Ohio Mar. 10, 2011), the district court granted plaintiffs' motion for class certification in this ERISA "stock-drop" lawsuit. Macy's argued, among other things, that plaintiffs could not satisfy the typicality requirement for class certification because of the individual nature of: (1) detrimental reliance on the alleged misrepresentations, (2) the transaction-by-transaction 404(c) defense, (3) releases signed by thousands of purported class members, and (4) "risk" determinations based on each person's investment portfolio. The court, reasoning that these types of ERISA claims are brought on behalf of the plans, focused on the conduct of the defendants, and not the individual class members. The court found that these individual issues did not defeat typicality of the claims or prevent class certification.
- In *Murphy v. Verizon Communications Inc.*, No. 3:09-CV-2262-G (N.D. Tex. Mar. 3, 2011), the district court certified a class of more than 1,000 retired former participants in Verizon's pension plans who were transferred into Idearc's pension plans during a spin-off transaction. The plaintiffs allege that the involuntary transfer was without their consent and that, under ERISA, they are entitled to the benefits that they would have received if they had remained participants in Verizon's pension plans. The court found that there were common questions of law and fact regarding whether the terms of the Verizon pension plans allowed for the controversial transfer of the retired former participants to Idearc's pension plans.

### Benefit Claims

- In *Baldwin v. Univ. of Pittsburgh Med. Ctr.*, --- F.3d ---, 2011 WL 1126038 (3d Cir. Mar. 29, 2011), the Third Circuit held that an adoptive mother and her children had standing under ERISA to pursue benefits from the life insurance policies of the deceased biological mother. Relying on Pennsylvania law, the district court dismissed the complaint, finding that adoption severed all legal ties from the biological mother; thus, the minors were not “children” under the insurance policies’ default payment provisions. The Third Circuit reversed, holding that federal law governs interpretation of ERISA documents, and the term “children” was ambiguous because the court required extrinsic evidence to determine its meaning. Because the children presented a colorable claim that they qualified as beneficiaries under one interpretation of the insurance policies, the district court incorrectly dismissed the suit for lack of standing.

- In *Ramsay v. Mayer*, No. 10-2447, 2011 WL 1097536 (7th Cir. Mar. 23, 2011), the Seventh Circuit rejected the claims of the children of a retirement plan participant that they were entitled to survivors’ annuity benefits because this was the choice their mother would have made had her employer adequately explained that she could elect that option. In so ruling, the court noted that plan documents are controlling, and “[a]rguments that something different should have been filed . . . do not change what was actually done,” and “[d]ocuments on file prevail over beliefs about participants’ mental states.”
- In *Salomaa v. Honda Long Term Disability Plan*, --- F.3d ----, 2011 WL 768070 (9th Cir. Mar. 7, 2011), the Ninth Circuit held, in a split decision, that a plan administrator with a conflict of interest abused its discretion in denying a plaintiff’s claim for disability benefits by, among other things: requiring objective evidence of chronic fatigue syndrome; apparently disregarding the claimant’s disability benefits award from the Social Security Administration; and failing to meaningfully communicate with the claimant. In so ruling, the majority held, in accordance with *dicta* from a Ninth Circuit fibromyalgia case, that “conditioning an award [of disability benefits] on the existence of evidence that cannot exist is arbitrary and capricious.” The dissent criticized the majority’s finding that no objective evidence of chronic fatigue syndrome was available, because the claimant had submitted objective evidence – neuropsychological test results – after the deadline for his proof of claim had expired.
- In *Palmer v. Metropolitan Life Insurance Co.*, No. 10-3171, 2011 WL 892747 (10th Cir. Mar. 16, 2011), the Tenth Circuit upheld the district court’s conclusion that the defendant’s denial of the plaintiff’s long-term disability claim, based on a pre-existing condition, was not arbitrary and capricious even though the defendant had previously approved the claim, where evidence of the pre-existing condition was discovered in records that were in existence at the time the benefits were initially awarded, but not in the defendant’s possession. In so ruling, the Tenth Circuit reaffirmed its belief that a plan administrator could revisit disability claims and reach a different result, as long as the review was “principled,” in that it was authorized under ERISA and conducted in accordance with its principles.

**Retiree Benefits**

- In *Curtis v. Alcoa, Inc.*, No. 3:06-CV-448, 2011 WL 850410 (E.D. Tenn. Mar. 9, 2011), the district court held that Alcoa could enforce caps on retiree health care for employees who retired between June 1, 1993 and June 30, 2006. Relying on *Wood v. Detroit Diesel Corp,* 607 F.3d 427 (6th Cir. 2010), the court determined that the terms of the collective bargaining agreements and summary plan descriptions entitled the retirees to vested lifetime health benefits, but subject to the cap on Alcoa's contributions. The court rejected plaintiffs' argument that the caps were implemented solely for accounting purposes, and were never intended to go into effect ("caps with a wink"). Following trial, the court found that the overwhelming evidence established that Alcoa bargained for the right to impose a cap on retiree health costs beginning in 1993, and in each successive collective bargaining session. Thus, the caps were "real" even though Alcoa and the union agreed to defer implementation of the cap during the 1993, 1996, and 2001 bargaining sessions.

**Limitations Periods**

- In *Erlich v. Ouellette, Labonte, Roberge & Allen, P.A.*, --- F.3d ----, 2011 WL 679433 (1st Cir. Feb. 28, 2011), the First Circuit affirmed the district court's ruling that a pension fund's state law claims against the fund's auditor and actuary for more than $3.5 million in alleged overpayments were barred by Maine's six-year statute of limitations. The First Circuit agreed with the district court that Maine's more liberal discovery rule, which provides for accrual "when the injury is discovered rather than when the injury was incurred," did not apply because the auditor and actuary were not fiduciaries of, or parties to a confidential relationship with, the plan. As a result, the fund's state law claims for breach of contract, negligence, and professional malpractice were subject to Maine's limitations period based on the date of injury, rather than the date of discovery.
- In *Young v. United Parcel Services, Inc. Employees' Short Term Disability Plan*, No. 10-4156, 2011 WL 984734 (10th Cir. Mar. 22, 2011), the Tenth Circuit upheld the district court's ruling that a six-month statute of limitations provision in the plan's summary plan description was enforceable and barred the plaintiff's untimely claim. The court rejected plaintiff's arguments that the provision was unenforceable because it only appeared in the SPD and not in the plan itself, because of where it appeared in the SPD, and because it was ambiguous; and because the defendant breached its promise that it would inform her of the time limit to file suit. The court noted that the plaintiff was confusing the internal appeals process with the filing of a legal action after the internal process had been exhausted.

### Enforcement of Oral Agreements

- In *Central States, Southeast and Southwest Areas Pension Fund v. Auffenberg Ford, Inc.*, --- F.3d ---, 2011 WL 832937 (7th Cir. Mar. 11, 2011), the court held that an oral understanding, even if later committed to writing, cannot alter an employer's written agreement to make contribution payments to a multiemployer fund. The defendant-employer participated in the fund from 1980 to 1997, incurring withdrawal liability of $50,000 in 1997, which was fully paid. In 2001, the defendant-employer rejoined the fund so that several longtime employees could qualify for a larger benefit, pursuant to an oral agreement that there would be no withdrawal liability for the defendant-employer for five years. The terms of the governing collective bargaining agreement and participation agreement, however, did not grant the employer-defendant five years of protection from withdrawal liability. In 2006, the plaintiff-trustee filed suit to collect delinquent contributions after the defendant-employer withdrew. The Seventh Circuit affirmed that ERISA benefit plans must be established and maintained pursuant to written agreements, and thus the oral agreement to avoid withdrawal liability for five years did not trump the written terms of the plan.
- In *Giordano v. Coca-Cola Enterprises Inc.*, No. 08 Civ. 0391, 2011 WL 839507 (E.D.N.Y. Mar. 7, 2011), the plaintiff sought to enforce an oral agreement with his supervisor that purportedly promised plaintiff greater pension benefits than provided under the controlling written plan. The district court denied defendants' motion for summary judgment on plaintiff's estoppel claim, holding that plaintiff was entitled to trial regarding the existence and terms of the agreement and whether "extraordinary circumstances" entitled him to benefits based on an estoppel theory. The court dismissed plaintiff's breach of fiduciary duty claim because relief could be achieved pursuant to a claim for benefits, and held ERISA preempted his breach of contract claim.

### Fees & Costs

- In *Rogers v. Baxter Int'l, Inc.*, No. 04 C 6476, 2011 WL 941188 (N.D. Ill. Mar. 16, 2011), the court ordered plaintiffs to pay $60,000 in costs after defendants successfully defeated plaintiffs' breach of fiduciary duty claims. Applying the Supreme Court's recentdecision in *Hardt v. Reliance Standard Life Ins.*, 130 S. Ct. (2010), the court determined that it had discretion to award costs when either party achieves some success on the merits. Costs were limited, however, to taxable costs as described in 28 U.S.C. Section 1920. Of the $500,000 in costs requested, defendants were awarded costs for copying and transcripts, but not costs for expert fees and e-discovery. Defendants did not seek attorney's fees.

- In *Flores v. The Life Ins. Co. of North America*, --- F. Supp. 2d ---, Civil No. L-10-0098, 2011 WL 921826 (D. Md. Mar. 17, 2011), the district court ruled that a plaintiff seeking short- and long-term disability benefits was entitled to $18,000 in attorneys' fees even though the case was resolved prior to any ruling by the court. The court reasoned that, although plaintiff "technically prevailed in the administrative arena, this litigation was the catalyst for LINA's decision to award her benefits," and thus plaintiff "achieved the very prayer for relief which she sought by her original complaint." The court rejected plaintiff's claim for statutory penalties against LINA, the plan's claims administrator and insurer, for failure to produce plan documents. The court held LINA could not be liable for penalties because it was not the plan administrator and the Fourth Circuit has not adopted the "de facto" plan administrator doctrine.

**Discovery as to Conflict of Interest**

- In *Cook v. Hartford Life & Accident Insurance Co.*, No. 1:10-cv-11809, 2011 WL 722018 (E.D. Mich. Feb. 23, 2011), the district court denied a participant's motion for additional discovery regarding the plan administrator's potential bias with respect to its denial of the participant's claim for long-term disability benefits. The participant argued that the administrator's decision to place greater weight on its own reviewing doctor's opinion, rather than on the participant's treating physician's opinion, established bias. The district court disagreed, finding that this allegation alone was insufficient to require additional discovery outside of the administrative record.
- In *Quinones v. First Unum Life Insurance Co.*, No. 10-cv-08444-SAS, 2011 WL 797456 (S.D.N.Y. Mar. 4, 2011), plaintiff alleged that defendant wrongfully denied her claim for LTD benefits under the ERISA plan and sought discovery as to whether the review of her claim may have been tainted by a conflict of interest. In denying plaintiff's motion to compel discovery outside the administrative record, the court noted that a plaintiff must provide specific examples from the administrative record showing that the purported conflict of interest is based on questionable incentive structures or a prior relationship between the plan administrator and plaintiff's reviewing doctors. Here, the court found that plaintiff failed to show that there was a reasonable chance that the requested discovery could "undermine the propriety" of the administrator's determinations because the participant only offered "conclusory statements of a conflict of interest without any specific supporting evidence of undue influence. . . ."

**Preemption**

- In *Ball v. Std. Ins. Co.*, No. 09 C 3668, 2011 WL 759952 (N.D. Ill. Feb. 23, 2011), the court held that ERISA did not expressly preempt an Illinois statute prohibiting discretionary clauses in insurance policies, as a result of which the de novo standard of review applied to plaintiff's long-term disability claim. Applying *Kentucky Assoc. of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), the court determined that the Illinois statute was "saved" from preemption because the state law was directed at the insurance industry and regulated insurance practices. Further, the court held that conflict preemption did not apply to the state statute because "insurance regulation is not preempted merely because it conflicts with substantive plan terms." The court noted that its ruling was consistent with a growing body of case law, including: *Standard Ins. Co. v. Morrison*, 584 F.3d 837, 842 (9th Cir. 2009); *Am. Council of Life Insurers v. Ross*, 558 F.3d 600, 606 (6th Cir. 2009); *Haines v. Reliance Standard Life Ins. Co.*, No. 09 C 7648, 2010 U.S. Dist. LEXIS 104625, at *6 (N.D. Ill. Sept. 9, 2010); and *McClenahan v. Metro. Life Ins. Co*., 621 F. Supp. 2d 1135, 1140 (D. Colo. 2009).

**Forum Selection Clause**

- In *Smith v. AEGON USA, LLC,* No.10 Civ. 048, 2011 WL 710586 (W.D. Va. Feb. 22, 2011), the court enforced an ERISA disability plan's forum selection clause. The plaintiff argued that because her claim was brought under ERISA, proper venue is where the breach of the obligation to pay benefits took place. Defendant sought to dismiss the claim because plaintiff failed to bring the action in the designated forum. The court agreed that it should enforce the plan's forum choice, but rather than dismiss the action, transferred it to the proper forum. The court observed that the majority of the courts have upheld forum selection clauses in ERISA plans because they "advance[ ] ERISA's goal of establishing a uniform administrative scheme."

[1] Originally published by Bloomberg Finance L.P. Reprinted with permission.

[2] 2010 BL 92690.

[3] ERISA Section 404(c) provides fiduciaries with an affirmative defense against investment losses resulting from participant control over their own investments. 29 U.S.C. § 1104(c).

[4] Final Regulation Regarding Participant Directed Individual Account Plans (ERISA Section 404(c) Plans), 57 Fed. Reg. 46,905, 46,924 n.27 (Oct. 13, 1992) (Preamble).

[5] *Amicus* briefs in support of Plaintiffs also were submitted by the American Association of Retired Persons, Public Justice, and Richard Kopcke and Francis Vitagliano.

[6] Proskauer submitted an *amicus curiae* brief for the Chamber of Commerce of the United States in support of Defendants in this action.

[7] 2011 BL 16211.

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[9] 2006 BL 78840.

[10] 2005 BL 34216.

[11] 2008 BL 221321.

[12] 2008 BL 136196.

[13] 2008 BL 168066.

[14] 2010 BL 4848.

[15] 2008 BL 106762.

[16] 2009 BL 247778.

[17] 2011 BL 68615.

[18] In *Ballaris v. Wacker Siltronic Corp.*, 370 F.3d 901 (9th Cir. 2004), the Ninth Circuit Court of Appeals missed an opportunity to address this issue. In *Ballaris*, the lower court granted summary judgment in favor of defendants with respect to plaintiffs' claims under both the FLSA and ERISA. *Id.* at 903. On appeal, the Ninth Circuit reversed the district court's determination that plaintiffs received all of the compensation due under the FLSA. *Id.* at 914. Rather than addressing the propriety of plaintiffs' ERISA claims, the Ninth Circuit summarily concluded that "[b]ecause [defendant] appears not to have accounted properly for the hours worked, we also reverse the court's summary judgment ruling as to plaintiffs' ERISA claims." *Id.*

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