SouthWest BENEFITS Association

31st Annual Benefits Compliance Conference

Scheduled in 2 Hour Segments during November 2020 Produced Virtually via Zoom

SESSION 1:
The ERISA Litigation Update

Introduction: **Lori Oliphant**, Shareholder, Winstead, PC
Speaker: **Howard Shapiro**, Attorney at Law, Jackson Lewis PC

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Our 45th Annual Conference

CE Update

- Please be sure to answer the poll questions today – 1 question per session
- **Check the Chat Box to download (word doc) your Attendance Record**
- **Submit your Attendance record to registration@swba.org after Thursday**
- TX Dept of Insurance, TX MCLE, OK MCLE – With your name and Bar/License#

  we will be able to submit your hours online
- Actuaries – Please send your recommendations re Core, Non-Core and No Credit Sessions
- All others – CPE, HRCI, SHRM, Other States, etc. –

  we will send you a certificate of attendance

Today’s Speaker

Howard Shapiro is a principal in the New Orleans, Louisiana, office of Jackson Lewis P.C., and is co-leader of the firm’s ERISA Complex Litigation group. Howard focuses his practice on the defense of large, sophisticated ERISA class actions. Howard defends “bet-the-company” litigation where damages are potentially material. His cases involve the defense of Defined Benefit plans, 401(k) Plans, and 403(b) Plans. He also defends litigation involving health and welfare plan issues. His practice is nationwide, and throughout his career, Howard has appeared as counsel across the entire country. Typically, his cases involve damage allegations in excess of hundreds of millions of dollars. Howard has defended cases involving: breach of fiduciary duty; breach of the duty of loyalty; Prohibited Transactions; 401(k) Plan asset performance, fees, and expense issues; 403(b) Plan asset performance, fees, and expense issues; defined benefit plan asset issues, accrual issues, and cut-back issues; Cash Balance Plan issues; ESOP litigation; fiduciary misrepresentation claims; sophisticated preemption issues; Executive Compensation litigation, both pension and welfare claims; Directed Trustee claims; retiree rights litigation; severance plan class actions; Section 510 cases; and complex benefit claim cases. He has appeared in federal courts from coast to coast while maintaining an active national ERISA litigation practice.

JacksonLewis

The ERISA Litigation Update

2019-2020: What's Up in ERISA Litigation?

Southwest Benefits Association
31st Annual Benefits Compliance Conference

Howard Shapiro

November 19, 2020

Jackson Lewis P.C., New Orleans

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Acknowledgement

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  - Presenters at the 14th Annual ABA Section of Labor and Employment Law Continuing Legal Education Conference, November 2020.
  - Lesley Pietras, Knowledge Management Attorney, Jackson Lewis ERISA Complex Litigation Group, New Orleans Office, who deserves special recognition for her comprehensive additions to this PowerPoint.

Today's Topics

- What's Going On?
  - Supreme Court ERISA Litigation
- What Happened This Year?
  - 401(k)/403(b) Plan Fee Litigation
  - Stock Drop Litigation
  - COBRA Notice Litigation
  - Arbitration of ERISA Cases, Class Action Waivers

Supreme Court
ERISA Litigation

Thole v. U.S. Bank,
140 S. Ct. 1615 (2020)

- Claims related to the alleged mismanagement of defined benefit plan assets from 2007 – 2010.
- By 2014, the plan was overfunded with more money in assets than needed to meet its obligations because of sponsor contributions.
- Amended complaint filed in 2014 alleged that, in 2007, the ***entire*** plan portfolio was invested in equities, either direct stock holdings or through mutual funds, and this lack of diversification resulted in $1.1 billion of losses.
- The district court dismissed because the claim was moot given the plan's current overfunded status.

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Thole v. U.S. Bank,
140 S. Ct. 1615 (2020)

- The Eighth Circuit affirmed.
- In a 2-1 decision, the majority held that because the plan was overfunded, Plaintiffs no longer fall within the class of persons enumerated under ERISA § 502(a)(2) or ERISA § 502(a)(3) to bring suit.
- To proceed under either section, Plaintiffs must show actual injury to fall within the class of plaintiffs authorized by Congress to sue.
- Because the plan is overfunded, there is no actual or imminent injury to the plan itself that caused injury to the plaintiffs' interests in the plan.

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Thole v. U.S. Bank,
140 S. Ct. 1615 (2020)

- In a 5-4 decision, the Supreme Court affirmed on the ground that the Plaintiffs lack **Article III** standing because they had **no concrete stake in the suit (no injury).**
- It was of "decisive importance" that the dispute arose in the context of a defined benefit plan, where retirees receive a fixed payment each month that does not vary based upon the value of the plan or the fiduciaries' good or bad investment decisions.
- The Plaintiffs had received all their monthly benefit payments; the outcome here would not affect their future benefit payments.
- The majority acknowledged that, if Plaintiffs had not received their vested benefits, they would have Article III standing.

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Thole v. U.S. Bank,
140 S. Ct. 1615 (2020)

- Citing trust law, Plaintiffs argued an ERISA defined benefit plan participant possesses an equitable or property interest in the plan: injuries to the plan are injuries to the plan participants.
- But the Court noted a defined benefit plan “is more in the nature of a contract” because the plan participants’ benefits will not change, regardless how well or poorly the plan is managed.
- Plaintiffs also asserted standing as representatives of the plan.
- The Court rejected this argument holding that to represent the interests of others, the litigants themselves must have suffered an injury in fact, giving them a concrete stake in the outcome.
    - This may impact ERISA class certification issues.

Thole v. U.S. Bank,
140 S. Ct. 1615 (2020)

- Plaintiffs also argued they had standing because ERISA provides defined benefit plan participants a general cause of action to sue for restoration of plan losses.
- However, relying upon its earlier holding in *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016), the majority held that a litigant does not satisfy the injury-in-fact requirement whenever a statute grants a statutory right a litigant sues to vindicate.
- In a footnote, the majority stated that this holding did not implicate suits to obtain plan information. Even with that qualification, the application of *Spokeo* to ERISA litigation may become significant.

Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020)

- Plaintiffs' employer stock drop claims cite fiduciaries' alleged insider knowledge.
- Alleged insider knowledge: in 2013 IBM failed to disclose that its microelectronics business was on track to incur annual losses of ($700 million) and valued the business at $2 billion.
- In 2014, IBM announced that it would pay $1.5 billion to the acquirer of the business; IBM announced a $4.7 billion pre-tax charge as a result of the transaction.
- IBM shares fell $12.00 per share upon disclosure.
- Retirement Committee members were the Chief Accounting Officer; the Chief Financial Officer, and the General Counsel.
- Plaintiffs argued these insiders were charged with the responsibility under the securities laws to make corrective disclosures and had requisite knowledge.

Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459 (2014)

- To state a claim for breach of the duty of prudence based upon ***inside information***, a plaintiff must plausibly allege:
  - An alternative action that the defendant could have taken that would have been consistent with the securities laws, *and*
  - A prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.
- Lower courts should consider:
  - Duty of prudence does not require that fiduciary break securities laws.
  - Whether a plan fiduciary's decision to purchase (or refrain from purchasing) additional stock comports with federal securities laws and their objectives.
  - Whether a fiduciary's failure to disclose information to the public conflicts with federal securities laws and their objectives.
  - Whether a prudent fiduciary could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the stock fund.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020)

- Plaintiffs here alleged:
- Fiduciaries should have made an early corrective disclosure, conducted alongside the regular SEC reporting process.
- Defendants uniquely situated to fix the problem because they had primary responsibility for public disclosure.
- Failure to disclose prolonged the negative consequences for IBM stock.
- Defendants knew they would be unable to hide the overvaluation because once the sale of the microelectronics business occurred, disclosure would occur.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020)

- The District Court Judge followed *Dudenhoeffer* and dismissed holding that Plaintiff failed to plead facts giving rise to an inference that Defendants could not have concluded that public disclosures or halting the Plan from further investing in IBM stock, were more likely to harm than help the fund.
- The Second Circuit reversed and drawing all reasonable inferences for Plaintiff held the complaint sufficiently pleaded that no prudent fiduciary in the Plan defendants' position could have concluded that earlier disclosure would do more harm than good.

Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020)

- Question posed by IBM's Supreme Court brief:
  - Whether *Dudenhoeffer*'s "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.
- Supreme Court Per Curiam decision on Jan. 14, 2020
  - Vacated and remanded to give Second Circuit the opportunity to entertain IBM's argument that ERISA imposes no duty on an ESOP fiduciary to act on inside information and government's argument that ERISA-based duty to disclose information not otherwise required to be disclosed by securities laws would conflict with securities laws.
  - Dispute in two concurring opinions over whether the arguments are foreclosed by *Dudenhoeffer*.

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Jander v. IBM, 910 F.3d 620 (2d Cir. 2018), *vacated and remanded*, 140 S. Ct. 592 (2020), *reinstated*, 962 F.3d 85 (2d Cir. 2020)

- Second Circuit Per Curiam decision on June 22, 2020
  - Reinstated the judgment entered pursuant to its initial opinion.
  - Arguments in supplemental briefs either were previously considered by the court or were not properly raised.
- On Sept. 1, 2020, IBM again filed a writ of certiorari with Supreme Court
  - Whether *Dudenhoeffer's* "more harm than good" standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time and therefore plan fiduciaries should have made earlier disclosures through regular securities law filings
  - Whether ERISA imposes a duty on a plan fiduciary who is a corporate officer to use inside information for the benefit of plan participants
- The Supreme Court denied IBM's petition on Nov. 9, 2020

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Sulyma v. Intel,

909 F.3d 1069 (9th Cir. 2018), *aff'd*, 140 S. Ct. 768 (2020)

- When does the three-year statute of limitations, *i.e.*, actual knowledge, run for claims for breach of fiduciary duty?
- Plaintiff challenges investment mix of 401(k) Plan.
- The plan disclosed the investment mix in Fund Fact sheets on various web sites.
- Plaintiff accessed some of the Fund Fact sheet information but testified he was not actually aware his retirement accounts were invested in alternative investments.
- District court grants summary judgment to Intel Defendants, holding Plaintiff had actual knowledge of the alternative investments more than three years before suit was filed.

Sulyma v. Intel,
909 F.3d 1069 (9th Cir. 2018), *aff'd*, 140 S. Ct. 768 (2020)

- 9th Circuit: reverses district court and holds actual knowledge is something between bare knowledge of the underlying transaction and actual legal knowledge that only a lawyer would possess.
- Actual knowledge means knowledge that is actual, not merely a possible inference.
- Rejects *Brown v. Owens Corning,* 622 F.3d 564, 571(6th Cir. 2010), that held Plaintiff's failure to access plan documents and failure to read documents will not shield Plaintiff from having actual knowledge of documents' contents.

Sulyma v. Intel,

909 F.3d 1069 (9th Cir. 2018), *aff'd*, 140 S. Ct. 768 (2020)

- Question Intel presents in its Supreme Court brief:
- Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, 29 U.S.C. 1113(2), which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit where all of the relevant information was disclosed to the plaintiff by the defendants in statutorily mandated disclosures more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

Sulyma v. Intel,

909 F.3d 1069 (9th Cir. 2018), *aff'd*, 140 S. Ct. 768 (2020)

- The Supreme Court affirmed the Ninth Circuit and unanimously held that "actual knowledge" means "when a plaintiff actually is aware of the relevant facts, not when he should be." *Sulyma*, 140 S. Ct. at 778.
- "Actual knowledge" requires more than disclosing all relevant information to plaintiff; plaintiff must in fact have become aware of that information.
- But the Court stated that its opinion does not preclude defendants from contending that evidence of "willful blindness" supports a finding of "actual knowledge."
- Decision may impact class certification.

Pharm. Care Mgmt. Ass'n v. Rutledge, 891 F.3d 1109 (8^{th} Cir. 2018), *cert. granted*, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 140 S. Ct. 812 (2020)

- Pharmacy benefit managers (PBMs) act as intermediaries between employers that sponsor prescription drug benefit plans, and insurers, pharmacies, and other healthcare providers.
- PBMs reimburse pharmacies for the pharmacies' costs to acquire drugs sold to prescription drug plan participants at a contractually set rate.
- Frequently, reimbursement for generic drugs is controlled by a PBM-created schedule, known as a Maximum Allowable Cost (MAC) list.

Pharm. Care Mgmt. Ass'n v. Rutledge, 891 F.3d 1109 (8th Cir. 2018), *cert. granted*, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 140 S. Ct. 812 (2020)

- Arkansas passed a law (Act 900) requiring MAC lists to:
- Allow reimbursement to pharmacies at a rate at least equal to the pharmacy's acquisition cost
- Be updated within 7 days of a 10 percent increase in a pharmacy's acquisition cost from 60 percent of wholesalers
- Be disclosed to pharmacies.
- Act 900 also requires that an appeal procedure be provided for pharmacies challenging MAC-based reimbursements.

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Pharm. Care Mgmt. Ass'n v. Rutledge, 891 F.3d 1109 (8th Cir. 2018), *cert. granted*, *Rutledge v. Pharm. Care Mgmt. Ass'n*, 140 S. Ct. 812 (2020)

- A PBM trade association filed suit against Arkansas, claiming Act 900 is preempted by ERISA and therefore invalid.
  - ERISA preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan..." 29 U.S.C. § 1144(a).
- Trade association prevails in the district court and Eighth Circuit.
- Arkansas sought and obtained Supreme Court review. Parties contend resolution turns on whether Act 900 imposes an administrative scheme on ERISA benefit plans and is thus preempted by ERISA, or whether Act 900 is simply rate regulation, which historically has been protected from ERISA preemption.
- Oral argument was held Oct. 6, 2020.

401(k)/403(b) Plan Fee Litigation

Big Dollar Settlements Continue In Plan Fee Litigations in 2020

Plan Sponsor	Participants	Plan Assets	Resolution*
Cornell University 2 403(b) plans	59,200	$4.2 billion	$225,000 (post-summary judgment)
Emory University 2 403(b) plans	101,000	$5.6 billion	$16.75 million
Invesco 401(k)	3,800	$1.2 billion	$3.47 million
Insperity 401(k)	144,000	$4.9 billion	$39.8 million
JP Morgan Chase 401(k)	271,000	$33 billion	$9 million
McKinsey & Co. 2 401(k) plans	44,000	$7.4 billion	$39.5 million
Mutual of Omaha 2 401(k) plans	7,400	$1 billion	$6.7 million
National Rural Electric Cooperative Association 401(k)	71,000	$12 billion	$10 million
Northrup Grumman 401(k)	108,000	$30 billion	$12.4 million (final approval denied)
SunTrust 401(k)	35,500	$3.7 billion	$29 million

*Information sourced from, among others, EBSA, 5500 filings, Mercer LLC, Pensions & Investments, Plansponsor, Plan Adviser, Bloomberg Law

401(k) Plan
Fee Litigation

401(k) Plan Non-Proprietary Fee Cases

Generally, these complaints consist of three (3) types of claims:

1. Excessive administrative fees
   - More than one recordkeeper
   - No competitive bidding
   - Asset-based fees and revenue sharing instead of or in addition to fixed-dollar fees
   - Occasionally, kick-back allegations
   - Failure to monitor fee payments to recordkeepers
2. Excessive management fees and performance losses
   - Duplicative investment options for each asset class, which underperformed and charged higher fees than lower-cost share classes of certain investments
3. Failure to monitor and evaluate appointees

401(k) Plan Proprietary Fund Fee Cases

- Proprietary funds include mutual funds or collective investment trusts managed by an affiliate of the plan/plan sponsor that pay fees to the affiliate.
- ERISA § 408(b)(8) and PTE 77-3 recognize that investments in affiliated funds is a "common practice" in the financial services industry and provide exemptions for party in interest transactions.
- Recent actions challenging the inclusion of affiliated funds include claims that the funds:
  - Charge excessive fees;
  - Are imprudent investment options because, net of fees, they offer inferior performance to available alternatives; and
  - The payment of fees to an affiliate constitutes a prohibited transaction.

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Explosion of 401(k) Fee Cases in 2020

- By the end of August 2020, proposed class actions challenging 401(k) fees are **on track to be five times greater in 2020 than 2019.**
- **More than 60 cases filed in first 8 months of 2020**, compared to 20 in 2019.
- By the end of August 2020, class action 401(k) fee litigation was filed by the following plaintiffs' firms:
  - Capozzi Adler (26)
  - Walcheske & Luzi (10)
  - Other (10)
  - Shepherd, Finkelman, Miller & Shah (9)
  - Schlichter Bogard & Denton (5)
  - Nichols Kaster (5)
- Source: Jacklyn Wille, 401(k) Fee Suits Flood Courts, Set for Fivefold Jump in 2020, Bloomberg Law (Aug. 31, 2020).

Mixed Results in 401(k) Fee Litigation - Some Dismissals

- *Davis v. Salesforce.com, Inc.*, 20-1753, 2020 U.S. Dist. LEXIS 184283 (N.D. Cal): On Oct. 5, 2020, the district court granted the motion to dismiss, finding
  - Plaintiffs failed to state an imprudence claim predicated on a comparison of actively and passively managed funds
  - Plaintiffs failed to state an imprudence claim predicated on a comparison of share classes
  - Plaintiffs failed to state an imprudence claim predicated on a comparison of mutual funds with collective trusts and separate accounts
  - Breach of duty of loyalty claim was conclusory
  - But district court granted Plaintiffs leave to amend the complaint, which they have now done.

Mixed Results in 401(k) Fee Litigation – Some Dismissals

- *Kong v. Trader Joe's Co.*, 20-5790, 2020 U.S. Dist. LEXIS 181013 (C.D. Cal): On Sept. 24, 2020, the district court granted defendants' motion to dismiss, finding
  - Plaintiffs' allegations that the Plan offered higher cost mutual funds does not support a claim for breach of fiduciary duty
  - Plaintiffs had failed to allege any facts to support their allegations that defendants do not adequately monitor the Plan or investigate the availability of lower cost mutual funds
  - Plaintiffs' allegations regarding excessive recordkeeping fees were insufficient
  - Plaintiffs had failed to allege a breach of the duty of loyalty
  - But the court granted leave to amend the complaint, which Plaintiffs have done
  - Another motion to dismiss is now pending.

Mixed Results in 401(k) Fee Litigation – Some Cases Moving Forward

- *Baker v. John Hancock Life Ins. Co.*, 20-10397 (D. Mass): On July 23, 2020, the district court denied the motion to dismiss.
  - The amended complaint alleged that, out of self-interest and imprudence, defendants only selected and offered John Hancock's proprietary investments as plan options, and that many of the plan funds materially underperformed against their own benchmarks and less expensive market comparators, and that defendants failed to monitor and control recordkeeping expenses.

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Mixed Results in 401(k) Fee Litigation – Some Cases Moving Forward (or Settling)

- *Pinnell v. Teva Pharms. USA, Inc.*, 19-5738, 2020 U.S. Dist. LEXIS 55617 (E.D. Pa.)
  - Plaintiffs alleged that Plan fiduciaries maintained expensive investments despite the availability of identical but lower-cost alternatives. Plaintiffs included three tables comparing investment options offered by the Plan to similar or identical lower-fee alternatives and comparing expense ratios to median fees in the same category.
  - On March 31, 2020, the district court denied the motion to dismiss, noting that Plaintiffs alleged "specific breaching conduct." Although Defendants had challenged the accuracy of some of the plaintiffs' comparisons to alternative funds, the court had said it could not resolve such disputes at the motion to dismiss stage. The court also found the Plaintiffs' allegations of excessive recordkeeping fees to be plausible.
  - On Oct. 15, 2020, the parties announced they had reached a settlement in principle; the court has ordered the settlement papers to be filed by Nov. 18, 2020.

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Mixed Results in 401(k) Fee Litigation – Some Courts Awarded Judgments to Plaintiffs

- **Partial Summary Judgment for Plaintiffs:** *Moitoso v. FMR LLC*, 451 F. Supp. 3d 189 (D. Mass. 2020) – On cross motions, court grants ("case stated") summary judgment for Plaintiffs on claims of breach of duty of prudence based on failure to monitor recordkeeping expenses and failure to monitor fiduciary committees "to ensure they were properly administering the plan;" with judgment for Defendants on other claims.
- **Partial Judgment for Plaintiffs After 8-Day Bench Trial:** *Ramos v. Banner Health*, No. 15-2556, 2020 U.S. Dist. LEXIS 88639 (D. Colo. May 20, 2020)
  - Partial judgment for Plaintiffs: recovery of $1.7 million on breach of duty of prudence claim based on excessive fees and failure to negotiate lower fees, and $687,589 on prohibited transaction claim for reimbursing sponsor for non-plan-related expenses; judgment for Defendants on other claims.

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The Lawsuits Continue . . .

- *Wehner v. Genentech, Inc.*, 20-6894, N.D. Cal., filed Oct. 2, 2020
- *Greenberg v. The Board of Directors of the Pentegra Defined Contribution Plan for Financial Institutions*, 20-8503, S.D.N.Y, filed Oct. 13, 2020
- *Cutrone v. The Allstate Corp.*, 20-6463, N.D. Ill., filed Oct. 30, 2020
- *Shaw v. Quad/Graphics, Inc.*, 20-1645, E.D. Wis., filed Oct. 30, 2020

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403(b) Plan Fee Litigation:
The University Cases

Background

- More than 20 colleges have been sued under federal benefits law in recent years over alleged mismanagement of their retirement plans.
- Since mid-2016, Plan participants have filed many suits against universities that sponsor 403(b) plans.
- These actions typically assert claims based on:
  - Offering of imprudent investment options
  - Retention of administrative service providers charging excessive fees
  - Failure to remove poorly performing funds

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The Recent Wave of University Fee Cases

Fee Cases Filed Against University 403(b) Plans:

- Brown University, D.R.I.
- Columbia University, S.D.N.Y.
- Cornell University, S.D.N.Y.
- Duke University, M.D.N.C.
- Emory University, N.D. Ga.
- George Washington, D.D.C.
- Georgetown University, D.D.C.
- Johns Hopkins University, D. Md.
- Long Island University, E.D.N.Y.
- Massachusetts Institute of Technology, D. Mass.
- New York University, S.D.N.Y.
- Northwestern University, N.D. Ill.
- Princeton University, D.N.J.
- University of Chicago, N.D. Ill.
- University of Miami, S.D. Fla.
- University of Pennsylvania, E.D. Pa.
- University of Rochester, W.D.N.Y
- University of Southern California, C.D. Cal.
- Vanderbilt University, E.D. Tenn.
- Washington University, St. Louis, E.D. Mo.
- Yale University, D. Conn.

The Recent Wave of University Cases

3 Main Allegations:

- Excessive administrative fees
  - Multiple recordkeepers
  - No competitive bidding
  - Asset-based fees and revenue sharing instead of or in addition to fixed-dollar fees (allegations of kick-backs)
  - Failure to monitor increase in fees
- Failure to monitor and evaluate appointees
- Excessive Management fees/performance losses
  - Duplicative investment options in each asset class that underperformed and charged higher fees than lower-cost share classes of certain investments
  - Historically underperforming investment options—specifically CREF Stock and TIAA Real Estate funds

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Current Status of Cases

- Motions to dismiss generally have been denied.
- Some cases have been dismissed:
  - *Divane v. Northwestern Univ.*, 2018 WL 2388118 (N.D. Ill. May 25, 2018) (motion practice), *aff'd*, 953 F.3d 980 (7th Cir. 2020).
  - *Sacerdote v. New York Univ*., 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (trial on the merits), *reconsideration denied by*, 2019 U.S. Dist. LEXIS 110561 (S.D.N.Y. July 1, 2019).
  - *Wilcox v. Georgetown Univ.*, 2019 U.S. Dist. LEXIS 3082 (D.D.C. Jan. 8, 2019) (motion practice), *leave to amend complaint denied by,* 2019 U.S. Dist. LEXIS 89557 (D.D.C. May 29, 2019), *appeal pending*, 19-7065 (D.C. Cir).

Current Status of Cases

- Types of claims that generally have been dismissed:
  - Offered too many investment options; and
  - Duty of Loyalty claims.
- Mixed:
  - Claims Based on Offering Retail Share Classes; and
  - Claims for Violations of ERISA Prohibited Transactions Rules
- Types of claims that generally have not been dismissed:
  - Failed to include lower-cost index funds; and
  - Failed to include lower-cost share classes.

University Fee Cases: Settlements

- ***Nearly $90 million in settlements to date***
- *University of Chicago* (N.D. Ill.) - Settled for ***$6.5 million*** on 5/23/18; final approval order entered on 9/12/18; other equitable relief.
- *Duke* (M.D.N.C.) - Settled for ***$10.65 million*** on 12/14/18; final approval order entered on 6/24/19; other equitable relief.
- *Vanderbilt (*M.D. Tenn.) - Settled for ***$14.5 million*** on 4/22/2019; preliminary approval order entered on 5/30/19; final approval entered 10/22/19; other equitable relief.
- *Brown* (D.R.I.) - Settled for ***$3.5 million*** on 3/12/19; preliminary approval order entered on 4/15/19; final approval entered 8/2/19; other equitable relief.

University Fee Cases: Settlements

- *Johns Hopkins* (D. Md.) – Preliminary approval of settlement granted 8/16/19; final approval order entered 1/8/20; monetary relief is ***$14 million***; plus other equitable relief.
- *MIT* (D. Mass) – Settled for ***$18.1 million*** on 10/28/19; final approval order entered 6/5/20; plus other equitable relief.
- *Emory* (N.D. Ga.) – Following mediation, settled for ***$16.75 million*** on 4/28/20; final approval order issued 11/4/20; plus other equitable relief.
- *Princeton* (D. N.J) – Settled for ***$5.8 million*** on 7/27/20; preliminary approval order entered 8/31/20; plus other equitable relief.
- *Cornell* (S.D.N.Y) – Following summary judgment, settled for ***$225,000*** on sole remaining claim on 9/18/20; but appeal goes forward in 2nd Cir.; preliminary approval order entered 10/7/20.

Sweda v. Univ. of Pennsylvania, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *aff'd in part and rev'd in part*, 923 F.3d 320 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 2565 (2020)

- Participants alleged that defendants breached their fiduciary duties of loyalty and prudence by:
  - Locking plan into arrangements with record-keeper
  - Paying unreasonable administrative fees due to asset-based model
  - Paying unreasonable investment management fees
  - By selecting and retaining underperforming funds.
- Plan "lock-in:" District court rejected claim as implausible, finding that locking-in rates was a common practice to obtain better terms, as was the use of multiple record-keepers who each bundled their own investment options.
- Administrative Fees: claim rejected because it was within the Plan fiduciary's discretion to select a prudent arrangement. Court recognized the trade-offs between the asset-based and flat-rate models:
  - Under the asset-based model participants with higher account balances pay more, but under the flat-rate model each participant pays the same regardless of account balance.

Sweda v. Univ. of Pennsylvania, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *aff'd in part and rev'd in part*, 923 F.3d 320 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 2565 (2020)

- Management Fees: District court noted that half of the Plan's investment options were in the institutional share class, and there were valid reasons why a fiduciary would not move the other investments into institutional share classes, *e.g.*, high minimum investment requirements.
  - Fiduciaries cannot discharge their duties with a "myopic focus on the singular goal of lower fees."
- Underperformance: District court held it must examine the "mix and range of options and . . . evaluate the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options," thereby preventing plan participants from "second-guessing a plan fiduciary's investment decisions just because they lose money."
- Hindsight analysis is insufficient to state a claim for underperformance.

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Sweda v. Univ. of Pennsylvania, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017), *aff'd in part and rev'd in part*, 923 F.3d 320 (3d Cir. 2019), *cert. denied,* 140 S. Ct. 2565 (2020)

- In a split (2-1) decision, the Third Circuit reversed the district court's decision to dismiss all fiduciary breach claims.
- Panel adopted 8th Circuit's decision in *Braden v. Wal-Mart*, 588 F.3d 585, 597 (8th Cir. 2009) for the proposition that an ERISA plan participant is not required to rule out every lawful explanation of plan fiduciary's conduct in order to state a plausible claim for relief.
- Third Circuit held that the plaintiffs' prohibited transaction claims were properly dismissed.
- *Rehearing en banc* denied; the Supreme Court denied a petition for writ of certiorari on March 30, 2020.

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Divane v. Northwestern University,

2018 WL 2388118 (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020)

- Participants alleged that Defendants breached their fiduciary duties of loyalty and prudence and engaged in prohibited transactions by:
  - Allowing TIAA-CREF to mandate the inclusion of the CREF Stock Account and Money Market Account and by allowing TIAA-CREF to require the plans to use itself as recordkeeper for its proprietary funds;
  - Allowing the plans to pay record-keeping expenses through revenue sharing and by failing to prevent those fees from being excessive; and
  - Providing an overly broad range of investment options.
- District court held there was no breach of fiduciary duty and rejected plaintiffs' claims, finding that (1) no participants were required to invest in CREF Stock Funds or any other TIAA-CREF product; (2) the Plans had valid reasons to use TIAA-CREF as the record-keeper; (3) the Plans had good reason to offer the TIAA-CREF Traditional Annuity.
- District court found nothing wrong with charging record-keeper expenses via expense ratios rather than on a flat-rate basis and noted that it was unclear whether lower prices could be obtained.
- Finally, the district court explained that offering of overly broad range of investment options was not a valid claim because the range of investments included inexpensive options.

Divane v. Northwestern University,

2018 WL 2388118 (N.D. Ill. May 25, 2018), *aff'd*, 953 F.3d 980 (7th Cir. 2020)

- The Seventh Circuit affirmed.
  - "There is, then, nothing wrong—for ERISA purposes—with plan participants paying recordkeeper costs through expense ratios." *Divane*, 953 F.3d at 990.
  - "Not only did Northwestern provide the plans with a wide range of investment options, it also provided prudent explanations for the challenged fiduciary decisions involving alleged losses or underperformance." *Id.* at 992.
- Some Plaintiffs filed a petition for a writ of certiorari (19-1401), asking whether allegations that a defined contribution plan paid or charged its participants fees that substantially exceeded fees for alternative available investment products are sufficient to state a claim against plan fiduciaries for breach of the duty of prudence.
  - October 5, 2020, Supreme Court invites Acting Solicitor General to file brief expressing their views.

Davis v. Wash. Univ. in St. Louis,
960 F.3d 478 (8th Cir. 2020)

- Participants alleged that defendants breached their fiduciary duties by: (1) allowing “out of control” investment management fees and recordkeeping expenses and (2) by retaining for too long three underperforming plan investments. District court dismissed both claims.
- Eighth Circuit reinstated the fiduciary breach claim that fees were too high, noting it had to draw every reasonable inference of favor of Plaintiffs at motion to dismiss stage.
- But the Eighth Circuit upheld the dismissal of the claim based on allegedly underperforming, overly costly investment options because Plaintiffs failed to identify better-performing benchmark/comparator options.

Wilcox v. Georgetown, 2019 U.S. Dist. LEXIS 3082 (D.D.C. Jan. 8, 2019).

- Plaintiffs sued Georgetown claiming the school failed to properly manage its two retirement plans.
- Plaintiffs claim Georgetown offered more than 300 investment options for participants to choose from, charged high administration fees, and provided poor investment options.
- Motion to Dismiss granted in January 2019. The court said the dismissal order was final but appealable, however the plaintiffs failed to file a motion to amend within the required 28 days.
  - "If a cat were a dog, it could bark. If a retirement plan were not based on long-term investments in annuities, its assets would be more immediately accessed by plan participants. These two truisms can be summarized: cats don't bark and annuities don't pay out immediately." *Wilcox*, 2019 U.S. Dist. LEXIS 3082 at *2.
- Plaintiffs appealed on June 28, 2019. The D.C. Circuit held oral argument on September 10, 2020.

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401(k) Plan Class Action Employer Stock Drop Litigation

Types of Claims Asserted in Stock Drop Litigation

- **Prudence Claim:** Plan fiduciaries knew or should have known that company stock was an imprudent investment and breached fiduciary duties by failing to eliminate the stock fund as an investment option or discontinue investments in that fund.

- **Disclosure Claim:** Plan fiduciaries breached fiduciary duties by making material misrepresentations about the company or failing to disclose material (both public and non-public) information re: value of company's stock.

Prudent Person Standard

- § 404(a)(1)(B): Fiduciaries' investment decisions and disposition of assets are measured by the "prudent person" standard.
- § 404(a)(1)(C): Requires ERISA fiduciaries to diversify plan assets.
- § 404(a)(2): Establishes the extent to which those duties are loosened in the ESOP context to ensure that employers are permitted and encouraged to offer ESOPs.
- *Moench* **Presumption of Prudence**:
  - *Moench v. Robertson*, 62 F.3d 553, 571 (3rd Cir. 1995)
- Fiduciaries ***presumed*** to act prudently when they offer employees the option to invest in employer stock, unless company's viability is in doubt or other "dire circumstances" are present.
- This presumption was the key to many successful Motions to Dismiss.

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)

- Rejected Defendants' arguments in favor of the Presumption.
- Duty of prudence is not defined by the aims of a particular plan as set out in the plan documents and thus should not be adjusted to take into account the aims of ESOPs.
- ERISA requires fiduciaries to act "in accordance with the documents and instruments governing the plan *insofar as such documents and instruments are consistent with the provisions of this subchapter*."
- ***Hard Wiring***: Plan sponsors cannot reduce or waive prudent man standard of care by requiring investment in the company stock fund; trust documents cannot excuse trustees from their duties under ERISA.
- Although not giving ESOP fiduciaries the benefit of the presumption conflicts with the insider trading prohibition, a presumption is not the appropriate way to weed out claims.

Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)

- Instead, whether a fiduciary acted prudently turns on the specific circumstances at the time the fiduciary acts.
- Court instructed the Sixth Circuit to apply the pleading standard as discussed in *Twombly* and *Iqbal* in light of the following considerations.
- Allegations that a fiduciary should have recognized from ***publicly available information*** alone that the market overvalued or undervalued the stock are implausible, absent special circumstances. ERISA fiduciaries may generally and prudently rely on the market price.
  - Court didn't consider if plaintiff can plausibly allege imprudence based on publicly available information by pointing to a special circumstance affecting the reliability of the market price.

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Fifth Third Bancorp v. Dudenhoeffer,
134 S. Ct. 2459 (2014)

- To state a claim for breach of the duty of prudence on the basis of inside information, a plaintiff must plausibly allege:
  - An alternative action that the defendant could have taken that would have been consistent with the securities laws, and
  - A prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

- Lower courts should consider:
  - Duty of prudence does not require that fiduciary break securities laws.
  - Whether a plan fiduciary's decision to purchase (or refrain from purchasing) additional stock comports with federal securities laws and their objectives.
  - Whether a fiduciary's failure to disclose information to the public conflicts with federal securities laws and their objectives.
  - Whether a prudent fiduciary could not have concluded that stopping purchases or publicly disclosing negative information would do more harm than good to the stock fund.

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Dudenhoeffer – Aftermath

- ***Amgen v. Harris***, 136 S. Ct. 758 (2016)
  - Reversed the Ninth Circuit.
  - Held: Courts should rely on *Dudenhoeffer*'s **"*not cause more harm than good*"** standard for claims that plan fiduciaries should have acted based on inside information regarding an employer's stock.
  - The Ninth Circuit's assumption that it was "quite plausible" that removing the employer stock fund would not cause undue harm was insufficient.
  - **Plaintiffs must plead specific facts that plausibly show a prudent fiduciary could not have concluded that the alternative action would do more harm than good.**

Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Smith v. Delta Air Lines***, 619 F. App'x. 874 (11th Cir. 2015)
  - Plaintiff alleged that fiduciaries imprudently permitted investment in the Delta stock fund despite concerns about Delta's financial condition and ability to survive.
  - Eleventh Circuit deemed Plaintiff's prudence claim "implausible as a general rule," as it failed to allege any material inside information about Delta's financial condition or any other special circumstances rebut the market-reliance / reliance on the market unreliable claim.
- "[W]hile [*Dudenhoeffer*] may have changed the legal analysis of our prior decision, it does not alter the outcome."

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Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Whitley v. BP, P.L.C.***, 838 F.3d 523 (5th Cir. 2016)
  - Applying *Amgen*, court held "the plaintiff bears the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary ***could not conclude*** that it would be more likely to harm the fund than to help it."
  - Plaintiffs alleged Fund, based on nonpublic safety information, should have (1) froze, limited, or restricted company stock purchases; or (2) disclosed the unfavorable safety information.
  - Court held plaintiffs should have made specific fact allegations that for each proposed alternative, a prudent fiduciary could not have concluded that the alternative would not do more harm than good.
  - Unreasonable to conclude that freeze or disclose is enough to meet the pleading standard.

Dudenhoeffer – Aftermath
"Not Cause More Harm Than Good"

- ***Rinehart v. Lehman Bros. Holdings Inc***., 817 F.3d 56, 68 (2d Cir. 2016).
  - Dismissed third amended complaint because allegations failed to demonstrate ". . . that a prudent fiduciary during the class period 'would not have viewed [disclosure of material nonpublic information regarding Lehman or ceasing to buy Lehman stock] as *more likely to harm the fund than to help it*.'" (quoting *Amgen* and *Dudenhoeffer).*

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Dudenhoeffer – Aftermath
“Not Cause More Harm Than Good”

- ***Saumer v. Cliffs Nat. Res., Inc.***, 853 F.3d 855 (6th Cir. 2017)
  - Plaintiffs claimed that fiduciaries imprudently retained Cliffs’ stock because (1) *public information* revealed Cliffs’ high-risk profile, low business prospects, deteriorating financial condition, and the collapse of iron ore/coal prices; and (2) fiduciaries had *inside information* of the stock’s overvaluation but neglected to “engage in a reasoned decision-making process regarding the prudence”.
  - Court upheld district court’s dismissal of public and inside information claims.
  - Reasoned (1) that “*every* company carries significant risk” and the fiduciary’s failure to investigate the investment decision alone did not amount to “special circumstances”; and (2) that removing the fund as an investment option was an alternative action, but plaintiff did not allege enough facts to show that doing so would have caused more good than harm.

Muehlgay v. Citigroup Inc., 649 F.App’x 110 (2d Cir. 2016)

- Plaintiffs claimed Citigroup breached its duty as plan administrator because public information indicated Citigroup’s subprime mortgage exposure made their stock too risky.
- Information included “omnipresent news stories” and “alarming public filings” prior to 2008.
- Court held plaintiffs’ had *actual knowledge* of Citigroup’s exposure more than three years prior to filing their complaint and were thus time-barred.

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Coburn v. Evercore Trust Co.,
844 F.3d 965 (D.C. Cir. 2016)

- Evercore was the independent fiduciary of the J.C. Penney 401(k) Plan employer stock fund when JCP stock price fell.
- Affirms district court's Motion to Dismiss.
- Applying *Dudenhoeffer,* court holds mere fact that employer stock was risky, where market is efficient, fiduciary may rely upon publicly known information and has no duty to outguess the market.
- The Court holds that when a stock price fluctuates in an efficient market, arguing that a stock is too risky to hold at current market prices is part and parcel of the claim that that stock is overvalued, a claim interdicted by *Dudenhoeffer.*

Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan,

312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), *aff'd*, 960 F.3d 190 (5th Cir. 2020)

- Allegation: Defendants breached duties of diversification and prudence by retaining a fund consisting of the former parent company's stock as that stock was no longer an "employer security" under ERISA.
  - Case of first impression.
- Plan created after a corporate spin-off; assets transferred from predecessor plan included a fund consisting of former parent's stock.
- After transfer, fund holding former parent's stock was closed to new investments; participants only could trade out of fund.

Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan,
312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), *aff'd*, 960 F.3d 190 (5th Cir. 2020)

- District court first held diversification was not the real issue:
  - Fiduciaries and participants could not buy former employer stock;
  - Participants could move their assets out of those funds at any time;
  - No claim that the plan's other investments were not diversified.
- District court dismissed prudence claims based upon *Dudenhoeffer*, stating fiduciaries can rely on market prices.
- Because the participants did not identify plausible special circumstances undermining the fiduciaries' reliance on the market price, nor plausibly allege that further investigation by the fiduciaries would reveal nonpublic information showing that the stock investments were too risky, the district court ruled that the participants failed to state a claim.

Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan,

312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), *aff'd*, 960 F.3d 190 (5th Cir. 2020)

- The Fifth Circuit affirmed dismissal of all claims.
- Although qualifying "employer securities" are statutorily exempt under ERISA from the diversification and the prudence requirement (to extent it requires diversification), the Fifth Circuit held that the former parent company's stock were not "employer securities" after the spin-off.
- It then upheld the dismissal of the duty to diversify claim:
- Fiduciaries for a defined contribution plan "need only provide investment options that enable participants to create diversified portfolios; they need not ensure that participants actually diversify their portfolios." *Schweitzer*, 960 F.3d at 196.
- Because the participants had not alleged that the fiduciaries did not offer sufficient investment options or fail to warn participants of the risk of a concentrated portfolio, their duty to diversify claim failed.

Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan,

312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), *aff'd*, 960 F.3d 190 (5th Cir. 2020)

- The Fifth Circuit also upheld the dismissal of the duty of prudence claim.
- *Dudenhoeffer* foreclosed claim fiduciaries should have known from public information that stock market underestimated risk of holding the former parent company stock.
- Plaintiffs claimed that holding a single-stock fund is imprudent *per se* because of the risk inherent in holding an undiversified asset. The Fifth Circuit found no *per se* bar, as "ERISA contains no prohibition on individual account plans' offering single-stock funds." *Schweitzer*, 960 F.3d at 197.
- But the Fifth Circuit recognized that, under some circumstances, a single-stock investment option may be imprudent. In this case, however, the fiduciaries had warned participants of the risks of not diversifying in the summary plan description, and the fund holding the former parent stock was closed to new investment. Participants were free to sell fund investment at any time and reinvest in other funds.
- On Oct. 8, 2020, the Fifth Circuit denied participants' rehearing petition.

Stegemann v. Gannett Co.,

970 F.3d 465 (4^{th} Cir. 2020)

- Similar to *Schweitzer* but Fourth Circuit reaches a different result.
- The case stems from a 2015 transaction where Tegna (formerly called Gannett) spun off its publishing business to a new company that took the Gannett name.
- Participants in the new Gannett 401(k) plan filed suit, alleging that defendants breached their fiduciary duties of prudence and diversification under ERISA because the plan continued to hold Tegna stock, which led to losses.
- Participants alleged defendants breached the duty of prudence by failing to monitor the prudence of holding a single-stock fund; simultaneously, the allegedly imprudent single-stock fund was correlated with another single-stock fund on the plan's menu, intensifying diversification concerns.

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Stegemann v. Gannett Co.,

970 F.3d 465 (4th Cir. 2020)

- In a 2-1 opinion, relying on prior precedent, the 4th Circuit held Plaintiffs plausibly alleged defendants breached their duty of prudence and caused a loss to the plan.
  - *DiFelice v. U.S. Airways, Inc.*, 497 F.3d 410 (4th Cir. 2007), examining the prudence of a fund standing alone from other offerings on a plan's menu, and requiring a fiduciary to identify and remedy imprudent funds on plan's menu.
  - *Tatum v. RJR Pension Inv. Comm.*, 761 F.3d 346 (4th Cir. 2014), holding that retaining an investment in an alleged imprudent fund even if frozen is not necessarily adequate.
- 4th Circuit concluded *Dudenhoeffer* does not apply because participants "do not contend that the fiduciaries should have outsmarted an efficient market." Rather, they allege that the fiduciaries should have recognized the imprudence of a fund based on its composition. The fact that a fund's composition might be informed by publicly available financial information about its composition does "not shift an imprudent non-diversification claim into the ambit of *Dudenhoeffer*."
- Rehearing denied on September 22, 2020.

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Allen v. Wells Fargo & Co.,
967 F.3d 767 (8th Cir. 2020)

- In 2016, following an investigation, federal regulators announced that Wells Fargo had been fined in connection with opening unauthorized customer accounts. Following that disclosure, the market value of Wells Fargo's stock dropped in value only to rebound later.
- Plan participants who suffered alleged plan losses filed a class action lawsuit, contending that Wells Fargo breached its fiduciary duty of prudence and loyalty by failing to take protective measures on behalf of plan participants through the public disclosure of Well Fargo's practices relating to the unauthorized accounts while the investigations occurred.
- Participants alleged that the fiduciaries knew as early as 2013 that the government was investigating Wells Fargo's possible misconduct.
- The district court dismissed, and the Eighth Circuit affirmed.

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Allen v. Wells Fargo & Co., 967 F.3d 767 (8th Cir. 2020)

- Following *Dudenhoeffer*, the Eighth Circuit held Plaintiffs had not plausibly alleged that a prudent fiduciary could not have concluded that earlier disclosure would have done more harm than good.
- Participants' "allegation based on general economic principles – that the longer a fraud is concealed, the greater the harm to the company's reputation and stock price – is too generic to meet the requisite pleading standard." Allen, 967 F.3d at 774.
- A prudent fiduciary could conclude that disclosure before the conclusion of the government investigation risks "spooking the market," creating a potential stock drop.
- As for the disloyalty claim, the Eighth Circuit concluded that the duty of loyalty does not require disclosure of non-public information about the company that might impact the plan participants. Further, the participants' disloyalty claim "merely recasts the imprudence claim" to circumvent the *Dudenhoeffer* standard, as the claims were based on the same alleged facts.

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Motions to Dismiss Granted:
401(k) Plan Stock Drop Litigation

- *Lynn v. Peabody Energy Corp.,* 250 F.Supp.3d 372 (E.D. Mo. Mar. 30, 2017), appeal dismissed by appellants, 2017 WL 5256238 (8th Cir. Sept. 29, 2017).
- *Graham v. Fearon*, 2017 WL 1113358 (N.D. Ohio Mar. 24, 2017), *aff'd,* 721 F.App'x 429 (6th Cir., Jan. 8, 2018).
- *Hill v. Hill Bros. Constr. Co.,* 2016 WL 1252983 (N.D. Miss. Mar. 28, 2016), *reconsideration denied*, 2016 WL 4132255.
- *In re Idearc ERISA Litig.*, 2016 WL 7189981 (N.D. Tex. Oct. 4, 2016), *aff'd*, *Kopp v. Klein,* 894 F.3d 214 (5th Cir. 2018).
- *In re 2014 RadioShack ERISA Litig.*, 2016 WL 8505089 (N.D. Tex. Sept. 29, 2016) (partial), *aff'd,* 882 F.3d 137 (5th Cir. 2018).
- *Brannen v. First Citizens Bankshares, Inc.*, 2016 WL 4499458 (S.D. Ga. Aug. 26, 2016) (partial).
- *Vespa v. Singler-Ernster, Inc.*, 2016 WL 6637710 (N.D. Cal. Nov. 8, 2016).

Insider Allegations:
Earlier Disclosure of Negative Corporate Information.

- Five Circuits have now held that a premature disclosure of negative insider corporate information could cause the plan more harm than good.

– *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016); *Loeza v. Does*, 659 F. App'x 44, 45–46 (2d Cir. 2016).

– *Martone v. Robb*, 902 F.3d 519, 526–27 (5th Cir. 2018); *Whitley v. BP, P.L.C.*, 838 F.3d 523, 529 (5th Cir. 2016).

– *Graham v. Fearon*, 721 F. App'x 429, 437 (6th Cir. 2018); *Saumer v. Cliffs Nat'l Res., Inc.*, 853 F.3d 855, 864 (6th Cir. 2017).

– *Laffen v. Hewlett-Packard Co.*, 721 F. App'x 642, 644–45 (9th Cir. 2018).

– *Allen v. Wells Fargo & Co.*, 967 F.3d 767, 774-75 (8^{th} Cir. 2020).

Insider Allegations:
Duty to Disclose Corporate Information to Plan Participants

- Cases that hold that corporate fiduciaries have no duty under ERISA to disclose inside information ***about the company*** to plan participants.
  – *Allen v. Wells Fargo & Co.*, 967 F.3d 767, 776 (8th Cir. 2020).
  – *Slaymon v. SLM Corp.*, 506 F. App’x 61, 64 (2d Cir. 2012).
  – *In re Citigroup ERISA Litig.*, 662 F.3d 128, 143 (2d Cir. 2011).
  – *Kopp v. Klein*, 722 F.3d 327, 340 (5th Cir. 2013), *vacated and remanded by,* 134 S. Ct. 2900 (2014).
  – *Howell v. Motorola, Inc.*, 633 F.3d 552, 572 (7th Cir. 2011).
  – *Wilson v. Sw. Bell Tel. Co.*, 55 F.3d 399, 406 (8th Cir. 1995).
  – *Lanfear v. Home Depot, Inc*., 679 F.3d 1267, 1284 (11th Cir. 2012).

COBRA Notice Litigation

What is the Legal Framework?
Consolidated Budget Reconciliation Act of 1985

- ERISA Sections 601-608 (29 U.S.C. §§ 1161-1168), IRC § 4980B
- Requires group health plans to make continuation coverage available to a COBRA Qualified Beneficiary upon occurrence of a Qualifying Event
  - Termination of employment
  - Death of employee
  - Enrollment in Medicare
  - Reduction in hours of employment
  - Divorce or legal separation
- Event is not a “Qualifying Event” unless it causes a loss of group health coverage
- Qualified Beneficiary pays the entire cost of coverage, plus 2% administrative charge

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What is the Legal Framework?
COBRA Notice Requirements

- Plan must furnish Initial COBRA Notice to participant and spouse
  - 90 days from date coverage first begins
- Qualified Beneficiaries must notify plan administrator (dependent reaches age limit or divorce)
  - Within 60 days of Qualifying Event
- Notice requirements for employers
  - Employer must notify plan administrator within 30 days following or receiving notice of a Qualifying Event
- Plan administrator must furnish COBRA Election Notice to Qualified Beneficiaries
  - Within 14 days of Qualifying Event (44 days if employer is also plan administrator)

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What is the Legal Framework?
Penalties for Failing to Furnish COBRA Notices

- Excise taxes – $100 per Qualified Beneficiary (up to $200 per family) per day until Qualified Beneficiary receives a compliant notice
  - Employer is generally the party liable for the excise tax
- Minimum COBRA excise tax of $2,500
  - IRS may assess if employer commits a de minimis COBRA violation, fails to correct the violation before IRS notifies employer it will perform an audit, and failure occurred during period under audit
- Maximum for unintentional failures is 10% of amount paid during the preceding tax year by the employer for group health benefits or $500,000
- DOL can also assess ERISA penalty of $110 per Qualified Beneficiary per day (no maximum)
- Courts can impose discretionary statutory penalties of up to $110 per day

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COBRA Notice Litigation

- Motions to dismiss denied
  - *Robles v. Lowe's Home Centers, Inc.*, No. 19-2713, 2020 U.S. Dist. LEXIS 36385 (M.D. Fla. Mar. 3, 2020)
  - *Riddle v. PepsiCo, Inc.*, 440 F. Supp. 3d 358 (S.D.N.Y. 2020)
- 2020 cases filed against Amazon (2 cases), Bank of America, Best Buy (quickly settled), Citigroup, Comcast (voluntarily dismissed), Nestlé Waters, Starbucks, Sysco (voluntarily dismissed)
- Recently Settled Cases

Plan Sponsor	Settlement
Best Buy	Not available
First Fleet, Inc.	$386,000
Lockheed Martin Corp.	$1.25 million
Marriott, Inc.	$250,000
PetSmart, Inc.	$500,000
Target Corp.	$1.6 million

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COBRA Notice Litigation

- *Bryant v. Wal-Mart Stores, Inc.*, 16-24818 (S.D. Fla.)
  - After Jamie Bryant lost her job at Wal-Mart, she filed a class action suit alleging that Wal-Mart's COBRA notice was deficient.
  - In April 2019, the district court denied in part Wal-Mart's motion to dismiss. *Bryant*, 2019 U.S. Dist. LEXIS 102959 (S.D Fla. Apr. 18, 2019).
    - The district court held that Wal-Mart's inclusion of the COBRA administrator's contact information (instead of the information for the plan administrator) did not satisfy the regulatory requirements of 29 C.F.R. 2590.606-4(b)(4)(i).
    - The district court also determined that the COBRA notice, which omitted the contact information for the plan administrator, is not "sufficient to permit the discharged employee to make an informed decision whether to elect coverage."

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COBRA Notice Litigation

- *Bryant v. Wal-Mart Stores, Inc.*, 16-24818 (S.D. Fla.)
  - On July 15, 2020, at 2020 U.S. Dist. LEXIS 125266, the magistrate recommended that class certification be denied (without prejudice) because the three named plaintiffs lack the requisite standing:
    - One faced no lapse in coverage, was paying lower premiums than she would have paid under COBRA, and had produced no evidence of delayed medical care; one had not read the COBRA notice nor had any intention of electing COBRA; and one knew before receiving the COBRA notice that she could not afford it.
  - Two days later, upon the parties' joint stipulation, the district court dismissed the case with prejudice. *Bryant*, 2020 U.S. Dist. LEXIS 128546 (S.D. Fla. July 17, 2020).

Arbitration of ERISA Class Actions

Supreme Court Arbitration Case Law

- The Supreme Court has taken a favorable view of arbitration.
- *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018) (rejecting NLRA concerted activity concerns as a bar to arbitration).
- *Am. Express Co. v. Italian Colors Rest*., 133 S. Ct. 2304, 2312 (2013) (rejecting argument that class waiver would prevent effective vindication of statutory rights even though enforcement of a class waiver prevented plaintiffs from pursuing a representative antitrust claim, which was the only economically viable way for them to assert such claims).
- *Gilmer v. Interstate/Johnson Lane Corp*., 111 S. Ct. 1647 (1991) (enforcing arbitration and class action waiver even though ADEA permits collective action).
- *Henry Schein, Inc. v. Archer & White Sales, Inc.,* 139 S. Ct. 524 (2019) (when contract delegates the question of the arbitrability of a particular dispute to an arbitrator, a court may not override the contract, even if it thinks that the argument that the arbitration agreement applies to a dispute is groundless).
- *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019) (rejecting class arbitration where arbitration agreement was ambiguous as to class arbitration).

Dorman v. Charles Schwab Corp., 934 F.3d 1107, and 780 F.App'x 510 (9th Cir. 2019)

- Class action, proprietary fee case.
- Allegation: class action alleges Defendants breached fiduciary duties by including Schwab-affiliated investment funds in the Plan—despite the funds' poor performance—to generate fees for Schwab and its affiliates.
- December 2014: Plan amendment adds arbitration provision (with a class action waiver), effective January 1, 2015, nine months before Dorman ends his employment, nearly one year before ending his Plan participation.
- Plaintiff's employment documents also required arbitration of all employment related claims and included a class action waiver.

Dorman, Claims Asserted

- Complaint alleges various Defendants breached their fiduciary duties of loyalty and prudence and violated ERISA's prohibited transaction rules by selecting Plan investment funds affiliated with Schwab.
- Complaint alleges the Schwab-affiliated funds performed poorly but were retained solely to generate fees for Schwab and its affiliates.
- Complaint also alleges that Board of Directors breached their duty to monitor Plan fiduciaries who selected these investment funds.
- Complaint further asserts claims for co-fiduciary breach and knowing participation in a breach against various Defendants.

Dorman, Plan Language

- The Plan document states that "[a]ny claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration . . . ."
- The arbitration provision includes a waiver of class or collective action that requires individual arbitrations, even if absent the waiver Dorman could have represented the interests of other Plan participants.
- It states that any arbitration would be conducted "on an individual basis only, and not on a class, collective or representative basis," and that Plan participants waive the right to be part of any class action. *Dorman*, 934 F.3d at 1109.

Dorman, Holding

- A unanimous Ninth Circuit Panel first overrules *Amaro v. Continental Can Co.*, 724 F.2d 747 (9th Cir. 1984). *Amaro* was controlling precedent precluding arbitration of ERISA claims.
- Relying upon intervening Supreme Court case law, including *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304 (2013), the Panel overruled *Amaro.*
- Because *American Express Co*. held that federal statutory claims are generally arbitrable and arbitrators can competently interpret and apply federal statutes, the Panel held intervening Supreme Court authority is irreconcilable with *Amaro* and that *Amaro* is no longer binding precedent. 934 F.3d at 1112.

Dorman, Class Action Waiver
780 F.App'x 510, 2019 U.S. App. LEXIS 24791 (9th Cir. 2019)

- The class action waiver was described by the Court as selecting an arbitral forum for resolving fiduciary breach claims and requires arbitration on an individual rather than collective basis.
- The Panel held that provision was not an effort to insulate fiduciaries from ERISA liability.
- Instead, the provision selected a forum for litigating fiduciary breach claims that offered quicker, more informal, and often cheaper resolutions for everyone involved.
- The provision was not invalid under ERISA because arbitration on an individual basis does not relieve a fiduciary from responsibility or liability. 780 F.App'x at 513.

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Dorman, Class Action Waiver
780 F.App’x at 514, 2019 U.S. App. LEXIS 24791 (9th Cir. 2019)

- Relying upon controlling Supreme Court precedent, the Panel held no party can be compelled under the FAA to arbitrate on a class-wide or collective basis unless it agrees to do so by contract.
- “The Supreme Court's recent decision in *Lamps Plus, Inc. v. Varela*, 139 S. Ct. 1407 (2019), confirms that the parties here should be ordered into individual arbitration, as they did not agree to class-wide or collective arbitration.”
- Holding that arbitration is a matter of contract, the Panel held the provision's waiver of class-wide and collective arbitration must be enforced according to its terms, and the arbitration must be conducted on an individualized basis.

Dorman, Class Action Waiver
780 F.App'x at 514, 2019 U.S. App. LEXIS 24791 (9th Cir. 2019)

- Although ERISA § 502(a)(2) claims seek relief on behalf of a plan, the Supreme Court has recognized that such claims are inherently individualized when brought in the context of a defined contribution plan like that at issue. *LaRue v. DeWolff, Boberg & Assocs., Inc*., 128 S. Ct. 1020 (2008).
- *LaRue* stands for the proposition that a defined contribution plan participant can bring an ERISA § 502(a)(2) claim for the plan losses in her own individual account.
  - *Russell's* "entire plan" language, which appears nowhere in § 409 or § 502(a)(2), does not apply to defined contribution plans. *LaRue*, 128 S. Ct. at 1025.
- The Plan and Dorman both agreed to arbitration on an individualized basis, and this is consistent with *LaRue*.

Dorman, Class Action Waiver
780 F.App'x at 514, 2019 U.S. App. LEXIS 24791 (9th Cir. 2019)

- As a result the entire class action is:
- "**REVERSED** and **REMANDED** with instructions for the district court to order arbitration of individual claims limited to seeking relief for the impaired value of the plan assets in the individual's own account resulting from the alleged fiduciary breaches." *Dorman,* 780 F.App'x at 514.

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Munro v. Univ. of Southern Cal., 896 F.3d 1088 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019)

- The Ninth Circuit refused to require individual arbitration of an ERISA fiduciary breach class claim.
- The arbitration provision was contained in an employment agreement with the individual employee and not in the Plan document.
- The Ninth Circuit held that, because “a plaintiff bringing a suit for breach of fiduciary duty … seeks recovery only for injury done to the plan,” the participant could not force the Plan’s claim into individual arbitration on the basis of an employee’s own individual arbitration agreement.
- The Ninth Circuit did not address whether an arbitration provision contained in the Plan itself would be enforceable.

MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386 (3d Cir. 2020)

- Union benefits funds attempted to force employer to arbitrate claims as to underpaid contributions.
- The funds relied on a short form agreement (SFA) signed by the employer's president. The SFA purported to incorporate an unattached and unsigned collective bargaining agreement (CBA) with an arbitration clause providing that the arbitrator "shall have the authority to decide whether an Agreement exists."
- The employer filed suit to enjoin arbitration, arguing it never intended to execute a statewide CBA requiring it to pay fringe benefits on all of its projects in the state with an arbitration provision, and that the union representative had assured the employer the SFA only covered a Newark airport job.

MZM Constr. Co. v. N.J. Bldg. Laborers Statewide Benefit Funds, 974 F.3d 386 (3d Cir. 2020)

- The Third Circuit held that, “unless the parties clearly and unmistakably agreed to arbitrate questions of contract formation in a contract whose formation is not in issue, those gateway questions are for the courts to decide.” 974 F.3d at 402.
- Here, the Third Circuit concluded that the employer sufficiently alleged fraud in the execution, putting the formation of the arbitration agreement at issue.
- The funds were not entitled to have the gateway arbitrability claim submitted to arbitration on the face of complaint.

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Smith v. GreatBanc Trust Co., 2020 U.S. Dist. LEXIS 151992 (N.D. Ill. Aug. 21, 2020)

- Former employee of Triad Manufacturing and former participant in Triad's ESOP (a defined contribution plan) filed suit on his own behalf and on behalf of the Plan, alleging that the ESOP's trustee and Triad's board of directors breached their fiduciary duties and engaged in prohibited transactions in violation of ERISA.
- Defendants moved to compel arbitration, based on an arbitration amendment added to the Plan after plaintiff's departure from Triad.
- Plaintiff argued that the provision is unenforceable against him because he was never notified of it, never accepted this modification to the Plan, and never received consideration in exchange for an acceptance.

Smith v. GreatBanc Trust Co., 2020 U.S. Dist. LEXIS 151992 at *11

- Defendants argued that plaintiff agreed to be bound by the amendment by participating in the Plan while the provision was in effect, citing *Dorman*. The district court declined to follow precedent it regarded as non-binding.
- Defendants further argued that, because the Plan agreed to arbitration by virtue of the amendment, plaintiff must arbitrate his claims. The district court rejected this argument, stating:
  - "Under the circumstances presented here, however, and absent Seventh Circuit authority, the Court is unwilling to conclude that the traditional contract analysis that governs the issue of the existence of an arbitration agreement is displaced in the context of ERISA plans. It is difficult to reconcile defendants' approach to the analysis—simply substituting the Plan itself (or the Plan's sponsor) for a plan participant—with the FAA's 'overarching principle that arbitration is a matter of contract.'"

Smith v. GreatBanc Trust Co., 2020 U.S. Dist. LEXIS 151992 at *15

- In addition, the district court concluded that the arbitration provision was unenforceable as to plaintiff's § 502(a)(2) claims because the arbitration provision eliminated his right to pursue Plan-wide statutory remedies granted under § 502(a)(2). The arbitration amendment contained "material and non-severable" terms that purported to restrict plaintiff's remedies to losses to his individual account, a prorated portion of profits, and other individualized relief.
- Accordingly, the district court denied the motion to compel arbitration.
- Defendants have appealed to the Seventh Circuit (20-2708). Defendants' opening brief was filed on October 28; Plaintiff's Opposition is currently due on Jan. 14, 2021; and the reply is now due on Feb. 4, 2021. Resolution in 2021. Supreme Court in the future?

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Coleman v. Reliance Trust Co., 2019 U.S. Dist. LEXIS 223195 (E.D. Tex. Nov. 13, 2019)

- Plan was a leveraged ESOP sponsored and administered by non-party RVNB, Inc.
- Two former participants filed claims against the former Plan trustee (Reliance) pursuant to ERISA, including claims under § 502(a)(2).
- After the plan was terminated, it was amended to include an arbitration agreement that required arbitration of all claims on an individual basis.
- Several months into the litigation, RVNB produced a copy of the arbitration clause, and Reliance moved to compel arbitration.

Coleman v. Reliance Trust Co., 2019 U.S. Dist. LEXIS 223195 (E.D. Tex. Nov. 13, 2019)

- The magistrate recommended against arbitration:
  - By the time the arbitration provision was added, plaintiffs had left their employment and were fully vested in their Plan benefits.
  - Reliance had not shown that plaintiffs received notice of the arbitration amendment and that they had accepted the change.
  - Reliance was no longer trustee at the time the arbitration provision was added.
- Reliance objected to the magistrate's recommendation. Thereafter, in March 2020, the parties moved for approval of a class action settlement. The district court granted final approval of the settlement on August 6, 2020.

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Thank you.

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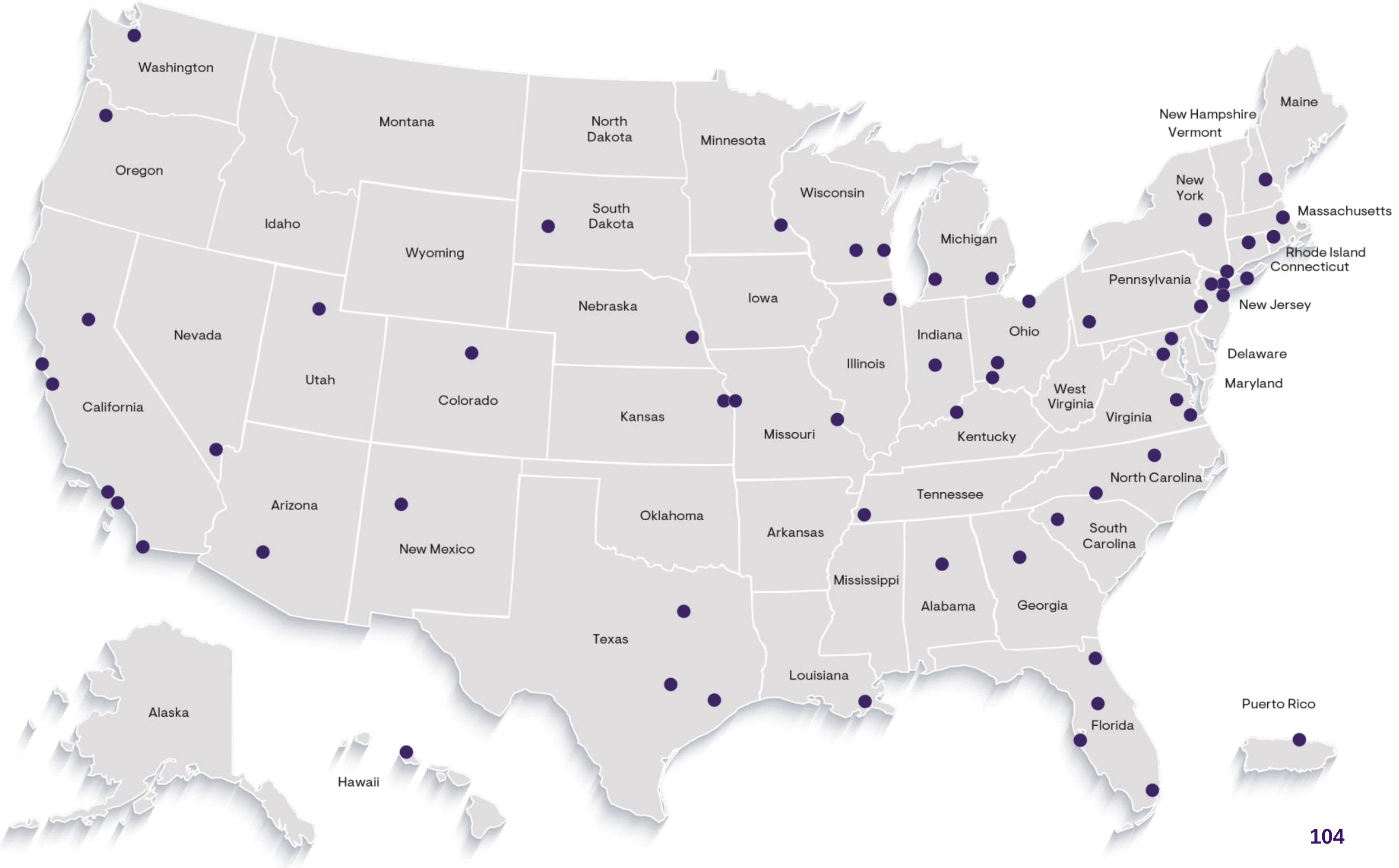

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SouthWest BENEFITS Association

31st Annual
Benefits Compliance Conference

Scheduled in 2 Hour Segments during November 2020 Produced Virtually via Zoom

SESSION 2:
Ethics and ERISA - Issues for Inside/Outside Attorneys

Introduction: **Brandon Long**, Shareholder and Practice Leader, McAfee Taft, PC
Speaker: **Felicia Finston,** Partner, Wilkins Finston Friedman Law Grou

Today’s Speaker

Felicia A. Finston has over 30 years of experience handling benefit and compensation issues for Fortune 500 and other public and private companies and tax-exempt entities (including church-related organizations and government employers). Felicia prides herself on developing and maintaining long-term relationships with her clients, such that she in essence serves in the capacity of an in-house benefits counsel for many of her clients. Felicia regularly provides legal counsel on qualified plan and health plan regulatory concerns, including ACA and HIPAA compliance issues, Form 1094 and 1095 filings and penalty assessments and Medicare coordination of benefit matters. She also advises clients regarding executive compensation and governance matters, such as SEC disclosure and filing issues, shareholder approval issues and proxy disclosure requirements involving compensatory arrangements. An important part of her practice also involves representing clients before the IRS, the DOL and the PBGC in connection with employee benefit plan audits and under voluntary submission programs such as EPCRS and DFVC.

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Ethics and ERISA - Issues for Inside/Outside Attorneys

Southwest Benefits Association

Felicia A. Finston

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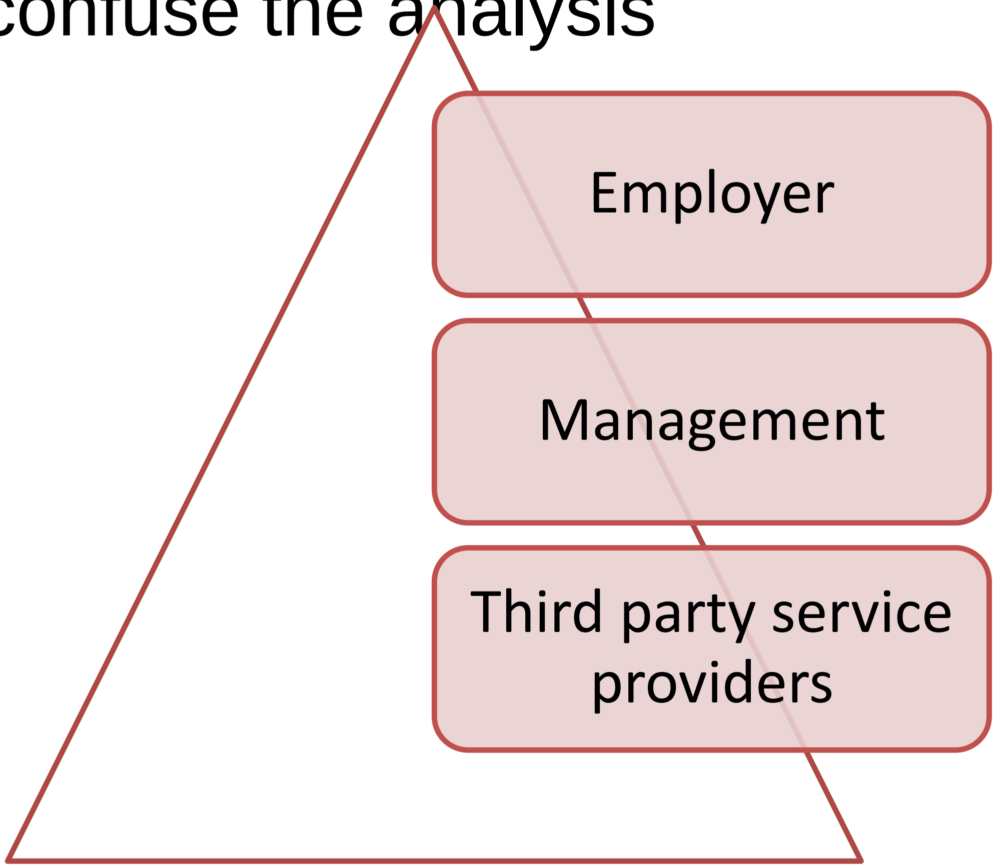
AGENDA

- Attorney Client Privilege
  - Employee benefit practice considerations
  - When it applies
  - Who it applies to
- Ways to lose Privilege
  - Not for legal advice
  - Third party disclosure
  - Fiduciary exception
- Protective actions

MULTIPLE HAT CONCEPT

In employee benefits field multiple hats of players confuse the analysis



TYPES OF LEGAL REPRESENTAION

- Advice on settlor decisions
- Benefits litigation
- Plan administration and fiduciary responsibilities

RULES GOVERNING PRACTICE

- ABA Model Rule 5.5(d)(2) permits an employee benefit attorney to advise on federal law in states in which the attorney is not admitted without engaging in unauthorized practice of law
- In-house attorneys can represent their organizational clients in multiple jurisdictions without admission
- Attorney's in good standing with any state bar can represent clients before the IRS under Circular 230
- Check local rules

APPLICABLE ETHICS RULES

- Generally rules of state where admitted to practice apply
- However, rules of state where providing services could apply
- What if multiple rules apply (e.g., admitted in multiple states)?

WHO IS THE CLIENT?

Important to determine

- Who is owed duties of competence and diligence, confidentiality, loyalty, and zealous representation
- Privilege
- Conflicts of Interest
- Exceptions to Privilege

Not always clear in employee benefits setting

PRIVILEGE

- Attorney-client privilege applies when there is
  - A communication
  - Made between privileged persons
  - In confidence
  - For the purpose of obtaining or providing legal advice for the client

Restatement (Third) of the Law Governing Lawyers § 68

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SCOPE OF PRIVILEGE

- Privilege only extends to the communications themselves and not the content
- Content can be discovered through an alternate path which does not involve compelling disclosure of communication with an attorney.

Wachtel v. Health Net, Inc., 482 F.3d 225, 237-38, 40 EBC 1545 (3d Cir. 2007), *citing Upjohn Co. v. United States*, 449 U.S. 383, 395 (1981).

ORGANIZATIONAL CLIENTS

- Attorney-client privilege applies to an entity client with respect to communications between its attorney and its constituents if the communications relate to the representation. *Upjohn Co. v. U.S*., 449 U.S. 383 (1981).
  - To enjoy privilege, the communication must, however, be with an “agent” of the entity, which can include even lower level employees communicating with counsel concerning the subject matter of the representation.
  - See ABA Model Rule 1.13(a) and Texas Rule 1.12(a)

ORGANIZATIONAL CLIENTS

- Privilege also applies with respect to communications entity attorneys have with consultants who are "functional equivalent of employees. *U.S. v. Graf*, 610 F.2d 1148 (9th Cir. 2010)
  - Criminal trial of founder of corporation who was not an employee
  - Founder sought to exclude testimony of corporation's counsel
  - Court concluded founder had no privilege with the company attorney's
  - The company had privilege because the founder, as a consultant was a functional employee
  - The Company waived the privilege so the attorneys could testify in the founder's criminal trail

IN-HOUSE COUNSEL

- Historically courts have applied extra scrutiny in determining if privilege applies to in-house counsel
  - Often due to believe that in-house counsel serves in a business capacity
  - May help to have separate legal department

ORGANIZATIONAL CLIENTS

- Attorney-client privilege will typically pass to buyer in merger or corporate acquisitions with respect to pre-merger communications.
  - Merger agreement could provide otherwise contractually. *Great Hill Equity Partners IV, LP v. SIG Growth Equity Fund I, LLLP*, 80 A.3d 155 (Del. Ch. 2013).

ORGANIZATIONAL CLIENTS

- Potential confusion as to who is the client – executives, board members, shareholders?
- ABA Model Rule 1.13(f) provides in dealing with organizations directors, officers, employees, members and shareholders or other constituents:
  - Lawyer shall explain identity of client
  - When the lawyer knows or reasonably should know that the organizations interests are adverse to those of the constituent's with whom the lawyer is dealing

ORGANIZATIONAL CLIENTS

- **Example**: General Counsel wants you to amend company's 401(k) plan to add a non-IRS safe harbor hardship request so he can get a distribution.
  - GC is acting on behalf of Organization who is the client
  - Even if GC could be client there is a conflict of interest such that attorney cannot represent both
  - Advise GC that organization is your client and can't take action adverse to it to benefit him

IMPUTED ATTORNEY-CLIENT RELATIONSHIP

- Risk of inadvertently creating attorney-client relationship with constituents of organizational client
- May lead to disqualification
  - Attorney representing employer disqualified because she inadvertently represented trustee of pension fund who was subject to potential liability. *Montgomery Academy v. Cohn*, 50 F. Supp. 2d 344 (D. N.J. 1999).
  - Attorney representing plaintiff plan disqualified because she had formed attorney-client relationship with defendant trustee when trustee shared personal information relating to plan obligations. *Schiffli Embroidery Workers Pension Fund v. Ryan*, 1994 W.L. 62124 (D. N.J. 1994).

IMPUTED ATTORNEY-CLIENT RELATIONSHIPS

- Service as agent/employee of organization doesn't necessarily create a joint attorney-client privilege with the organization as illustrated in *Graf*
  - Employee must show he approached counsel for purpose of seeking legal advice
  - Made clear he was seeking legal advise in individual capacity
  - Demonstrate the counsel communicated with him in individual capacity
  - Prove communications with counsel were confidential
  - Show substance of conversations with counsel did not concern matters within the company or the general affairs of the company
- *Graf* failed 2, 3 and 5 because retainer agreements were signed by a company founder other than Gaff and company paid all legal bills.

IMPUTED ATTORNEY-CLIENT RELATIONSHIP

- Advising fiduciary committee as to fiduciary duties does not mean that attorney is representing plan participants. *Colucci v. Agfa Corp. Severance Pay Plan*, 431 F. 3d 170 (4th Cir. 2005).
  - Must look at nature of the advice
  - If attorney's advice is on behalf of beneficiaries it may be discoverable under the fiduciary exception

DUTY TO REPORT

- ABA Model Rule 1.13(b) requires attorney to report to higher authority action by a person associated with an organizational client is engage in action or refusing to act in a matter related to the representation that is
  - A violation of a legal obligation of the organization or violation of law that could be imputed to the organization
  - Likely to result in substantial injury to the organization
- Similar requirement under Texas rule 1.12
- **Exception:** Reasonably believe it is in best interest of organization not to do so

DUTY TO REPORT

- **Example:** HR Director wants you to amend Corporation's deferred compensation plan to accelerate distributions in violation of section 409A
  - Duty to report? Injury to organization?
  - What if action involved a qualified retirement plan and would result in disqualification?

MULTIPLE CLIENTS

- If there is a conflict, lawyer can only represent multiple clients if she reasonably believes the representation of each client will not be materially affected and each party gives informed consent. ABA Model Rule 1.7 and Texas Rule 1.12(b).
- Who is the client in the case of an organization?
  - The plans
  - The fiduciaries
  - The sponsor

MULTIPLE CLIENTS

- Just as company may serve as both plan sponsor and administrator, a lawyer can represent the company in both roles. *Edgin v. Cobb*, 2008 WL 2858741 (E.D. Mich. 2008).
- May be precluded from representing both plan and its fiduciaries where their interests are adverse.
  - Law firm barred from representing plan or company officers serving in fiduciary roles in case where plan sued trustee, and trustee counterclaimed against officers for fiduciary breaches. *Pressman-Gutman Co. v. First Union National Bank*, 2004 WL 2743582 (E.D. Pa. 2004).

MULTIPLE CLIENTS

- Confidential communications between attorney and joint clients are privileged as to third parties and may be disclosed to other client

AUDIT LETTERS

- Remember who is your client –not the auditor
  - Response isn't protected by attorney client privilege
  - May be protected by work product doctrine if in jurisdiction that protects documents prepared in anticipation of litigation
- Audit is on behalf of plan – if plan isn't your client should note that (some firms will not respond)

SELECTED AUDIT RESONSE ISSUES

- Request to confirm unasserted possible claims for financial disclosure
  - Confirm with client
  - State only reporting if client requests?
- Specific audit inquires such as breach of fiduciary duty, plan is qualified?
  - Only respond if client requests
- Should plan pay?
  - Only if plan is your client

WAYS TO LOSE PRIVILEGE

- Not providing legal advice
- Third party disclosure
- Fiduciary Exception

NOT FOR LEGAL ADVICE

- No privilege if communication isn't for purpose of obtaining legal advice
  - Communications among actuarial firm, employer's attorney and employer prepared to assist attorney in performing her counseling function, but those that merely aided employer's business decisions were not. *Byrnes v. Empire Blue Cross Blue Shield*, 1999 WL 1006312 (S.D.N.Y. 1999).
  - Documents prepared in connection with meetings of employer's personnel review committee were not privileged even though in-house counsel participated in the meetings where primary purpose of meetings was to make a business decision not to obtain legal advice and documents did not show attorney provided legal advice. *Neuder v. Battelle Pacific Northwest Nat. Laboratory*, 194 F.R.D. 289 (D.D.C. 2000).

THIRD PARTY DISCLOSURE

- Communications directly with accountants, actuaries, recordkeepers are not privileged – not privileged persons
- Communications with attorneys that copy or include third parties are not privileged – not in confidence.
  - *Hill v. State Street Corp.*, 2013 U.S. Dist. Lexis 181168, 57 EBC 2036 (D. Mass. 2013) (presence of consultant at fiduciary committee meeting destroyed privilege).
  - *Lewis v. Unum Corp. Severance Plan*, 203 F.R.D. 615 (D. Kan. 2001) (disclosure to third party plan administrator waived privilege)

THIRD PARTY DISCLOSURE EXCEPTION

- Attorney employs a non-lawyer to help evaluate a legal matter for a client. *U.S. v. Kovel*, 296 F.2d 918 (2d Cir. 1961)
  - grand jury investigating tax violations by the client of a law firm
  - Prosecutor subpoenaed accountant employed by law firm who had worked with firm client
  - Accountant refused to talk, sentenced for criminal contempt
  - Court found privilege applies, with key points being that (1) the non-attorney was hired before the communications, and (2) the non-attorney is necessary, or at least highly useful, for the effective consultation between the client and the lawyer (foreign language analogy)

THIRD PARTY DISCLOSURE EXCEPTION

- *Cottillion v. United Refining Co*., 2011 U.S. Dist. Lexis 151519 (W.D. Pa. 2011)
  - Dispute over the actuarial reduction to early retirement benefits
  - Attorney copied actuary on communications to client
  - Privilege applied because actuary was involved for purposes of assisting the attorney in providing legal advice

THIRD PARTY DISCLOSURE EXCEPTION

- Protective take aways
  - Attorney must be hired before client communicates with non-attorney
  - Consider having attorney hire non-attorney
  - Non-attorney needs to be necessary or highly useful for effective client consult
    - Attorney hired to evaluate satisfaction of minimum funding standards for defined benefit pension plan requires retention of actuary
    - Query can actuary be regular actuary client communicates with on many occasions?

FIDUCIARY EXCEPTION

- Generally recognized by courts in ERISA cases – fiduciary represents interests of participants so communications with an attorney for the plan or fund are not privileged against the participants. *Washington-Baltimore Newspaper Guild, Local 35 v. Washington Star Co*., 543 F.Supp. 906 (D.D.C. 1982).
- Some courts require showing of "good cause" to waive the privilege and required disclosure to participants, but most do not.

FIDUCIARY EXCEPTION

- May extend to disclosures to government when it is investigating and prosecuting malfeasance in administration of an ERISA fund.
- May also extend to audits of employee benefit plans.
  - *Solis v. Food Employers Labor Relations Assn.*, 644 F.3d 221 (4th Cir. 2011) (fiduciary exception applies to DOL investigation of multiemployer plans who invested in Madoff funds, even though not a suit on behalf of beneficiaries)

LIMITS ON FIDUCIARY EXCEPTION

- Communications regarding settlor functions. *In re Long Island Lighting Co*., 129 F.3d 268 (2d Cir. 1997) (documents related solely to plan amendments are privileged).
- Communications regarding forming plan committee are privileged because they constituted a plan amendment rather than plan management. *Beesley v. Int'l Paper Co.,* 2008 WL 2323849, 44 EBC 1038 (S.D. Ill.2008).
- If employer cannot demonstrate that documents relate solely to nonfiduciary activities, privilege will not apply. *Everett v. USAir Group, Inc*., 165 F.R.D. 1 (D. D.C. 1995)

LIMITS ON FIDUCIARY EXCEPTION

- Advice regarding personal liability of plan fiduciaries is privileged. *United States v. Mett*, 178 F.3d 1058, 23 EBC 1081 (9th Cir. 1999).
  - With respect to denial of benefit claim, advice before denying claim is not privileged but advice provided after denial may be privileged. *Bell v. Pfizer Inc.*, 2006 U.S. Dist. Lexis 62611 (S.D. N.Y. 2006).
  - Contrast *Tatum v. R.J. Reynolds Tobacco Co*.,247 F.R.D. 488, 43 EBC 2304 (M.D.N.C. 2008) holding timing of communications is not dispositive-key is whether the communication relates to administration or a generalized concern for liability.

LIMITS ON FIDUCIARY EXCEPTION

- Top hat plans – fiduciary exception does not apply because these plans are exempt from ERISA's fiduciary rules. *Marsh v. Marsh Supermarkets, Inc.*, 2007 WL 1597938 (S.D. Ind. 2007).
  - Did not address whether a fiduciary duty could be owed under non-ERISA law.

LIMITS ON FIDUCIARY EXCEPTION

- Documents prepared in anticipation of litigation are protected under the work product doctrine.
  - *Wildbur v. Arco Chemical*, 974 F.2d 631 (5th Cir. 1992) - ARCO sale of assets, employees claimed termination of employment for purposes of severance and early retirement benefits
    - advice of in-house counsel to fiduciary committee on claims was generally not privileged;
    - later advice of in-house and outside counsel once litigation was commenced was protected as work product even if not privileged)

WORK PRODUCT DOCTRINE

- May apply if attorney client privilege does not
  - May be claimed by client or attorney. *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 587, 2 EBC 1393 (N.D. Ill. 1981)
  - Cannot be used against the client. *Everett v. USAir Group, Inc.*, 165 F.R.D. 1 (D.D.C. 1995)
  - Won't stand if there is a significant likelihood a litigation adversary will obtain the materials. *Castle v. Sangamo Westin, Inc*., 744 F.2d 1464 (11th Cir. 1984);

WORK PRODUCT DOCTRINE

- Codified in Federal Rules of Civil Procedure and similar state procedure
  - Encompasses "documents and tangible things that are prepared ***in anticipation of litigation*** or for trial by or for another party or its representative."
  - A party's representative includes not only its attorney (including in-house counsel), but also an insurer, employee, or other agent working on the party's behalf.
- Courts do not agree on what in anticipation of litigation means but generally consider if the document or tangible thing was created both:
  - before or during litigation (time); and
  - with an eye towards litigation (reason)

WORK PRODUCT DOCTRINE

- With respect to the time, a lawsuit does not need to have been filed, but there must be some likelihood litigation will follow.
  - Doctrine didn't apply where correspondence was prepared before trustees received a demand or warning of charges. *Helt v. Metropolitan District Commission*, 113 F.R.D. 7, 7 EBC 2617 (D. Conn. 1986)
  - Nothing bars application of rule to documents created before litigation event. *Hudson v. General Dynamics Corp*., 186 F.R.D. 271 (D. Conn. 1999) (*quoting the Second Circuit's decision in United States v. Adlman*, 68 F.3d 1495 (2d Cir. 1995), *order vacated by*, 134 F.3d 1194 (2d Cir. 1998)

WORK PRODUCT DOCTRINE

- Three different standards for determining reason documents were prepared:
  - Prepared for litigation (i.e., prepared to assist in anticipated litigation). *U.S. v. Textron*, 577 F.3d 21 (1st Cir. 2009) (en banc), *cert. denied*, 78 U.S.L.W. 3687 (May 24, 2010).
  - Because of the prospect of litigation (i.e., prepared due to an event that reasonably could lead to litigation). *U.S. v. Adlman*, 134 F.3d 1194, 1202 (2d Cir. 1998); *Nat'l Union Fire Ins. Co. v. Murray Sheet Metal Co.,* 967 F.2d 980, 984 (4th Cir. 1992); *Bink Mfg. Co. v. Nat'l Presto Indus. Inc*., 709 F.2d 1109, 1118-19 (7th Cir. 1983); *Simon v. G.D. Searle & Co*., 816 F.2d 397 (8^{th} Cir. 1987); and *Senate of Puerto Rico v. U.S. Dep't. of Just*., 823 F.2d 574, 586 (D.C. Cir. 1987).
  - Primarily motivated to assist in future litigation (i.e., litigation need not be imminent but the primary motivating purpose must be to aid in possible future litigation). *U.S. v. El Paso*, 682 F.2d 530, 542-43 (5th Cir. 1982), *citing U.S. v. Davis*, 636 F.2d 1028, 1040 (5th Cir. 1981).

FIDUCIARY EXCEPTION

- Generally the fiduciary exception is not applicable to work product doctrine because plan beneficiaries don't stand in same position with respect to attorney for whom the work product doctrine benefits as they do for attorney-client privilege. *Donovan v. Fitzsimmons*, 90 F.R.D. 583, 2 EBC 1393 (N. D. Ill. 1981)
- Limited courts have extended fiduciary exception to work product doctrine. *See e.g., Harvey v. Standard Ins. Co*., 2011 U.S. Dist. Lexis 107834, 53 EBC 2185 (N.D. Ala. 2011)
- Some courts will apply to pre-decisional phase of a benefits determination. *See e.g., Redd v. Bhd. Of Maintenance of Way Employees Div. of the Int'l Bhd. Of Teamsters*, 2009 U.S. Dist. Lexis 46288 (E.D. Mich. 2009)

PROTECTIVE ACTIONS

- Communications with Plan Sponsor as settlor
  - Label "Protected Settlor Communication" "Protected by the Attorney–Client Privilege"
  - Make clear the intended recipient is the employer acting in its settlor capacity
  - State the purpose is to advise on potential business decision involving the plan

PROTECTIVE ACTIONS

- Communications with fiduciary will not be privileged against beneficiaries unless
  - interests between beneficiaries and fiduciaries have diverged or
  - purpose is to advise on personal liability of fiduciary, then:
    - Clearly mark as "Attorney-Client Privileged"
    - State that fiduciary is intended recipient and purpose is to advise on personal liability.

PROTECTIVE ACTIONS

- Matter involves potential litigation with respect to benefit claim under the plan, in which case:
  - Mark all communications as "Protected by the Work Product Doctrine"
  - State intended recipient is fiduciary and purpose of communication is to advise the fiduciary on the dispute with the plan participant

PROTECTIVE ACTIONS IN-HOUSE BENEFITS COUNSEL

- Use single title that reflects role as counsel such as "Assistant General Counsel" to minimize role in business of organization
- Statements of privilege – written notes or communications should state the purposes is legal communication.
- Privilege and confidential stamp – written documents should be stamped with some variation of "Privileged Communication to Lawyer for Legal Advice"
- Separate filing –Maintain privileged documents in counsel's files rather than those of management
- Limit distribution – greater likelihood privilege will be upheld if persons receiving documents are limited to people who need the information as part of their daily work responsibilities

QUESTIONS???