ERISA Litigation Update

28th Annual Benefits Compliance Conference
SouthWest Benefits Association
Dallas, Texas; November 2, 2017

Howard Shapiro
Proskauer Rose LLP
650 Poydras Street, Suite 1800
New Orleans, Louisiana 70130
howshapiro@proskauer.com
Phone: (504) 310-4085

Proskauer

Attribution

- For their assistance with this PowerPoint deck, I wish to thank:
- Randall John Bunnell
  - 2017 Associate, Proskauer New Orleans Office.
- Kyle C. Hansen
  - The University Of Mississippi School of Law, Class of May 2018.
  - Kyle will join Proskauer's New Orleans Office in the Fall of 2018.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Overview of Presentation

- Supreme Court Church Plan Decision
- 401(k) Plan Fee Litigation: Proprietary Fund Cases
- 403(b) Plan Fee Litigation: University Cases
- 401(k) Plan Employer Stock Drop Litigation
- Breach of Fiduciary Duty: Loss Causation
- Statute of Limitations

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Supreme Court Church Plan Decision: *Advocate Health Care Network et al. v. Stapleton et al.*

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com
November 2, 2017

Proskauer

Religious Healthcare Entities Sued Since 2013

- CHE – Catholic Health East
- Ascension Health Alliance
- Dignity Health
- St. Peter's Health System
- CHI – Catholic Health Initiatives
- Trinity Health
- Providence Health & Services
- Daughters of Charity Health Services
- Advocate Health Care Network
- St. Anthony's Medical Center
- St. Joseph's Healthcare System
- Adventist Health System
- Hospital Sisters Health System
- Baptist Health System
- Presence Health Network
- Saint Francis Hospital and Medical Center
- SSM – Sisters of St. Mary
- Mercy Health
- St. Elizabeth Medical Center
- Wheaton Franciscan Healthcare
- Bon Secours Health System
- Franciscan Missionaries of Our Lady Health
- Franciscan Alliance
- Methodist Le Bonheur
- Holy Cross Hospital

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
Church Plan Definition: ERISA § 3(33)

- § 3(33)(A): The term "church plan" means a plan established and maintained . . . for its employees (or their beneficiaries) by a church or by a convention or association of churches which is exempt from tax under section 501 of title 26.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
Church Plan Definition: ERISA § 3(33)

- § 3(33)(C): For purposes of this paragraph—
  - (i) A plan established and maintained for its employees (or their beneficiaries) by a church or by a convention or association of churches includes a plan maintained by an organization, whether a civil law corporation or otherwise, the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits or welfare benefits, or both, for the employees of a church or a convention or association of churches, if such organization is controlled by or associated with a church or a convention or association of churches. (Emphasis added).

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
Three Circuit Court Opinions

- *Kaplan v. St. Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015); *Stapleton v. Advocate Healthcare Network,* 817 F.3d 517 (7th Cir. 2016); *Rollins v. Dignity Health,* 830 F.3d 900 (9th Cir. 2016).
- All three circuits unanimously held that the ERISA provision unambiguously requires a church, not a church-affiliated organization, establish a plan to qualify for the exemption.
- U.S. Supreme Court granted certiorari on December 2, 2016 and scheduled oral arguments for March 27, 2017. 16 *amici* briefs filed.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
In the Interim

- Despite courts putting most cases on stay when the Supreme Court granted certiorari., several religious health organizations settled by agreeing to funding commitments.
- Providence Health – $352 million over 7 years.
- Franciscan Missionaries of Our Lady – $125 million over 5 years.
- Holy Cross Hospital – $4 million insurance proceeds.
- Trinity Health Corp. – $75 million over 3 years.
- Ascension Health – $8 million one time contribution.
- Bon Secours – $98 million over 7 years.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
Parties' Key Arguments

- Plans & Government
  - Statutory text unambiguously states plans maintained by qualifying church-affiliated organizations, or "principal-purpose organizations" (PPOs), are exempt from ERISA.
  - This reading comports with Congress' intent to eliminate *any* distinctions between churches and their affiliated organizations.
  - Plans relied for over 30 years on agency interpretations in private letter rulings and opinion letters that a church did not have to establish a plan to be exempt. Since then, Congress amended ERISA but left § 3(33)(C) untouched.
  - Agency interpretations demands *Skidmore* deference.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Background
Parties' Key Arguments

- Employees
  - Plain text reading clearly establishes that § 3(33)(C)(i) only modifies the maintenance requirement.
  - Congress did not intend to exempt non-church employees from ERISA's protections. Congress amended § 3(33) only to allow church plans to continue providing benefits for employees of church agencies after expiration of a sunset provision.
  - Congress enacted the church plan exemption to prevent the government from looking into churches' books.
    - This concern is not present when a plan is not established by a church.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Supreme Court Opinion, 137 S. Ct. 1652 (June 5, 2017)

- Unanimous opinion written by Justice Kagan, Justice Gorsuch taking no part; concurrence by Justice Sotomayor.
- Reversed all three Courts of Appeal.
- Plan maintained by a PPO is an exempt church plan, regardless of whether a church established the Plan.
- The Court agreed with Plans and Government's reading that the PPO provision supplanted/expanded the original definition of "church plan."

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Supreme Court Opinion, 137 S. Ct. 1652 (June 5, 2017)

- "The term 'church plan' means ~~a plan established and maintained by a church~~ [a plan maintained by a principal-purpose organization]."
- Determined Congress would not have eliminated "established and" from the first part of the provision if it only intended to alter the maintenance requirement.
- Held employees' reading ran contrary to the surplusage canon.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – Supreme Court Opinion, 137 S. Ct. 1652 (June 5, 2017)

- The Court was not persuaded by Employees' disabled veterans hypothetical or by the legislative history.
- Justice Sotomayor expressed concern over the decision's consequences in her concurrence, suggesting Congress might not exempt these plans today if it were to re-examine the statutory language and agency interpretations.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Stapleton – What Next?

- “Principal-purpose organizations” – who qualifies?
  - Are petitioners and other similar organizations sufficiently church-affiliated?
  - Are petitioners and other similar organizations’ benefit committees PPOs?
- If exempt from ERISA, future state court litigation?
- Is Sotomayor’s concern warranted?
  - Will Congress reexamine the exemption?

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

401(k) Plan Fee Litigation:
The Proprietary Fund Cases

403(b) Plan Fee Litigation:
The University Cases

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

November 2, 2017

Proskauer

Recent Successes for Plaintiffs

- Three notable and long running fee litigation cases settled in 2015 for over $220 million, including the payment of over $80 million in attorney's fees.
  - *Haddock v. Nationwide Life Ins. Co.*
  - *Abbott v. Lockheed Martin Corp.*
  - *Krueger v. Ameriprise Fin. Inc.*
- Spurred new litigation against new targets, such as: Vanguard Funds, Stable Value Funds, and ERISA-Exempt Guaranteed Benefit Policies.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Bloomberg/BNA Data on Fee Litigation Settlements/Attorney's Fees

Defendant	Amount
Caterpillar Inc.	5,500,000
General Dynamics	5,050,000
Lockheed Martin Corp.	20,666,666
International Paper Co.	10,000,000
Bechtel Corp.	6,100,000
Boeing Co.	19,000,000
Kraft Foods Inc.	3,166,666
CIGNA Corp.	11,666,667
Ameriprise Financial	9,166,666
Mass Mutual	10,300,000
Novant Health	10,666,666
Total	111,283,331

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

401(k) Plan Fee Litigation: The Proprietary Fund Cases

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

November 2, 2017

Proskauer

The Lawsuits Continue . . .

- *Barrett v. Pioneer Nat. Res. USA, Inc.,* No. 17-cv-1579, D. Colo. (filed June 28, 2017)
- *Schapker v. Waddell & Reed Fin., Inc.*, No. 17-cv-2365, D. Kan. (filed June 24, 2017)
- *Schmitt v. Nationwide Life Ins. Co.*, No. 17-cv-558, S.D. Ohio (filed June 27, 2017)
- *Patterson v. Capital Grp. Cos.*, No. 17-cv-4399 C.D. Cal. (filed June 13, 2017)
- *Baird v. BlackRock Inst. Tr. Co.*, No. 17-cv-1892, N.D. Cal. (filed Apr. 5, 2017)

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

The Lawsuits Continue . . .

- *Pease v. Jackson Nat'l Life Ins. Co.*, No. 17-cv-284, W.D. Mich. (filed Mar. 29, 2017)
- *Feinberg v. T. Rowe Price*, 17-cv-427, D. Md. (filed Feb. 14, 2017)
- *Beach v. JPMorgan Chase Bank*, No. 17-cv-563 S.D.N.Y. (filed Jan. 25, 2017)
- *Severson v. Charles Schwab*, No. 17-cv-285 N.D. Cal. (filed Jan. 19, 2017)
- *Meiners v. Wells Fargo*, No. 16-cv-3981, D. Minn. (filed Nov. 22, 2016)

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Meiners v. Wells Fargo, 2017 WL 2303968 (D. Minn., May 25, 2017).

- Wells Fargo includes its proprietary Target Date Funds.
- Allegations insufficient to plausibly allege a breach of fiduciary duty. District court grants Motion to Dismiss in full.
- Complaint fails to allege Vanguard and Fidelity funds are reliable comparators, offer similar services, or are of similar size, nor that Wells Fargo funds are more expensive when compared to the market as a whole.
- The mere fact Wells Fargo funds are more expensive than two other funds does not give rise to a plausible breach of fiduciary duty claim.
- Seeding claim fails to allege sufficient facts showing fiduciary's acted for its financial self-interest.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

In re Fid. ERISA Float Litig., 829 F.3d 55 (1st Cir. July 13, 2016) (J. Souter)

- Plaintiffs, plan participants, and a plan administrator alleged that Fidelity, the trustee of Plaintiffs’ 401(k) plans, violated ERISA’s prohibition on self-dealing and breached their duty of loyalty.
- Plaintiffs alleged that Fidelity breached these two fiduciary duties in its treatment of “float” interest earned on the cash paid out by the mutual funds.
- Plaintiffs argued ERISA mandated float should be credited back to the plans, rather than back to Fidelity.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

In re Fid. ERISA Float Litig., 829 F.3d 55 (1st Cir. July 13, 2016) (J. Souter)

- Court dismissed Plaintiffs claims, finding that Plaintiffs could not claim a personal stake in the float as it was not a plan asset.
- Float was never intended to become part of the plan.
- Cash held by a mutual fund is not transmuted into a plan asset when it is received by an intermediary whose obligation is to transfer it directly to a participant.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Urakchin v. Allianz, No. 15-cv-01614, C.D. Cal. (filed Oct. 7, 2015)

- Allegations:
  - Exclusively offered proprietary funds.
  - Only “core” investment options offered in the plan were investments managed by Allianz subsidiaries.
  - Allianz breached fiduciary duties by:
    - Selecting high-cost proprietary funds solely to benefit Allianz
    - Failure to monitor high fees
    - Failure to investigate lower-cost options with comparable performance and retaining high-cost options
    - Using the plan to promote untested mutual funds in furtherance of Allianz’ mutual fund business; these funds have underperformed

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Urakchin v. Allianz,
No. 15-cv-01614, C.D. Cal. (filed Oct. 7, 2015)

- Aug. 5, 2016
- Motion to Dismiss Denied in Part:
- Court rejected defendants’ argument that plaintiffs lacked standing regarding options in which they did not invest.
- Found plaintiffs adequately alleged conflict of interest and improper fiduciary acts.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Urakchin v. Allianz, No. 15-cv-01614, C.D. Cal. (filed Oct. 7, 2015)

- Jun. 15, 2017
- Court conditionally granted participants' motion for class certification.
- Plaintiffs produced enough evidence to suggest that Allianz managed and selected funds based on whether they would benefit Allianz.
- Plaintiff demonstrated that Allianz charged higher fees on average than participants would have to pay if nonproprietary funds had been chosen.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Bowers v. BB&T Corp., No. 15-cv-732, M.D.N.C. (filed Sept. 4, 2015)

- Plaintiffs alleged defendants used a BB&T company for recordkeeping and trustee services without soliciting bids. Also, plaintiffs alleged defendants seeded these funds for self-benefit.
- Granted motion to dismiss Cardinal Investment Advisors from suit.
- Court stated plaintiffs' facts did not show that Cardinal was a fiduciary to the acts at issue. Instead, they only demonstrated that Cardinal gave BB&T general investment advice.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Brotherston v. Putnam Invs., No. 15-cv-13825, D. Mass. (filed Nov. 13, 2015)

- Plaintiffs alleged Putnam breached its duty of loyalty by
  - offering Putnam affiliated funds and failing to monitor them *and*
  - engaging in prohibited transactions with parties of interest and a fiduciary.
- Mar. 30, 2017
  - Judgment in defendants' favor and held prohibited transactions claims were time-barred.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Brotherston v. Putnam Invs., 2017 WL 2634361 (D. Mass., June 19, 2017)

- Ruled in favor of Putnam on all counts after bench trial.
- Insufficient to "merely point to a defendant's self-dealing" to allege breach of duty of loyalty.
- Court declined to enter a conclusive finding on breach of the duty of prudence, but ultimately held that plaintiffs failed to establish loss for the prudence claim.
- Court did state, however, that it appeared that the committee failed to monitor plan investments independently.
- Also, court found plaintiffs' damages theory was too broad because it sought damages for the entire investment lineup even though plaintiffs only alleged failure to monitor a specific investment.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Ellis v. Fidelity Mgmt. Tr. Co., 2017 WL 2636042 (D. Mass., June 19, 2017)

- Plaintiffs claimed Fidelity adopted too conservative an investment strategy which led to lower returns.
- They also claimed the fees paid to wrap providers were excessive and Fidelity attempted to hide the fund’s poor performance.
- District court grants summary judgment
- Participants failed to establish that there was conflict of interest in administrator's pursuit of wrap insurance and dismisses ERISA duty of loyalty claim.
- Appeal filed July 10, 2017.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Ellis v. Fidelity Mgmt. Tr. Co., 2017 WL 2636042 (D. Mass., June 19, 2017)

- District court grants summary judgment.
- Participants failed to establish administrator entered into unduly conservative guidelines for purposes of claim for breach fiduciary duty of loyalty under ERISA.
- Participants failed to establish that portfolio's conservative performance benchmark violated plan administrator's fiduciary duty of prudence under ERISA.
- Participants failed to establish that plan administrator's refusal to seek competitive level of income violated its fiduciary duty of prudence under ERISA.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

403(b) Plan Fee Litigation: The University Cases

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

November 2, 2017

Proskauer

The Recent Wave of University Fee Cases

- New filings of fee cases against university 403(b) Plans.
- Columbia University, S.D.N.Y.
- New York University, S.D.N.Y.
- Cornell University, S.D.N.Y.
- Yale University, D. Conn.
- Massachusetts Institute of Technology, D. Mass.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

The Recent Wave of University Cases

- Vanderbilt University, E.D. Tenn.
- Johns Hopkins University, D. Md.
- Duke University, M.D.N.C.
- University of Pennsylvania, E.D. Pa.
- Emory University, N.D. Ga.
- Northwestern University, N.D. Ill.
- University of Southern California, C.D. Cal.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

The Recent Wave of University Cases

- Princeton University, D.N.J.
- University of Chicago, N.D. Ill.
- Washington University, St. Louis, E.D. Mo.
- Brown University, D.R.I.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

The Recent Wave of University Cases: 3 Main Allegations

- Excessive administrative fees
  - Multiple record keepers
  - 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

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Clark v. Duke Univ., No. 16-cv-01044, 2017 WL 4477002 (M.D.N.C. May 11, 2017)

- Motion to dismiss granted in part, denied in part.
- Leaves several key arguments:
- Unreasonable administrative fees
- Breach of fiduciary duty: unreasonable investment management fees, performance losses
- Prohibited transactions
- Violation of Plan Investment Policy

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Henderson v. Emory Univ., 2017 WL 2558565 (N.D. Ga. May 10, 2017)

- Motion to dismiss granted in part, denied in part.
- Leaves several key arguments:
  - Imprudently chose retail-class shares & actively managed funds associated with record keepers without investigating alternatives.
  - Unnecessary fees
  - Underperforming investments
  - Offering an annuity fund offered by plain record keeper, TIAA, rather than a stable value fund
  - Excessive fees due to revenue sharing arrangement with plan record keepers
  - Imprudently retaining three record keepers
  - Engaging in prohibited transactions
  - Acting disloyally

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Sacerdote v. N.Y. Univ., 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017)

- Standard prudence and loyalty allegations.
- On Motion to Dismiss, the district court dismisses duty of loyalty claims.
- Plaintiff cannot plead adequately a claim simply by making a conclusory assertion that a defendant failed to act for the exclusive purpose of providing benefits to participants and defraying reasonable administration expenses.
- Instead, to implicate the concept of loyalty, a plaintiff must allege plausible facts supporting an inference that the defendant acted for the purpose of providing benefits to itself.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Sacerdote v. N.Y. Univ., 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017)

- Court also dismisses prudence and loyalty claim based upon Defendant’s contractual agreement to include certain investment Options.
- Plaintiffs fail to demonstrate that this arrangement resulted in the Plans’ inclusion of plainly risky Options.
- Plaintiffs have not alleged plausibly that defendant engaged in a transaction that in fact (versus in theory) contractually precluded the Plans’ fiduciaries from fulfilling their broad duties of prudence to monitor and review investments under this standard.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Sacerdote v. N.Y. Univ., 2017 WL 3701482 (S.D.N.Y. Aug. 25, 2017)

- Court denies Motion to Dismiss as to allegation Defendant breached its duty of prudence with regard to incurring excessive administrative fees relating to recordkeeping.
- Court also sustains claims that the Plan fiduciaries failed to diligently investigate and monitor recordkeeping costs.
- Permits claim to stand that Defendants were imprudent in selecting certain investment options.
- On a Motion to Dismiss record, district court is unable to dismiss claims Defendants assert are barred by the statute of limitations.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

401(k) Plan Class Action Employer Stock Drop Litigation

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

November 2, 2017

Proskauer

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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Prudence Claim and Presumption of Prudence

- *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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- Rejected Fifth Third's 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*."

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- ***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.
- 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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- 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.
- 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.**

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- Lower courts should consider:
  - Duty of prudence does not require that the 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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Dudenhoeffer – Aftermath
Amgen v. Harris, 136 S. Ct. 758 (2016)

- Reversing the Ninth Circuit; holding 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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Dudenhoeffer – Aftermath
Not Cause More Harm Than Good

- *Smith v. Delta,* 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.
- "[W]hile [*Dudenhoeffer*] may have changed the legal analysis of our prior decision, it does not alter the outcome."

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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).*

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Muehlgay v. Citigroup Inc., 649 F. App’x 110 (2d Cir. May 23, 2016)

- Plaintiffs claimed Citi breached its duty as plan administrator because public information indicated Citi’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 Citi’s exposure more than three years prior to filing their complaint and were time-barred.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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.*

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- *Lynn v. Peabody Energy Corp.*, No.15-cv-00916, 2017 WL 1196473 (E.D. Mo. Mar. 30, 2017)
- *Graham v. Fearon*, No. 16-cv-2366, 2017 WL 1113358 (N.D. Ohio Mar. 24, 2017)
- *Hill v. Hill Bros. Constr. Co., Inc.*, No. 14-cv-213, 2016 WL 1252983 (N.D. Miss. Mar. 28, 2016), *reconsideration denied*, 2016 WL 4132255.
- *In re Idearc ERISA Litig.*, No. 09-cv-2354, 2016 WL 7189981 (N.D. Tex. Oct. 4, 2016)

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

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

- *In re 2014 RadioShack ERISA Litig.*, No.14-cv-959, 2016 WL 8505089 (N.D. Tex. Sept. 29, 2016) (partial), appeal pending.
- *Brannen v. First Citizens Bankshares Inc.*, No. 15-cv-30, 2016 WL 4499458 (S.D. Ga. Aug. 26, 2016) (partial)
- *Vespa v. Singler-Ernster, Inc.*, 16-cv-03723, 2016 WL 6637710 (N.D. Cal. Nov. 8, 2016)
- *Jander v. Intl. Bus. Machines Corp.*, 15-cv-3787, 2016 WL 4688864 (S.D.N.Y. Sept. 7, 2016)

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Breach of Fiduciary Duty: Loss Causation

Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017)

- RJR spun off its food business from its tobacco business, but the Plan document required the food business funds remain frozen in the Plan.
- Plaintiffs alleged RJR sold the food funds after the spin-off and ultimately eliminated them from the Plan without independent counsel or investigation.
- After the divestment, the food stocks increased in value.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014)

- Participants alleged RJR breached its fiduciary duties by liquidating the funds without investigating and by imposing an arbitrary timeline for liquidation.
- Affirmed lower court's finding that RJR breached and bore the burden of proving causation.
- As a preliminary matter, the court of appeals determined that § 1109(a) required causation in its "resulting from" language ("any losses to the plan resulting from each such breach.")

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Tatum v. RJR Pension Inv. Comm., 761 F.3d 346 (4th Cir. 2014)

- The default rule that the burden of proof lies with the plaintiff did not apply.
- “ERISA’s fiduciary duties ‘draw much of their content from the common law of trusts . . . .”
- Common law trusts use the burden-shifting framework: “once a fiduciary is shown to have breached his fiduciary duty and a loss is established, he bears the burden of proof on loss causation”.
- As such, requiring the fiduciary to bear the burden was the “most fair” allocation.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017)

- Case comes back to the 4th Circuit for the 3rd time.
- Court affirms district court and holds the fiduciary's breach did not cause the losses because a prudent fiduciary would have made the same divestment decision at the same time and in the same manner.
- Referring to the would have vs. should have standard, the court held in remanding the case, we explicitly recognized the possibility that, using the correct "would have" standard, the district court might find that RJR had met its burden.
- Plaintiff argued a fiduciary needs a compelling reason to divest, while the decision to invest requires less critical motivation.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Tatum v. RJR Pension Inv. Comm., 855 F.3d 553 (4th Cir. 2017)

- The district court did not err in refusing to require a more compelling reason for divestment vs. investment decisions.
- Plaintiff has a factual dispute over whether a prudent fiduciary would have refrained from divesting and the district court resolved this issue against Plaintiff while using the more demanding would have standard.
- Significant dissent opines that the district court did not apply the would have standard appropriately.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- Pioneer, a car dealership, began to consider an ESOP transaction where the ESOP would acquire the remaining 62.5% of the company’s stock.
- To avoid a conflict of interest, the Plan hired Alerus to negotiate the purchase of the original owner’s shares.
- Pioneer’s dealership agreement with Land Rover gave Land Rover a right of refusal of *any* proposed ownership changes.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- Pioneer sent Land Rover an informal proposal of the contemplated ESOP transaction.
- Land Rover maintained that the prior transaction resulting in 37.5% ownership by the ESOP dealership violated its agreement because it was not pre-cleared by Land Rover.
  - However, Land Rover approved that 37.5% transfer a year later.
- Land Rover rejected the informal proposal for the second new transaction that would transfer all remaining shares to the ESOP.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- Alerus did not agree to the transaction, so Pioneer never sent a formal proposal to Land Rover.
- After the transaction failed, Pioneer sold most of its assets to a third party.
- The ESOP then sued Alerus for breach of fiduciary duty resulting from the failure to approve the ESOP transaction.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- The ESOP alleged that expert testimony, state law, and record evidence showed Land Rover would have approved the transaction.
- A divided panel affirmed the lower court's grant of summary judgment.
- Held ERISA Plaintiffs have the burden of proving causation, not fiduciaries.
- § 1109(a) provides fiduciaries are liable for "any losses to the plan resulting from each such breach."

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- "Resulting from" requires proof that an alleged breach *caused* the claimed loss.
- Court noted that although "the statute is silent as to *who* bears the burden of proving a resulting loss," the default rule is that pleading burdens reside with plaintiffs.
- Causation is an element of the claim, not a defense. And, the burden of proving loss and causation does not shift to the defendants.
- "The requirement that the losses to the plan have resulted from the breach cannot be omitted from the statute without substantially changing the definition of the claim, thereby doing violence to it."

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Pioneer Centres Holding Co. Emp. Stock Ownership Plan & Tr. et al. v. Alerus Fin., N.A., 858 F.3d 1324 (10th Cir. 2017)

- Court determined plaintiffs did not meet the causation burden because:
  - the record evidence only showed that Land Rover would *not* have approved the transaction, regardless of whether Alerus agreed.
  - The expert testimony was merely "speculation" *and*
  - "Land Rover's final letter stated that it would retroactively approve the prior transfer of 37.5% to the Plan, but that it 'would not support a future ownership change . . . .'"
- The dissent found a genuine issue of material fact as to whether Land Rover would have approved the transaction.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Who Bears the Burden?

- Plaintiffs
  - Second Circuit
    - *Silverman v. Mut. Benefit Life Ins. Co.*, 138 F.3d 98 (1998).
  - Sixth Circuit
    - *Kuper v. Iovenko*, 66 F.3d 1447 (1995).
  - Ninth Circuit
    - *Wright v. Ore. Metallurgical Corp.*, 360 F.3d 1090 (2004).
  - Tenth Circuit
  - Eleventh Circuit
    - *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (1992).
- Defendants
  - Fourth Circuit
  - Fifth Circuit
    - *McDonald v. Provident Idem. Life Ins. Co.*, 60 F.3d 234 (1995).
  - Eighth Circuit
    - *Martin v. Feilin*, 965 F.2d 660 (1992).

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

New Statute of Limitations Case

Secretary of Labor v. Preston, 2017 WL 4545962 (11th Cir. 2017)

- Preston was owner/selling shareholder in an ESOP transaction investigated by the DOL.
- Preston signs a standard DOL tolling agreement.
- Litigation occurs: question is whether a tolling agreement can waive the six-year statute of repose contained in ERISA Section 413(1), 29 U.S.C. § 1113(1)?
- Interlocutory appeal under 28 U.S.C. § 1292(b).
- 11th Circuit concludes that the 6 year statute of repose can be waived by a party.
- Statute of repose is non-jurisdictional and is waivable.
- Common sense tells Court statute of repose is waivable.

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

Proskauer's Global Presence

© Howard Shapiro, Proskauer Rose LLP, howshapiro@proskauer.com

ERISA Litigation Update

SouthWest Benefits Association
28th Annual Benefits Compliance Conference
Dallas, Texas, November 2, 2017

Howard Shapiro
Proskauer Rose, LLP
650 Poydras Street, Suite 1800
New Orleans, Louisiana 70130
Howshapiro@proskauer.com
Phone: (504) 310-4085

Proskauer