ERISA Litigation Update

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Attribution

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Today's Topics

- 401(k)/403(b) Plan Fee Litigation
  - Non-proprietary cases and proprietary fund cases
  - University cases
- Arbitration of ERISA cases
- Burden of Proof: Fiduciary Litigation
- Employer Stock-Drop Litigation
- Legal Privilege - will not discuss, but important to keep in mind
- Church Plan Litigation – will not discuss but these cases are still percolating through the courts.

401(k) Plan Fee Litigation: Non-Proprietary Funds

401(k) Plan Non-Proprietary Fee Cases

- Generally, these complaints consist of three (3) types of claims:
  - 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
  - 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
  - Failure to monitor and evaluate appointees

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

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

White v. Chevron Corp.,
2017 WL 2352137 (N.D. Cal. May 31, 2017)

- Defendant’s 401(k) offered participants a diversified array of investment options with an overall low-cost fee structure.
- Plaintiffs alleged that participants lost more than $20M through unnecessary expenses as a result of Defendant’s inclusion of 10 Vanguard funds because there were “identical” Vanguard funds available with lower-cost share classes.
- Plaintiffs also alleged that Defendant paid excessive administrative fees to Vanguard as recordkeeper through revenue-sharing from investment plan options – specifically, because Vanguard was compensated for a period of time through an asset-based arrangement, its fees increased as the plan’s assets increased.

White v. Chevron Corp.,
2017 WL 2352137 (N.D. Cal. May 31, 2017)

- **Court granted Motion to Dismiss in its entirety**:
  - Rejected claim that Defendant fiduciaries had a duty to offer cheaper institutional-class funds over retail-class funds, noting that price is not the only investment feature that a fiduciary is required to consider when compiling options.
  - Rejected the argument that Defendant acted imprudently in compensating the plan's recordkeeper via revenue-sharing.
- Plaintiffs, with leave from the court, amended their complaint, but all **claims were dismissed again**:
  - Insufficient to merely provide comparisons between funds that were in the plan lineup and funds that plaintiffs claim were less expensive.
  - Chevron provided a valid rationale for being in the retail-class shares, specifically noting that the revenue sharing fees associated with these higher-cost share classes paid the plan's recordkeeping expenses.
- Plaintiffs appealed; 9th Circuit oral argument held Oct. 19, 2018.

Marshall v. Northrop Grumman Corp.,
2017 WL 2930839 (C.D. Cal. Jan. 30, 2017)

- Plaintiffs alleged several claims for breaches of ERISA-imposed duties on the Plan fiduciaries, including:
  - Breach of fiduciary duties of Loyalty and Prudence;
  - Failure to Monitor;
  - Defendants individually responsible for breaches of Administrative Committees
- Motion to dismiss granted on claims for breach of fiduciary duty because Defendant was not a “named or functional fiduciary” with respect to duties of loyalty and prudence.
- Motion to dismiss for failure to monitor denied as a result of allegations that Defendant “did nothing at all to monitor their appointed fiduciaries.”
- Motion to dismiss allegations that defendants are “individually” responsible for the alleged breaches of the Committees was denied because the individual defendants are ERISA fiduciaries (officers of Northrop who served on the Committees).
- Class certification granted, 2017 WL 6888281 (C.D. Cal. Nov. 2, 2017).

Bell v. Pension Comm. of ATH Holding Co.,
2017 WL 1091248 (S.D. Ind. Mar. 23, 2017)

- Plaintiffs alleged breach of fiduciary duty by including a Money Market Fund (MMF) as an investment option while failing to prudently consider a Stable Value Fund (SVF).
- The court first noted that there is no duty requiring a fiduciary to "absolutely" offer a SVF over a MMF.
- The court then rejected as conclusory plaintiffs' argument that had defendants considered a SVF and weighed the benefits, defendants would have favored a SVF over a money market fund.
- The court did not dismiss claims for excessive administrative fees and a reporting and disclosure claim.
- The court also declined to find the surviving claims untimely holding there was no disclosure by Defendants of identical, available lower cost alternatives (assuming such were available).

Troudt v. Oracle Corp.,
2018 WL 637462 (D. Colo. Jan. 30, 2018)

- Plaintiffs in Oracle's 401(k) Savings and Investment Plan ($12 billion in assets), asserted 2 claims:
  - Defendants allowed Fidelity to collect excessive recordkeeping/admin fees.
  - Defendants caused the Plan to make imprudent investments.
- Defendants did not oppose class certification *per se*, but argued Plaintiffs' proposed class definition did not meet Rule 23 requirements:
  - Overly broad in terms of its proposed time frame; and
  - With respect to the imprudent investment claims, insufficiently specificity as to defining who is a class member.
- Court held it was premature to limit proposed class to 6-year SOL.
- Regarding the imprudent investment claims, the court narrowed the class definition to class members in two funds and permitted a class as to excessive fees, plan wide.
- Class certification granted (Jan. 30, 2018); class of 70,000 participants.

Green v. Morningstar, Inc.,
2018 WL 1378176 (N.D. Ill. Mar. 16, 2018)

- Plaintiff participated in 401(k) which “designates” 17 investment options and gives investors the ability to choose how their contributions will be invested.
- Plaintiff alleged that an enterprise worked together to procure "kickbacks" in violation of RICO, specifically 18 U.S.C. § 1962(c) and (d) and 18 U.S.C. § 1954, through their self-interested administration of “GoalMaker” (an asset-allocation service that automatically diversifies investments) by:
  - (1) Developing and configuring GoalMaker which intended to produce revenue-sharing payments;
  - (2) Repeatedly influencing the selective limitation of investment choices to be utilized by GoalMaker in the Plan to maximize the revenue-sharing payments made to Defendants; and
  - (3) Accepting revenue sharing payments.
- **Motion to Dismiss granted**: Complaint failed to adequately allege existence of an enterprise because it lacked “concerted, structured and purposeful conduct by the Defendants involved…”
- **Plaintiff filed amended complaint. Motion to Dismiss filed May 25, 2018.**

Harmon v. FMC Corp.,
2018 WL 1366621 (E.D. Pa. Mar. 16, 2018)

- Plaintiffs alleged breach of fiduciary duty by offering imprudent and undiversified investment options (30+ options). No loyalty claim.
- Plaintiffs attack “non-diversified” Sequoia Fund, a long-term growth fund heavily invested in Valeant Pharma stock, as imprudent after Valeant’s shares dropped for 3 years. Sequoia underperformed S&P 500 for 2+ years.
- **Motion to Dismiss granted:**
  - Plans are allowed to include undiversified options as long as the plans are diversified as a whole. ***§ 1104(a)(1)(c)***
  - Duty of prudence claim dismissed because it contained no direct allegations of flaws in Defendants’ ***process*** and instead relied upon a hindsight attack based upon publically available information.
  - Citing *Dudenhoeffer,* court holds that "where a stock is publicly traded, allegations that a fiduciary should have recognized from publicly available information alone that the market was over-or undervaluing the stock are **implausible as a general rule**, at least in the absence of special circumstances."

Muri v. Nat'l Indem. Co.,
2018 WL 1054326 (D. Neb. Feb 26, 2018)

- **Similar to *Harmon v. FMC Corp.* with different outcome:**
- Alleged violation of duties of prudence and loyalty.
- Imprudence because Sequoia Fund which was over-invested in Valeant stock.
- Disloyalty because Sequoia Fund holds the stock of FMC's parent company, Berkshire Hathaway.
- **Motion to Dismiss denied**: "The availability of multiple investment options does not absolve a fiduciary of its duty of prudence."
  - As to process, court held a reasonable process would have discovered issues with Valeant stock.
  - Process, Court's footnote 1: A plaintiff is not required to plead specifics concerning Defendant's process at initial pleading stage.
- Loyalty: Sufficient allegations to support claim Defendant did not act with "eye single" to participants. Plaintiffs need not rebut Defendants' explanations for offering Sequoia Fund, *i.e.*, history of strong performance.

Patrico v. Voya Fin.,
2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018)

- Defendants, Voya and VRA, are Nestle USA Plan service providers; Voya provides recordkeeping and other services.
- Voya agreement specifically states it does not provide “investment advisory services” to Plan participants.
- VRA offered investment advice options, but was designated as a fiduciary only “with respect to services provided.”
- Plaintiff alleged Defendants breached fiduciary duties and engaged in prohibited transactions by charging excessive fees.
- Court dismissed because complaint did not adequately allege that Defendants were Plan fiduciaries regarding the challenged conduct.
- Nestle retained authority to accept or reject Defendants’ proposed terms.
- Defendants did not act as fiduciaries because they did not exercise control over the amount of fees, which was set by a pre-determined formula.
- Appeal filed April 12, 2018.

Scott v. Aon Hewitt Fin. Advisors, 2018 WL 1384300 (N.D. Ill. Mar. 19, 2018)

- Defendant Hewitt, the record-keeper, and AFA, the investment advisor service, allegedly engaged in an improper “pay to play” / kickback scheme.
- Allegedly, AFA sub-contracted with Financial Engines [FE]. In exchange for being selected as the Plan’s advisor by AFA, FE agreed to “kick-back” or share fees from automated investment services with Defendants.
- The Court dismissed the fiduciary claims against Hewitt, finding that the arms' length negotiations between Hewitt and FE to provide data transmission and technological services was not an exercise of discretionary authority over the Plan or Plan assets.
- The Court dismissed the excessive fee claims against AFA: “[s]imilar to *Patrico*, AFA did not unilaterally control the compensation it would receive because [the Plan] was free to select a different investment advice service provider or none at all.”
- The Court also dismissed the prohibited transactions claims because (a) Hewitt was not a fiduciary and (b) Plaintiffs failed to show that the fees paid to AFA were unreasonable or that it received compensation from the Plan.

401(k) Plan Fee Litigation: Proprietary Funds

Background

- 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.
- Five companies have recently settled similar claims: American Airlines (settled for $22 million), Allianz ($12 million), TIAA ($5 million), New York Life Insurance Co. ($3 million), and Principal Life Insurance ($3 million).

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

- Plaintiffs alleged that defendants breached their fiduciary duties by including proprietary target-date funds in lieu of allegedly comparable and less expensive Vanguard and Fidelity funds.
- Plaintiffs argued that these proprietary target-date funds were selected to “seed the underperforming funds” and generate fees for Wells Fargo at the expense of Plan participants.
- **District Court dismissed all fiduciary breach claims:**
  - Court rejected underperformance claim because Vanguard funds were not a proper comparator since they utilized a different investment strategy than the Wells Fargo funds.
  - Court rejected excessive fee claims because Plaintiffs failed to provide a meaningful benchmark to compare fees; thus, the claim amounted to nothing more than the insufficient contention that Wells Fargo failed to choose the cheapest fund.
  - The seeding argument failed to allege sufficient facts showing the fiduciaries acted for their own financial interest.

Meiners v. Wells Fargo & Co.,
898 F.3d 820 (8th Cir. 2018)

- Insufficient fact matter alleged in complaint, MTD affirmed.
- No facts showing the Wells Fargo TDFs = underperforming funds.
  - Plaintiff pled that one Vanguard fund performed better.
  - But, fact that one fund with a different investment strategy ultimately performed better does not establish whether Wells Fargo TDFs were an imprudent choice.
- Court also rejected allegations as to expense.
  - Plaintiff does not allege that cheaper alternative investments with some similarities exist in the marketplace.
  - Plaintiff must allege a meaningful benchmark; merely finding a less expensive alternative fund or two is insufficient.

Allen v. Credit Suisse Sec. LLC, 895 F.3d 214 (2d Cir. 2018)

- Plaintiffs sued 12 banks and their affiliates for breach of fiduciary duties owed to the Plans or, in the alternative, for Defendants' "knowing participation" in prohibited transactions as non-fiduciary parties-in-interest.
- District Court dismissed the claims, determining that Defendants' alleged fraudulent conduct in conducting foreign currency exchange (FX) market transactions for the Plans was insufficient to plead the banks' ERISA functional fiduciary status. The alternative claim failed in the absence of any allegation that non-party Plan fiduciaries had "actual or constructive knowledge" of the banks' fraud.
- Plaintiffs' challenged the dismissal, arguing that Defendants acquired fiduciary status by exercising control over the disposition of Plan assets by manipulating benchmark rates to which FX transactions were tied, effectively allowing them to determine their own compensation for each transaction.
- **Second Circuit affirmed** (July 10, 2018): "[t]he facts alleged do not show that defendants exercised the control over Plan assets necessary to establish ERISA functional fiduciary status."

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Ellis v. Fidelity Mgmt. Tr. Co.,
257 F.Supp.3d 117 (D. Mass., June 19, 2017), *aff'd,* 883 F.3d 1 (1st Cir. 2018)

- Plaintiffs claimed Fidelity's Stable Value Fund (SVF) underperformed because of a "too conservative" investment strategy and excessive fees.
- Plaintiffs alleged Fidelity was initially "overly aggressive" with the SVF's investment strategy, and had overcorrected to an unreasonably conservative strategy causing remarkably low returns.
  - **District Court granted Summary Judgment**, finding that plaintiffs failed to show that Fidelity breached duty of prudence because Fidelity followed a "procedurally prudent" process, including regularly considering whether to change the SVF's investment strategy.
  - The court noted, "in the face of an undisputed process for making investment decisions, Plaintiffs cannot carry their burden by vaguely asserting that Fidelity breached its duty of prudence without explaining what actions constituted the breach"
- Appeal filed July 10, 2017. **First Circuit affirmed** (Feb. 21, 2018).
  - Participants failed to establish that portfolio's conservative performance benchmark violated administrator's ERISA fiduciary duty of prudence.
  - Participants failed to establish that plan administrator's refusal to seek competitive level of income violated ERISA fiduciary duty of prudence.

Patterson v. Capital Grp. Companies, Inc.,
2018 WL 748104 (C.D. Cal. Jan. 23, 2018)

- Plaintiffs alleged fiduciary breach by allowing 90% of the investment options in the Capital Group's retirement plans to consist of affiliated funds and by failing to select a lower-cost share class for several of these funds.
- Court dismissed fiduciary breach claim.
  - Plaintiffs failed to plausibly allege that the funds' fees were "unjustified."
  - The fact that the funds were affiliated and that "similar" Vanguard funds charged lower fees was not sufficient to state a claim, especially where the challenged funds charged fees that were not "obviously excessive."
  - Fiduciaries need not choose the cheapest investment options available.
  - Court observed that fiduciaries of other plans were investing substantial amounts in the challenged funds.
- Court dismissed prohibited transaction claim as exempt or time-barred.

Brotherston v. Putnam Invs.,

2017 WL 2634361 (D. Mass. June 19, 2017), *but see* next slide.

- Plaintiffs alleged breach of Loyalty, Prohibited Transactions and Prudence by including proprietary funds as investment options, and failing to offer the cheaper share class of these funds for part of the putative class period.
- Prohibited Transactions dismissed as time-barred prior to trial. The remaining claims proceeded to trial. After Plaintiffs presenter their case, Defendants moved for a judgment on partial findings.
- *Loyalty*: Plaintiffs failed to show that Putnam's decision to include proprietary funds in the plan amounted to a breach of loyalty where Putnam also made substantial discretionary contributions to the plan (more than $40 million during the class period), provided additional services to participants, and paid for recordkeeping expenses.
- *Prudence*: Plaintiffs failed to make a *prima facie* showing of loss, *i.e.*, failed to pinpoint specific investment decisions that resulted in a lose to participants.
  - Court declined to enter conclusive findings on whether Defendant's lack of an independent monitoring process was imprudent.
- **Case was appealed to the First Circuit**.

Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Important issue: burden of proof for fiduciary claims.
  - Court holds fiduciary did not investigate Putnam funds before including them as investment options, did not monitor once in Plan, and did not remove a single fund for underperformance, even when certain Putnam funds received a "fail" rating from Advised Asset Group, a Putnam affiliate.
  - This means no procedural prudence and sets up the burden of proof question.
- Prohibited Transaction – affirms judgment for Defendant.
  - Persuaded that other plans offered these funds indicating that cost was FMV as other plans with freedom to invest in other funds in the marketplace also offered these funds.

Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Court vacates district court judgment under ERISA §406(b) because Putnam received fees from the funds in which the Plan invested.
- Putnam argued as recordkeeper for the Plan it did not charge any fees to the Plan, and Putnam's investment managers pay no revenue sharing to or for the benefit of the Plan.
- Court remands for fuller factual development of issues under PTE 77-3.

Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Burden of proof – there was an alleged loss.
- Acknowledging Circuit split, 1st Cir. the burden of showing that a loss would have occurred even had the fiduciary acted prudently falls on the imprudent fiduciary.
- Focus of ERISA: protection of participant rights.
- 1st Circuit aligns with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent.

Moreno v. Deutsche Bank Ams. Holding Corp.,

2018 WL 2727880 (S.D.N.Y. June 6, 2018)

- Defendants allegedly breached their ERISA fiduciary duties:
  - Selecting and retaining Deutsche Bank's expensive and poorly performing proprietary mutual funds as available investments to participants in the Plan
  - Failing to consider non-mutual fund investment alternatives, such as lower cost separate accounts available to other Deutsche Bank clients.
- Defendants allegedly engaged in Prohibited Transactions:
  - Offering "high-cost" investments that generated revenue for Deutsche Bank
  - Offering mutual funds managed by Deutsche Bank
- Summary Judgment denied on breach of Fiduciary Duty claims:
  - Genuine issues of fact as to whether Defendants actions "caused a loss."
  - Court applied 2nd Circuit's "but for" causation test and reject Defendants' reliance on the "objectively prudent" test applied by the 4th Circuit: Plaintiffs were not required to show that the breach led to objectively imprudent investments.
  - **Claims proceeding to trial (On June 14, 2018, Plaintiffs filed pre-trial memo).**

Moreno v. Deutsche Bank Ams. Holding Corp.,
2018 WL 2727880 (S.D.N.Y. June 6, 2018)

- Summary Judgment granted with respect to Prohibited Transactions claim:
  - Exempt under PTE 77-3: Plan shares in its mutual funds were offered at same price to the participants as other investors.
- Parties allegedly reached a settlement on July 8, 2018, just one day before trial.
- Proposed settlement: $21,900,000, including $6,570,000 for Plaintiffs' attorney's fees.
- A Final Fairness Hearing is set for February 14, 2019.

Schapker v. Waddell & Reed Fin., Inc.,
2018 WL 1033277 (D. Kan. Feb. 22, 2018)

- Plaintiff alleged breach of fiduciary duties and prohibited transactions by charging excessive fees compared to unaffiliated companies for comparable mutual funds, and the performance levels of the available options were worse than the performance achieved by unaffiliated companies for comparable mutual funds.
- Court denied Motion to Dismiss based on 3-year Statute of Limitations:
  - Plaintiff must have acquired "actual knowledge" of the Defendant's process in selecting the funds > 3 years before filing her original complaint to start the clock.
  - Court determined Plaintiff did not acquire "actual knowledge" > 3 years before the filing.

Schapker v. Waddell & Reed Fin., Inc.,
2018 LEXIS 28458 (D. Kan. Feb. 22, 2018)

- Court denied Motion to Dismiss for Failure to State a Fiduciary Breach Claim:
  - Plaintiff alleged more than Defendants simply failed to select the cheapest or highest-performing funds.
  - Rather, Plaintiff showed more than 75 comparable funds that invested in the same industries as the Plan's funds.
  - Additionally, Plaintiff alleged Defendants offered ONLY proprietary investments products which charged higher fees and performed poorly in relation to comparable funds.
- Court denied Motion to Dismiss for Prohibited Transactions claim:
  - Plaintiff sufficiently pled that investment management fees were paid by the "assets of the plan" which is prohibited under 29 U.S.C. § 1106(a)(1)(D).

Schultz v. Edward D. Jones and Co., L.P.,
2018 WL 1508906 (E.D. Mo. Mar. 27, 2018)

- Plaintiffs alleged certain mutual funds resulted in excessive fees and Total Plan Costs.
  - Plaintiffs showed that Plan fees nearly tripled over the class period while market rates for recordkeeping services declined throughout the class period;
  - Total weighted average expense ratio of the Plan was “high” compared to market rates; and
  - Defendants failed to prudently monitor and control compensation to the plan’s recordkeeper in light of the services provided.
- Court reasoned that these facts were sufficient to raise an inference of disloyalty and imprudence and denied Defendant’s Motion to Dismiss.
- **Class certification hearing scheduled for Jan. 25, 2019.**

Fernandez v. Franklin Res., Inc.,
2018 LEXIS 59336 (N.D. Cal. Apr. 6, 2018)

- Plaintiff alleged Defendants breached fiduciary duties by engaging in prohibited transactions and failing to monitor fiduciaries.
- Court denied Defendant's Motion for Summary Judgment:
  - Even though Plaintiff signed a severance agreement after her employment with Defendant that contained a covenant not to sue, it was unenforceable because the agreement did not bar Plaintiff's claims "to restore value to the Plan."
- Court denied Motion to Dismiss for Prohibited Transactions and Failure to Monitor:
  - Plaintiffs' claims "accrued" each time a plaintiff received underpayment of benefits and thus did not violate the statute of limitations.
  - Plaintiffs were not required to plead specific facts about the fiduciary's internal processes "because such information is typically in the exclusive possession of a defendant."
- **Class certification granted (July 6, 2018)**

Urakhchin v. Allianz,
2016 LEXIS 104244 (C.D. Cal. Aug. 5, 2016)

- Plaintiff claimed that Allianz offered only high-cost proprietary funds as "core" investments, failed monitor fees, failed to investigate lower-cost options with comparable performance, retained the high-cost investment options at the direct detriment of Plan participants, and used the Plan to promote untested mutual funds.
- Motion to Dismiss denied in part:
  - Court rejected defendants' argument that plaintiffs lacked standing regarding options in which they did not invest.
    - Due to defendants' alleged misconduct "Plaintiffs were unable to select low-cost options when investing in the plan."
  - "[A]llegations sufficiently state a claim for breach of fiduciary duties."
- Class Certification conditionally granted on June 15, 2017:
  - 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
- **On Feb. 7, 2018, Allianz settled claims for $12 million.**

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)

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)

403(b) Plan Fee Litigation: The University Cases

Background

- At least 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 a multitude of 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

The Recent Wave of University Fee Cases

New filings of Fee cases 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.
- 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 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

Current Status of Cases

- Motions to dismiss have generally been denied.
- Only **two cases** have been dismissed in their entirety:
  - *Sweda v. Univ. of Pennsylvania*, 2017 WL 4179752 (E.D. Pa. Sept. 21, 2017).
  - *Divane v. Northwestern Univ.*, 2018 LEXIS 69127 (N.D. Ill. May 25, 2018)
- 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.

Sweda v. Univ. of Pennsylvania,
2017 WL 4179752 (E.D. Pa. Sept. 21, 2017)

- 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":** 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:** Court rejected claim 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)

- **Management Fees**: 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:** 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.
- **Case argued before 3rd Circuit on October 2, 2018.**

Divane v. Northwestern University,
2018 LEXIS 87645 (N.D. Ill. May 25, 2018)

- 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.
- The 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.
- The 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 Court explained that offering of a broad range of investment options was not a valid claim because the range of investments included inexpensive options.
- **Court denied Plaintiffs' motion to alter or amend the judgment** (June 27, 2018).

Daugherty v. Univ. of Chicago,
2018 LEXIS 6965 (N.D. Ill. Jan. 10, 2018)

- Plaintiffs claimed the University breached its fiduciary duties of loyalty and prudence by failing to prudently monitor two of Plans' investment options – the CREF Stock Account and the TIAA Real Estate Account.
- Also claimed that the University improperly paid excessive recordkeeping and administrative fees to the Plans' service providers by retaining two recordkeeping companies when one would have sufficed and would have been less expensive.
- Finally, Plaintiffs claimed a violation of ERISA's prohibited transactions rules with respect to the Plans' participant loan program.
- Court dismissed claims for breach of duty of loyalty and prohibited transactions.
- Court denied Motion to Dismiss for breach of prudence regarding Chicago Retirement Income Plan for Employees and for excessive recordkeeping and administrative fees relating to one of the plans.

Daugherty v. Univ. of Chicago,
2018 LEXIS 6965 (N.D. Ill. Jan. 10, 2018)

- The University settles 403(b) fee litigation for $6.5 million; each named plaintiff receives $10,000 incentive award.
- Class counsel requests 30% of the settlement amount for attorney's fees.
- In addition, the University agrees to retain certain structural changes to the Plans, including:
  - Not to increase per-participant recordkeeping fees for three years from the date of Final Approval of the Settlement, and to use commercially reasonable best efforts to continue to attempt to reduce recordkeeping fees.
  - Implementing a new investment lineup for the Plans that reduced the total number of investment options, and
  - Removal of the CREF Stock account as an investment option.

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

- Plaintiff brought standard Prudence and Loyalty claims:
  - The district court dismissed Loyalty claims:
    - Plaintiff cannot adequately plead 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.
- Court dismissed Prudence claim based on Defendant’s contractual agreement to include retail class shares instead of institutional shares:
  - Plaintiffs did not allege sufficient facts to support a plausible claim that the inclusion of retail class shares (versus only specific institutional class shares) breached the duty of prudence.

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

- Plaintiffs did not plausibly allege 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.
- However, Court denied Motion to Dismiss breach of prudence claim regarding incurring excessive recordkeeping fees:
  - Court sustained claims that Plan fiduciaries failed to diligently investigate and monitor recordkeeping costs and also permitted claim to stand that Defendants were imprudent in selecting certain investment options.
- Motion for reconsideration denied (Oct. 19, 2017).
- **Class certification granted** (Feb. 13, 2018).
- **Trial occurred on April 16, 2018.**

Sacredote v. N.Y. Univ.,
2018 WL 3629598 (S.D.N.Y., July 31, 2018)

- After trial on the merits, judgment for NYU.
  - No breach because of failure to consolidate plan’s two recordkeepers sooner than it did.
  - No breach because of failure to conduct more frequent request-for-proposals related to plan recordkeeping vendors.
  - No breach in negotiating recordkeeping fee reductions for plans.
  - No breach in opting for revenue-sharing model, rather than flat per-participant model for recordkeeping fees.
  - No proof participants sustained damages for excessive recordkeeping fees and monitoring of recordkeeping vendors;.
  - No breach of prudence: Funds were closely monitored.
  - No breach in offering tax deferred real estate fund as investment option.

Vellali v. Yale University,
2018 LEXIS 39284 (D. Conn. Mar. 30, 2018)

- Defendant offered eligible employees the opportunity to "participate" in a 403(b) defined-contribution plan.
- Defendant contracted with Vanguard and TIAA-CREF, who provided a "bundled" services arrangement of investment management and recordkeeping services for the Plan.
  - Plaintiffs alleged the arrangement "did not initially scrutinize every investment" in the plan, leading to unreasonably expensive or poor-performing investments.
  - Plaintiffs further alleged Defendants failed to monitor investments and recordkeeping costs, and that by allowing TIAA-CREF to get higher fees for higher-priced investments, Defendants placed their own interests ahead of the participants.
- Plaintiffs brought claims for breach of fiduciary duties, prohibited transactions, and failure to monitor "Committee members" to ensure compliance with ERISA standards.

Vellali v. Yale University,
2018 LEXIS 39284 (D. Conn. Mar. 30, 2018)

- Court granted defendant's motion to dismiss regarding the following claims:
  - Prudence: Offering too many investment options.
  - Prudence: Failure to reduce fees on several TIAA-CREF investments.
  - All duty of loyalty breaches.
- Court denied defendant's motion to dismiss regarding the following claims:
  - Breach of duty of prudence with respect to a bundling arrangement under which they "abdicated their responsibility to monitor and remove imprudent investments and reduce exorbitant fees."
  - Breach of duty of prudence based on unreasonably high administrative fees.
  - Breach of duty of prudence based on failure to offer institutional shares.
  - Breach of duty of prudence based on failure to remove underperforming investments.
  - Prohibited transactions.
  - Failure to Monitor.

Clark v. Duke Univ.,
No. 16-cv-01044 (M.D.N.C. Apr. 13, 2018)

- Plaintiffs contend Defendants breached fiduciary duties by failing to investigate and include low-cost recordkeeping services, funds with reasonable fees and including imprudent investment funds.
- **Motion to Dismiss granted in part, denied in part:**
- Leaves several key arguments:
  - Unreasonable administrative fees;
  - Unreasonable investment management fees, performance losses;
  - Prohibited transactions;
  - Violation of Plan Investment Policy.
- **Class certification granted** (April 13, 2018).
- **Bench trial tentatively scheduled for July 2019.**

Short v. Brown Univ.,
2018 LEXIS 115065 (D.R.I. July 11, 2018)

- Employees alleged Defendant acted imprudently by using more than one record-keeper, not employing competitive bidding in its selection, and allowing the plans to pay excessive administrative fees.
- Employees also alleged that the university breached fiduciary duties by selecting more expensive funds with poor historical performance (such as the CREF stock account and TIAA real estate account).
- Defendant’s Motion to Dismiss denied on these claims.
- However, Court dismissed claims for offering investments with multiple layers of fees and using asset-based fees and revenue-sharing (the employees did not respond to Defendant’s arguments on these claims so they waived them).
- Employees failed to state a valid claim that the university offered too many investment options and failed to feature a set of core investment options.

Cunningham v. Cornell Univ., 2018 WL 4279466 (S.D.N.Y., Sept. 6, 2018)

- Standard panoply of University fee allegations with Plaintiffs demanding a trial by jury.
- In the Amended Complaint Plaintiffs claim Defendants are personally liable to make good to the Plans all losses, labeling this claim for compensation to the Plans as legal, not equitable relief, triable by jury.
- The court held that this claim was for entry of a money judgment against Individual Defendants for amounts Plan paid to 3rd-Party vendors.
- Acknowledging a split in authority, the court concludes this is a claim for legal relief triable to a jury.

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*., 500 U.S. 20 (1991) (enforcing arbitration and class action waiver even though ADEA permits collective action).

Brown v. Wilmington Trust, 2018 WL 3546186 (S.D. Ohio July 24, 2018)

- Class action alleging Trustee paid more than FMV for employer stock in ESOP transaction.
- After 30 years, Plaintiff terminates in May 2015, taking full distribution of ESOP account in November 2016.
- Effective January 1, 2017, plan amended to add a "Mandatory and Binding Arbitration provision." Key provision:
  - **Covered Claims must be brought solely in *Claimant's* individual capacity, not in a representative capacity or on a class, collective, or group basis.**
- District Court held Plaintiff did not agree to arbitrate and even if she did, her claims fall outside the scope of the Arbitration Procedure contained within the Plan.
- Court denies motion to compel arbitration and to strike any claims purportedly brought on a class or representative basis.

Brown v. Wilmington Trust, 2018 WL 3546186 (S.D. Ohio July 24, 2018)

- "Although plan administrators and employers have broad discretion to modify the terms of a plan, those modifications do not necessarily bind individuals like Plaintiff, who have ceased ail participation in the plan and whose cause of action accrued prior to the modification."
- The Arbitration Procedure encompasses a wide variety of claims, including claims of breach of fiduciary duty asserted against a Trustee. Nevertheless, by its terms, the Arbitration Provision applies only to "Covered Claims," and those claims include only claims asserted "by a Claimant."
- Plaintiff had terminated her employment, cashed out the entire balance in her ESOP account, and ceased all participation in the Plan. Thus, she no longer qualified as a "Participant." Accordingly, she cannot be a "Claimant" and her claims are not subject to the Arbitration Procedure.
- The District Court reasoned, "[T]he fact that Plaintiff has statutory standing, as a "participant," to assert claims on behalf of the Plan does not necessarily mean that she qualifies as a "Participant" who is contractually bound by the Plan's Arbitration Procedure."

Munro v. Univ. of Southern Cal.,
896 F.3d 1088 (9th Cir. 2018)

- Defendant sought single claim arbitration of Plaintiff's class action ERISA § 502(a)(2) fee claims.
- District Court denied Defendant's motion to compel arbitration, determining that the agreements, which the Employees entered into individually, do not bind the Plans ***because the Plans did not themselves consent to the arbitration of the claims***.
- Relying on a *qui tam* holding in *Welch v. My Left Foot Children's Therapy, LLC*, 871 F.3D 791, 796 (9TH Cir. 2017), **Ninth Circuit affirmed**, reasoning that the ERISA § 502(a)(2) claims were brought on behalf of the Plan, not on behalf of Munro himself.
- Because the relief sought would benefit the plan, Munro cannot give agree to arbitrate the plan's rights under ERISA § 502(a)(2) because the plan did not consent to arbitration.

Dorman v. Charles Schwab & Co.,
2018 LEXIS 9107 (N.D. Cal. Jan. 18, 2018)

- Plaintiff, a former Charles Schwab employee, alleged that Defendant breached fiduciary duties by offering Schwab-affiliated funds which charged higher fees and performed more poorly than other investment options on the market.
- Court denied Motion to Dismiss and Motion to Compel Arbitration:
  - Because Plaintiff was a former employee, he could not be compelled to arbitration based on new provisions implemented *after* his termination.
  - Furthermore, the "Compensation Plan Acknowledgment" arbitration provision was limited to claims "arising out of or relating to the employment or the termination of employment."
    - Court noted ERISA claims are not "worked-related legal claims."
- "Because the arbitration provisions . . . do not encompass Plaintiff's claims, they do not require him to submit his claims to arbitration."

Breach of Fiduciary Duty: Burden of Proof

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. After the divestment, the food stocks increased in value.
- Plaintiffs alleged RJR sold the food funds after the spin-off and eliminated them from the Plan without independent counsel or investigation.
- Participants alleged RJR breached fiduciary duties by liquidating the funds without investigating and by imposing an arbitrary liquidation timeline.
- 4th Circuit affirmed lower court's finding that RJR breached fiduciary duties and thus 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.")

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

- The default rule that the burden of proof lies with 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.
- Case returns to 4th Circuit for the 3rd time:
  - Court affirmed 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, "[w]e explicitly recognized that, using the correct "would have" standard, the district court might find that RJR met its burden."
- Plaintiff argued a fiduciary needs a compelling reason to divest, while the decision to invest requires less critical motivation.

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

- **Held:** 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.
  - "…[t]he court failed to explain whether a hypothetical prudent fiduciary would have made the same decisions that RJR did with respect to the timing of the divestment and the fiduciary's disregard for the governing Plan document, both of which we described in our previous opinion as "extraordinary circumstances."

Pioneer Centres Holding Co. Emp. Stock Ownership Plan 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. 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.
  - Alerus did not agree to the transaction, so Pioneer never sent a formal proposal to Land Rover.

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

- 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.
  - 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."
  - "Resulting from" requires proof that an alleged breach *caused* the claimed loss.

Pioneer Centres Holding Co. Emp. Stock Ownership Plan v. Alerus Fin., N.A.,

858 F.3d 1324 (10th Cir. 2017)

- 10th Cir. 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 the 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."
- 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 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…'
- **Petition for writ of certiorari filed Nov. 2, 2017. Solicitor General invited to file a brief expressing his views on Mar. 19, 2018.**
- **While writ of certiorari was pending, the case settled (September 2018), resulting in the abandonment of the cert. petition.**

Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Important issue: burden of proof for fiduciary claims.
- Court holds fiduciary did not investigate Putnam funds before including them as investment options, did not monitor once in Plan, and did not remove a single fund for underperformance, even when certain Putnam funds received a “fail” rating from Advised Asset Group, a Putnam affiliate.
- This means no procedural prudence and sets up the burden of proof question.

Brotherston v. Putnam Invs., LLC, 2018 WL 4958829 (1st Cir., Oct. 15, 2018)

- Burden of proof – there was an alleged loss.
- Acknowledging Circuit split, First Circuit holds that the burden of showing that a loss would have occurred even had the fiduciary acted prudently falls on the imprudent fiduciary.
- Focus of ERISA: protection of participant rights.
- First Circuit aligns with the Fourth, Fifth, and Eighth Circuits and hold that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach, that is, to prove that the resulting investment decision was objectively prudent.

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
    - *Pioneer Centres Holding Emp. Stock Ownership Plan v. Alerus Fin., N.A.*, 858 F.3d 1324 (2017).
  - Eleventh Circuit
    - *Willett v. Blue Cross & Blue Shield of Ala.*, 953 F.2d 1335 (1992).

- **Defendants:**
  - First Circuit
    - *Brotherston v. Putnam Invs., LLC,* 2018 WL 4958829 (1st Cir., Oct. 15, 2018)
  - Fourth Circuit
    - *Tatum v. RJR Pension Inv. Comm.*, 855 F.3d 553 (2017).
  - Fifth Circuit
    - *McDonald v. Provident Idem. Life Ins. Co.*, 60 F.3d 234 (1995).
  - Eighth Circuit
    - *Martin v. Feilin*, 965 F.2d 660 (1992).

401(k) Plan Class Action Employer Stock Drop Litigation

Types of Claims Asserted in Stock Drop Litigation

- **<u>Prudence Claim</u>**: 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.
- **<u>Disclosure Claim</u>**: 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 Plaintiff'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*."
- ***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.

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.

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***, 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."

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).*

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.

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),), appeal filed 6/12/18.

- 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 stock was closed to new investments; participants only could trade out of fund.
- Court first held diversification was not the real issue because:
  - Fiduciaries and participants could not buy former employer stock;
  - The participants were free to move their assets out of those funds at any time; and
  - There was no claim that the plan's other investments were not diversified.

Schweitzer v. Inv. Comm. of the Phillips 66 Sav. Plan,
312 F.Supp.3d 608 (S.D. Tex. May 9, 2018), appeal filed 6/12/18.

- Court dismissed prudence claims based upon *Dudenhoeffer*, stating fiduciaries can rely on market prices.
- Because the participants had neither identified plausible special circumstances undermining the fiduciaries' reliance on the market price, nor plausibly alleged that further investigation by the fiduciaries would have revealed nonpublic information showing that the stock investments were too risky, the court ruled that the participants had failed to state a claim.
- Important case to watch because of commonly occurring situation, where there is no insider trading issue, and courts grapple with how 401(k) Plans deal with funds consisting of predecessor's employer stock.

In re Allergan ERISA Litigation,
2018 LEXIS 112127 (D.N.J. July 2, 2018)

- Former employees alleged that Allergan colluded with other companies to fix generic drug prices in violation of federal securities laws, creating excess revenue and putting Allergan at risk of civil and criminal liability.
  - Allergan and its executives allegedly violated ERISA when they retained company stock as an investment option *even though they knew or should have known that Allergan's statements artificially inflated its stock price*.
- Plaintiffs didn't sufficiently allege that Allergan/its directors were plan fiduciaries.
- As to insider knowledge:
  - Plaintiffs also failed to show that Allergan breached its ERISA fiduciary duties by keeping company stock as an investment option in its retirement plan while an investigation that affected its stock value was being conducted.
  - Court rejected the argument that Allergan was a fiduciary because it could hire and terminate a third-party administrator. Also rejected the allegation that Allergan was a fiduciary because it made SEC filings as the plan's administrator.
  - Plaintiffs did not allege a prudent fiduciary in Allergan's position could not have concluded that disclosing negative information *would have done more harm than good* to the plan by causing a drop in the stock price.

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,* 2018 WL 315098 (6th Cir., Jan. 8, 2018).
- *Hill v. Hill Bros. Constr. Co., Inc.*, 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)
- *Jander v. Intl. Bus. Machines Corp.*, 272 F.Supp.3d 444 (S.D.N.Y. Sept. 29, 2017), appeal filed.

Insider Allegations: Earlier Disclosure of Negative Corporate Information.

- Four Circuits have now held that a premature disclosure of negative insider corporate information would cause the plan more harm than good.
  - *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016); *Loeza v. John Does 1-10*, 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 Resources Inc.*, 853 F.3d 861, 864 (6th Cir. 2017).
  - *Laffen v. Hewlett-Packard Co.*, 721 F. App’x 642, 644–45 (9th Cir. 2018).

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.
  - *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).
  - *Howell v. Motorola, Inc.*, 633 F.3d 552, 572 (7th Cir. 2011).
  - *See 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).

Legal Privilege

Proskauer

“Fiduciary Exception” to Attorney-Client Privilege

- Under the “Fiduciary Exception," a person or entity which acts as a fiduciary to an ERISA plan cannot assert the attorney-client privilege about legal advice concerning ***plan administration***.” *Wildbur v. Arco Chemical Co.*, 974 F.2d 631 (5th Cir. 1992).
- The exception is based on specific fiduciary duties set forth by statute, and has been applied only in that limited context. *See Landry v. Georgia Gulf Corp.*, 2001 LEXIS 25223 (M.D. La. Feb. 26, 2001), (finding fiduciary exception to attorney client privilege did not apply where legal advice at issue concerned amendments to the plan clarifying eligibility and ***did not relate to administration or management of the plan***).
- *See also Tolbert v. RBC Capital Markets Corp.*, 2012 LEXIS 42974 (S.D. Tex. March 28, 2012), ("Even assuming the fiduciary duty exception were to apply, conduct involving the design, modification, or amendment of an ERISA plan ***does not*** constitute fiduciary conduct.").

Becher v. Long Island Lighting Co.,
129 F.3d 268 (2nd Cir. 1997)

- Issue of first impression: Whether an employer waives the attorney-client privilege with respect to all communications regarding a plan covered by ERISA via seeking advice as a plan fiduciary and as a non-fiduciary from the same attorney.
- The employer's ability to invoke the attorney-client privilege to resist disclosure sought by plan beneficiaries turns on whether or not the communication concerned a matter as to which the employer owed a fiduciary obligation to the beneficiaries.
- An employer acting in the capacity of ERISA fiduciary cannot assert attorney-client privilege against plan beneficiaries on matters of plan administration. This principle is the "fiduciary exception" to the attorney-client privilege.
- **Holding**: The fiduciary exception does not defeat Defendant's invocation of the attorney-client privilege with respect to communications with its attorneys on non-fiduciary matters.

United States v. Mett,
178 F.3d 1058 (9th Cir. 1999)

- Defendants were convicted for embezzling funds from their pension benefit plans, conspiring to misappropriate assets of pension benefit plans, and unlawfully serving as plan trustees after being convicted of a felony.
- Before trial, Defendants sought to suppress 3 memoranda sent to them by their then-counsel. However, the memoranda were admitted into evidence. Defendants contended that the memoranda and their counsel's testimony should have been excluded in light of the A/C privilege.
- 2 ends of the A/C privilege spectrum:
  - Where an ERISA trustee seeks advice for plan administration and the advice clearly does not implicate the trustee in any personal capacity, no A/C privilege.
  - Where a plan fiduciary retains counsel in order to defend himself against plan beneficiaries, the A/C privilege remains in-tact.
- **9th Circuit**: The fiduciary exception to A/C privilege does not apply to legal memoranda advising Defendants, as plan trustees, about their personal civil and criminal exposure in light of undocumented withdrawals of plan funds.

Stephan v. UNUM,
697 F.3d 917 (9th Cir. 2012)

- Internal memoranda were created by Unum's in-house counsel regarding claim. In 9th Cir., question of 1st impression as to whether to apply fiduciary exception to <u>insurance companies</u>.
- Existing fiduciary exception theories provide no basis for distinction among ERISA fiduciaries, such as insurance companies making claims decisions.
- The documents are notes of conversations between Unum claims analysts and Unum's in-house counsel about how the insurance policy should be construed.
- Because the disputed documents offer advice solely on how the Plan ought to be interpreted, fiduciary exception applies.
- No adversity between parties until final claim denial occurs.

Leber v. Citigroup 401(k) Plan Inv. Comm.,
2015 LEXIS 144367 (S.D.N.Y. Oct. 16, 2015)

- The documents at issue in Plaintiffs' motion to compel fall into 3 categories.
  - Documents relating to the planned response by Defendant to inquiries posed by a journalist researching financial institutions' use of proprietary funds in their 401(k) plans.
  - Un-redacted versions of documents containing summaries of legal advice that originally appeared in a memorandum prepared by Defendant's outside counsel.
  - An email from a Defendant senior executive to in-house counsel.
- With respect to each of these categories, Plaintiffs contend that, even if the information sought constitutes privileged communications, this information is nonetheless discoverable under the "fiduciary exception."
- Determining whether a particular communication concerns a fiduciary or non-fiduciary matter requires the Court to engage in a "fact-specific inquiry" that focuses on "both the content and context of the specific communication."
- "Where the purpose of legal advice is to benefit the plan or fulfill the administrator's fiduciary duties, the exception applies and the communication cannot be withheld."

Leber v. Citigroup 401(k) Plan Inv. Comm.,
2015 LEXIS 144367 (S.D.N.Y. Oct. 16, 2015)

- In the first instance, “the purpose of counsel's legal advice was to address the journalist's expected premise that the selection of assets for Citigroup's 401(k) Plan potentially implicated ERISA 's prohibition on self-dealing.” Given that this exchange plainly contemplated the legal ramifications of Citigroup's response and was conducted at the direction of counsel, in their capacity as attorneys, the communications must be considered **privileged**.
- Regarding the second issue, the legal advice contained in the Memo is subject to production, *to the extent it relates to the management or administration of the 401(k) Plan*, or to any other matter as to which Defendants bear fiduciary obligations to Plaintiffs.
- Finally, court denied the request to produce the e-mail communication from the senior executive, reasoning that the executive was not seeking legal advice in his fiduciary capacity because the communication “did not concern a matter within the scope of senior management’s fiduciary obligations.”

McFarlane v. First Unum Life Ins. Co.,
234 F. Supp. 3d 150 (S.D.N.Y. Feb. 6, 2017)

- Plaintiff was an employee receiving Long-Term Disability (LTD) benefits. Defendant (Plan fiduciary) granted Plaintiff's claim for benefits, but later decided to stop paying benefits because Plaintiff was no longer disabled and thus did not qualify.
- Plaintiff contends that communications that took place between Defendant and in-house counsel during the time her benefits appeal was pending are subject to the "Fiduciary Exception" to A/C Privilege.
- Defendant argues that the exception does not apply to ***insurance companies*** acting as benefit claims administrators.
- <u>Court applied 2nd Circuit's reasoning:</u>
  - If the communications concern exercise of Defendant's fiduciary duties, then plan participant or beneficiary is viewed as the "true client" of the advice. Additionally, all fiduciaries, regardless of whether they are insurers, have an obligation to provide full and accurate information to plan beneficiaries regarding administration of the plan.
- Thus, under the Second Circuit, "the fiduciary exception applies to ERISA insurance company fiduciaries ***when the purpose of the advice concerns exercise of fiduciary duties in the administration of a benefit plan***." (emphasis added)

Hill v. State St. Corp.,
2013 LEXIS 181168 (D. Mass. Dec. 30, 2013)

- As an initial matter, "[t]he plan administrator may assert attorney-client privilege as to communications between the administrator and its attorneys on-non-fiduciary matters, such as when the communications relate to plan sponsor or **'settlor' functions of adopting, amending, or terminating an ERISA plan, and not to fiduciary functions of managing or administering the plan**."
- Thus, **"settlor acts,"** which involve the "adoption, funding, amendment, modification, or termination" of an employee benefit plan, remain privileged and are not subject to the fiduciary exception because such settlor acts **"are more akin to those of a non-fiduciary trust settlor than they are to those of a trustee."**

Tatum v. R.J. Reynolds Tobacco,
247 F.R.D. 488 (M.D.N.C. 2008)

- Plaintiff plan beneficiary sued defendants, an employer and its plans, alleging breach of fiduciary duties by the elimination of stock funds from a plan. The beneficiary moved to compel the production of certain documents. Defendants contested the motion, invoking the attorney-client privilege under Fed. R. Civ. P. 26(b)(3).
- When the beneficiary met with the plan benefits compliance manager, he stated that he was considering a suit, which he filed after his benefits claim was denied. The court recognized a fiduciary exception to the Rule 26(b)(3) attorney-client privilege where an ERISA plan administrator asserted the privilege to withhold from plan beneficiaries communications related to matters on which a fiduciary duty was owed.

Tatum v. R.J. Reynolds Tobacco,
247 F.R.D. 488 (M.D.N.C. 2008)

- The court found that certain documents contained legal advice related to "settlor" functions, rather than fiduciary functions, and thus that they remained subject to the attorney-client privilege.
- In addition, the court denied the motion to compel other documents, finding that they were protected by the attorney-client privilege since they related to fiduciary communications with outside counsel seeking legal advice to protect the them from the beneficiary's imminent lawsuit.
- Finally, the remaining documents sought for production were protected as attorney work product since they were created when defendants were facing a specific threat of litigation from the beneficiary

Church Plan Litigation

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

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

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); and
- *Rollins v. Dignity Health,* 830 F.3d 900 (9th Cir. 2016).
  - All three circuits unanimously held that the ERISA provision unambiguously requires a church, <u>not a church-affiliated organization</u>, 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.

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.
- § 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 <u>includes</u> 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.

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.
- Trinity Health Corp. – $75 million over 3 years.
- Ascension Health – $8 million one time contribution.
- Bon Secours – $98 million over 7 years.

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.
- **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.

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

- Unanimous opinion written by J. Kagan, J. Gorsuch taking no part; concurrence by J. Sotomayor: <u>Reversed all three Courts of Appeal.</u>
- **Plan maintained by a PPO is an exempt church plan, *regardless of whether a church established the Plan*.**
- The S. Ct. agreed with Plans and Government's reading that the PPO provision supplanted/expanded the original definition of "church plan."
  - "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.
- <u>Concurrence</u>: J. Sotomayor expressed concern over the decision's consequences, suggesting Congress might not exempt these plans today if it were to re-examine the statutory language and agency interpretations.

Medina v. Catholic Health Initiatives, 877 F.3d 1213 (10th Cir. 2017)

- While this appeal was pending, the Supreme Court resolved the issue of an employee-benefit plan need not be established by a church to qualify for ERISA's church-plan exemption.
  - ***Advocate Health Care Network v. Stapleton***
- Plaintiff alleged CHI's retirement plan failed to satisfy the statutory criteria for the exemption, which requires the plan to be maintained by a PPO associated with a church, for the employees of an organization associated with a church.
- District Court held CHI's plan was a church plan that qualified for the ERISA exemption.
- 10th Circuit affirmed District Court's ruling, concluding that the plan satisfied the statutory requirements for the exemption:
  - CHI is a tax-exempt org. associated with a church, and thus the Subcommittee is a proper principal-purpose org. that is also associated with a church.
  - Did not define the scope of what it means to be "associated with" but agreed with the district court that the Subcommittee qualified.

Other District Court Church Plan Cases

- Many of the pending cases are going Defendants' way, *e.g.*,
- *Sanzone v. Mercy Health,* 326 F.Supp.3d 795 (E.D. Mo. Aug. 27, 2018).
  - The plan was maintained by a principal purpose organization because the Committee had all powers of plan administration.
  - Mercy Health and principal purpose organization were controlled by and associated with the Roman Catholic Church.
- *Smith v. OSF Healthcare Sys.,* 2018 WL 4680671 (S.D. Ill. Sept. 28, 2018).
  - OSF and principal purpose organization are controlled by and associated with the Roman Catholic Church.

Other District Court Church Plan Cases

- *But see, Rollins v. Dignity Health,* 2018 WL 4262334 (N.D. Cal. Sept. 6, 2018).
  - District Court Judge refused to take judicial notice of many documents offered to support Dignity's connection with church.
  - On this basis, could not conclude at Motion to Dismiss stage that Dignity Health or the principal purpose organization was associated with or controlled by the church.
  - The principal purpose organization does not maintain the plan because it lacks the power to fund, continue, amend and terminate the Plan.
  - Rejects Defendants' standing argument holding complaint alleges underfunding of $1.8 billion and funding at 72% level.
    - Participants at risk because no PBGC coverage.

New Statute of Limitations Case

Secretary of Labor v. Preston,

873 F.3d 877 (11th Cir. 2017), *cert. den.*, 138 S. Ct. 2680 (2018).

- Preston owner/selling shareholder in ESOP transaction and signs a standard DOL tolling agreement during investigation.
- Litigation commences: can a tolling agreement waive the six-year statute of repose contained in ERISA § 413(1)?
- Interlocutory appeal under 28 U.S.C. § 1292(b).
- 11th Circuit concludes that the six-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.
- **Petition for certiorari denied (June 25, 2018).**

Proskauer's Global Presence

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ERISA Litigation Update

November 8, 2018
Southwest Benefits Association
29th Annual Benefits Compliance Conference

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