2018-19 ERISA Litigation Update

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Recent 6th Circuit Cases:

- *Springer v. Cleveland Clinic Employee Health Plan Total Care*: ERISA standing, arbitrary and capricious standard of review, and pre-certification requirement
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- *Sulyma v. Intel Corporation Investment Policy Committee*, Case No. 17-15864 (9th Cir. Nov. 28, 2018)
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Non- 6th Circuit Cases (continued):

- *Chendes v. Xerox HR Solutions, LLC*, 2017 WL 4698970 (E.D. Mich. Oct. 19, 2017)
- *Fleming v. Fid. Mgt. Tr. Co.*, 2017 WL 4225624 (D. Mass. Sept. 22, 2017)
- *Martone v. Walter E. Robb III, et al.*, Case No. 17-50702 (5th Cir. Sept. 4, 2018)
- *Bell, et al. v. Pension Committee of Ath Holding Co.*, Case No. 15-2062 (S.D. Ind. Jan. 30, 2019)
- *Kirkendall v. Halliburton, Inc.*, 2019 WL 325649 (2d Cir. Jan. 24, 2019)
- *Wilcox v. Georgetown University*, 2019 WL 132281 (D.D.C. Jan.8, 2019)
- *Short v. Brown University*, Case No. C. A. No. 17-318 WES, (R.I.D.C. July 11, 2018)

Non- 6th Circuit Cases (continued):

- *Peterson v. UnitedHealth Group, Inc.*, 2019 U.S. App. LEXIS 1270 (8th Cir. Jan. 15, 2019)
- *U.S. Chamber of Commerce of United States of Am. v. United States Dep't of Labor*, 885 F.3d 360 (5th Cir. March 15, 2018)
- *Tedesco v. IBEW Local 1249 Ins. Fund*, 2018 WL 3323640 (2d Cir. July 6, 2018)
- *William Masten v. Metropolitan Life Insurance Company*, Case No. 1:18-CV-11229-RA (S.D.N.Y. Dec. 3, 2018)
- *William DuBuske v. PepsiCo, Inc., et al.*, Case No. 7:18-CV-11618-VB (S.D.N.Y. Dec. 12, 2018)
- *Martinez Torres, et al. v. American Airlines, Inc.*, et al., 4:18-CV-00983 (N.D. Tex. Dec. 11, 2018)
- *Smith, et al. v. U.S. Bancorp, et al.*, 0:18-Cv-03405 (C.D. Minn. Dec. 14, 2018)

Springer v. Cleveland Clinic Employee Health Plan Total Care, Case No. 2018 WL 3849376 (6th Cir. Aug. 14, 2018):

- "Sometimes it's easier to seek forgiveness than permission. Jason Springer hoped as much when he arranged air ambulance transportation for his son before his employee benefit plan could verify his membership and authorize the service. But the plan administrator denied Springer's claim for coverage because he did not obtain the precertification required for nonemergency transportation. The district court affirmed and alternatively found that Springer did not suffer an injury to have Article III standing. Although Springer has standing to bring his claim, we agree that the plain language of the plan required precertification."

- Clinic doctor moved from Utah to Cleveland, and used Angel Jet to move his 14-month old son due to various congenital abnormalities. Medical necessity was established, but not on an emergency basis.

- Welfare plan's TPA needed approximately two weeks to process the Utah doctor's paperwork and admission into the Clinic healthcare plan, a timeframe that was advertised to the doctor. "The plan provided that claims rendered during the enrollment period 'may be denied' but 'will be adjusted on the backend when [Antares] processes your benefit selections data.'"

Springer v. Cleveland Clinic Employee Health Plan Total Care (continued):

- Before the flight, Angel Jet sought coverage information from Antares. Antares was unable to confirm that Springer and his son were members of the plan while their enrollment paperwork was processing and did not pre-certify the air ambulance service. "Angel Jet decided to proceed with the transportation . . . and submitted a bill to Antares for $340,000." Antares denied the claim for failure to obtain precertification.

- Angel Jet appealed to the Clinic's Total Care Plan, which affirmed the denial but issued a check to Angel Jet for $34,000, ten percent of the billed charges. This was "an attempt to be fair" and reflected the amount the Plan's preferred provider of air ambulance services would have charged. The Advisory Committee, which exercises the final level of appeal under the Plan, affirmed.

- Angel Jet's suit was dismissed due to lack of standing; Springer did not properly assign his rights under the Plan to Angel Jet. Springer sued, but his case was rejected by the district court based on Springer's lack of standing (because he was not billed for the air ambulance costs), and because the Plan's determination was not arbitrary and capricious due to the non-emergency nature of the flight and the lack of precertification.

- 6th Circuit affirmed, but disagreed with the trial court's holdings regarding plaintiff's "lack of standing," and with the district court's use of the "arbitrary and capricious" standard of review.

Springer v. Cleveland Clinic Employee Health Plan Total Care (continued):

- "Springer suffered an injury within the meaning of Article III because he was denied health benefits he was allegedly owed under the plan. Like any private contract claim, his injury does not depend on [an] allegation of financial loss. His injury is that he was denied the benefit of his bargain. . . . Every circuit court to consider this issue agrees that a plaintiff in Springer's shoes does not need to suffer financial loss."

- Because the Plan Document did not "expressly and clearly" confer discretion to the Administrator, the "default rule" of *de novo* review by the court was appropriate. "Antares does not have a clear grant of discretionary authority under the plan. The plan assigns Antares seven discrete tasks in its capacity as third-party administrator, including 'member eligibility verification' and benefit coverage determinations.'"

- Due to the plan's unambiguous precertification requirement as a condition of coverage—"the weary-eyed could not overlook the requirement"—and because plaintiff could not establish an exception to the precertification rule, the court affirmed the district court's denial of plaintiff's claim.

Pearce v. Chrysler Group LLC Pension Plan, Case No. 17-1431 (6th Cir. June 20, 2018):

- Plaintiff, a long time Chrysler employee, was reasonably led to believe by the Plan's SPD that he qualified for early retirement supplemental benefits, and he made certain employment and retirement decisions based on this understanding.

- The Plan Document, in conflict with the SPD, contained an exclusion that worked to prohibit Plaintiff's entitlement to the supplemental early retirement benefits. Plaintiff never had the Plan Document, and he repeatedly was told by the plan sponsor to consult the SPD regarding his questions and legal rights.

- Plaintiff's claim for benefits under ERISA Section 502(a)(1)(B) was rejected by the Plan Administrator, and the district court, due to the unambiguous language in the Plan Document that barred Plaintiff's claim.

- Although "the Supreme Court held that statements in summary documents 'do not themselves constitute the terms of the plan for purposes of Section 502(a)(1)(B)' and therefore could not be enforced under this section . . . the Court stated that ERISA Section 502(a)(3) empowered a court to provide equitable relief in a situation in which the beneficiaries had been providing false or misleading information about plan provisions."

Pearce v. Chrysler Group LLC Pension Plan (continued):

- 6th Circuit affirmed the district court's rejection of plaintiff's equitable estoppel claim under Section 502(a)(3), based on an eight-factor test a plaintiff must satisfy when the plan language is unambiguous, because plaintiff could not prove that the "plan provisions which, although unambiguous, did not allow for individual calculation of benefits."

- However, the 6th Circuit reversed the district court's dismissal of plaintiff's equitable reformation claim, under Section 502(a)(3), as the trial court incorrectly required plaintiff to prove that Chrysler intended to deceive in order for plaintiff to establish that he was a victim of either fraud or inequitable conduct.

- "We have typically found constructive fraud in the ERISA context when there is: (1) an information asymmetry, such that the defendant is the only one who knows the true facts and the plaintiff cannot ascertain the true facts; (2) the defendant mispresents the benefits to which the plaintiff is entitled; and (3) the plaintiff investigated her benefits and drew a reasonable conclusion about them on the basis of the defendant's misrepresentations, even when the documents the plaintiff relief upon contained a disclaimer that the plan would govern in the event of a conflict."

Pearce v. Chrysler Group LLC Pension Plan (continued):

- "Additionally, whether the defendant took actions to mitigate its misrepresentations and correct the plaintiff's misunderstanding is also relevant. Thus when an employer made an 'honest mistake' and misinformed a beneficiary of her benefits, but then repeatedly sent correction letters in the ensuing months, the employer is not grossly negligent and therefore has not committed constructive fraud."

Clemons v. Norton Healthcare Inc. Retirement Plan, Case No. 16-5063/5124 (6th Cir. May 10, 2018):

- ERISA class action litigation lasting more than 10 years, arising from alleged underpayment of lump sum pension benefits, with $60 to $70 million at stake.
- Summary judgment, on liability only, granted in favor of Plaintiffs, with instructions from the district court regarding how the parties should calculate damages, and return to the district court later for entry of final judgment, including treatment of the class issues.
- Parties, including their respective experts, disagreed regarding how far back to calculate payments (based on which statute of limitations was applicable), how to interpret and resolve competing readings of the Plan Document, and how to apply the "arbitrary and capricious" standard of review.
- The 6th Circuit addressed and resolved longstanding confusion within its own decisions regarding the interplay in ERISA benefits cases between *Firestone*'s arbitrary and capricious standard of review, versus the well settled contract interpretation rule of *contra proferentum*, whereby ambiguous contract terms are construed against the drafter of the agreement.

Clemons v. Norton Healthcare Inc. Retirement Plan (continued):

- "As a practical matter, we do not think a court can apply *Firestone* deference and *contra proferentum* to the same case without contradiction. . . . Thus, we hold that when *Firestone* applies, a court may not invoke *contra proferentum* to 'temper' arbitrary-and-capricious review. However, when it is not clear whether the administrator has, in fact, been given *Firestone* deference on a particular issue, we think the doctrine still has legitimate force."

- The 6th Circuit also reversed the district court's reliance on Kentucky's five-year statute of limitations period for statute-based causes of action, as opposed to the state's 15-year limitations period for claims on written contracts. "'ERISA does not explicitly provide a limitations period for Section 1132(a)(1)(B) claims,' so 'courts fill the statutory gap using federal common law,' and we look to the most analogous state statute of limitations to answer that question."

Graham, et al. v. Fearon, et al., Case No. 17-3407 (6th Cir. Jan. 8, 2018):

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- Northern District of Ohio dismissed, with prejudice, Eaton employees' stock drop ERISA case, following the guidance of *Dudenhoeffer* and *Amgen*.

- The 6th Circuit affirmed the district court's refusal to allow Plaintiffs to file an Amended Complaint, whereby Plaintiffs would have tried to fix their pleading deficiencies. "[B]ecause Plaintiffs' request [to amend] was perfunctory and did not point to any additional factual allegations that would cure the complaint, the district court did not abuse its discretion in denying a motion to amend."

- Plaintiffs bought $40 million of Eaton stock through the ESOP during the relevant 8-month period, allegedly based in part on untrue or misleading statements made by certain company officers and plan fiduciaries who were privy to non-public inside information.

Graham, et al. v. Fearon, et al. (continued):

- Plaintiffs maintained that Eaton could have issued corrective disclosures, halted new contributions to the fund or directed the fund to divert a portion of its holdings into a low-cost hedging product.
- The 6th Circuit found that "the district court properly determined the complaint does not propose 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."
- 6th Circuit designated its opinion as "Not Recommended for Publication."

Jammal v. American Family Insurance Company, et al., Case No. 17-4125 (6th Cir. Jan. 29, 2019):

- Class action by thousands of current and former insurance agents for American Family, who claimed that they were denied ERISA rights because American Family misclassified them as independent contractors instead of employees.

- Judge Nugent, ND of Ohio, denied defendants' motion to dismiss and motion for summary judgment, granted plaintiffs' motion to certify the class, and the 6th Circuit denied defendants' attempt to appeal the class certification issue.

- An "advisory jury" trial was held regarding only the independent contractor vs. employee issue. Ordinarily there are no juries in ERISA cases, but Federal Civil Rule 39 permits district courts to "try any issue with an advisory jury" in an action that is "not triable of right by a jury."

Jammal v. American Family Insurance Company, et al. **(continued):**

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- After a 12-day trial, the jury found that plaintiffs were employees, and the judge issued an opinion in which he acknowledged that although he was not bound by the jury's determination, he believed that the jury's verdict "comported with the weight of evidence presented at trial," and the court entered an Order to this effect, while also certifying the ruling for an interlocutory appeal.

- The district court "concluded that the degree of control managers were encouraged to exercise was inconsistent with independent contractor status and was more in line with the level of control a manager would be expected to exert over an employee. This, along with the evidence related to the other *Darden* factors, led the court to determine that the plaintiffs were employees during the relevant class period."

- In a 2-1 decision, the 6th Circuit disagreed: "The plaintiffs have not shown that the facts here are so radically different from these cases [holding that insurance agents are independent contractors] to justify what would be a significant departure from these rulings, especially in the 'legal context' of ERISA eligibility where we have held that 'control and supervision is less important' than the financial structure of the parties' relationship."

Sulyma v. Intel Corporation Investment Policy Committee, Case No. 17-15864 (9th Cir. Nov. 28, 2018):

- 9th Circuit reverses district court, which had concluded that plaintiffs' ERISA fiduciary duty claims were barred by ERISA's three-year statute of limitations for such claims, Section 1113(2).

- Plaintiffs alleged that Intel invested participant assets in custom-built target-date funds that underperformed peer funds by 400 basis points annually.

- The 9th Circuit held that a two-step process is to be used in determining whether a claim like this is untimely: (1) the court first must isolate and define the underlying violation on which the plaintiff's claim is based, and then; (2) the court inquires whether the plaintiff had "actual knowledge" of the alleged breach or violation.

Sulyma v. Intel Corporation Investment Policy Committee **(continued):**

- Per the 9th Circuit, "'actual knowledge of the breach' does not mean that a plaintiff has knowledge that the underlying action violated ERISA. Second, 'actual knowledge of the breach' does not merely mean that a plaintiff has knowledge that the underlying action occurred. 'Actual knowledge' must therefore mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual legal knowledge, which only a lawyer would normally possess."

- "We conclude that the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff's action is filed."

Munro v. USC, Case No. 17-55550 (9th Cir. July 24, 2018):

- Nine plaintiffs, current and former USC employees, were participants in two USC retirement plans, and the plaintiffs alleged (in a putative class action) multiple breaches of fiduciary duty in the administration of the plans. Each of the plaintiffs had a written employment agreement, and each agreement contained an arbitration clause requiring arbitration of "all claims that either the Employee or USC has against the other party to the agreement. The agreements expressly cover claims for violations of federal law."

- The employees sought financial and equitable remedies for the benefit of the plans and all affected participants and beneficiaries, including a determination as to the calculation of losses, removal of the breaching fiduciaries, a full accounting of plan losses, reformation of the plans, and an order regarding future investments.

- The district court denied USC's motion to compel arbitration, determining that the arbitration agreements did not bind the plans because the plans did not themselves consent to the arbitration of claims.

- The 9th Circuit agreed: "Because the parties consented only to arbitrate claims brought on their own behalf, and because the Employees' present claims are brought on behalf of the Plans, we conclude that the present dispute falls outside the scope of the agreements."

The Depot Inc. v. Caring for Montanans Inc., 2019 WL 453485 (9th Cir. Feb. 6, 2019):

- The 9th Circuit agreed with the district court that the plan sponsor members of Montana's Chamber of Commerce failed to state a claim for breach of fiduciary duty and violations of ERISA's prohibited transaction rules against health insurers arising from alleged misrepresentations in the marketing and negotiation of the insurers' fully insured health plans to the plaintiffs' members.

- The appellate panel found that the insurers were not fiduciaries because they did not exercise discretion over plan management or control over plan assets. The court explained that the defendants had no fiduciary relationship to the plans and exercised no discretion regarding the plans' management because they were merely negotiating at arms-length to set rates and collect premiums prior to any agreement being executed.

- However, the appellate court disagreed with the district court and reversed the dismissal of plaintiffs' state law fraud claims. The court held that the state law claims were not preempted by ERISA because they did not have a connection with an ERISA plan, but rather arose from negotiations occurring prior to any ERISA-regulated relationship. The court characterized the case as one about fraud in the sale of health insurance policies, rather than as a case implicating ERISA.

Laborers' Pension Fund v. Miscevic, Case No. 17-2022 (7th Cir. Jan. 29, 2018):

- Anka Miscevic, who was found not guilty by reason of insanity, killed her husband Zeljko, who was a participant in the Laborers' Pension Fund. The Fund asked a court to decide who should get Zeljko's pension benefits. Anka argued it should be her, but the estate and the decedent's minor child argued that Anka was barred due to the Illinois slayer statute, which provides that "a person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death."

- Despite ERISA's broad preemption clause, which states that ERISA "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan," the appellate court said "some state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan."

- The court also noted that slayer laws are an aspect of family law, a traditional area of state regulation.

Jander v. IBM, Case No. 17-3518 (2d Cir. Dec. 10, 2018):

- 2d Circuit reverses SDNY's dismissal, under Federal Civil Rule 12 and the *Dudenhoeffer* case, of IBM employees' "stock drop" ERISA claims, finding that plaintiffs provided adequate factual support (via their allegations) that IBM breached its fiduciary duty of prudence by continuing to invest in company stock despite secretly knowing IBM's microelectronic business was overvalued.

- "The district court held that [the workers] failed to state a duty-of-prudence claim under ERISA because a prudent fiduciary could have concluded that the three alternative actions proposed in the complaint—disclosure, halting trades of IBM stock, or purchasing a hedging product-would do more harm than good to the fund. We respectfully disagree."

Robo-Advisor Fee Litigation:

Patrico v. Voya Financial, Inc. 2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018); *Scott v. Aon Hewitt Financial Advisers, LLC*, 2018 WL 1384300 (N.D. Ill. Mar. 19, 2018); *Chendes v. Xerox HR Solutions, LLC*, 2017 WL 4698970 (E.D. Mich. Oct. 19, 2017); *Fleming v. Fid. Mgt. Tr. Co.*, 2017 WL 4225624 (D. Mass. Sept. 22, 2017)

- The lawsuits claim that fees collected by record keepers for investment advice were unreasonably high, because the fees exceeded the amount actually paid to Financial Engines. The plaintiffs claimed that the record keepers did not provide services of sufficient value to justify retaining the spread between the amount charged and the amount actually paid to Financial Engines.

- The courts ruled that the record keepers were not acting as fiduciaries in setting fees at a level that allowed them to retain an amount in excess of what was paid to Financial Engines and thus plaintiffs could not proceed with claims that the record keepers breached fiduciary duties or engaged in prohibited self-dealing.

Martone v. Walter E. Robb III, et al., Case No. 17-50702 (5th Cir. Sept. 4, 2018):

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- 5th Circuit affirms the Texas district court's dismissal, under Rule 12 and *Dudenhoeffer*, of plaintiff's stock drop ERISA claims against Whole Foods.

- Plaintiff alleged that the Whole Foods executives, and ERISA fiduciaries, breached their fiduciary duties by allowing employees to continue to invest in Whole Foods stock "while its value was artificially inflated due to a widespread overpricing scheme."

- The district court dismissed the claims based on the rubric set out by *Fifth-Third Bank v. Dudenhoeffer*. The 5th Circuit agreed, ruling that the plaintiff failed to plausibly allege an alternative action that the fiduciaries could have taken that would have been consistent with securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it.

Bell, et al. v. Pension Committee of Ath Holding Co., Case No. 15-2062 (S.D. Ind. Jan. 30, 2019):

- Indiana district court rejects Anthem defendants' attempt to obtain summary judgment regarding plaintiffs' plan fees claims.

- Defendants' main arguments were: plaintiffs' money market fund claims are time-barred and legally and factually baseless; the excessive fee claims are time-barred and legally and factually baseless, and; the failure to monitor claim falls within the breach of fiduciary duty claims.

- The court, relying on the recent 9th Circuit decision in *Sulyma* (see above), held that plaintiffs offered enough Rule 56 evidence regarding their inability to know of their ERISA claims more than three years before filing suit to create material factual disputes such that summary judgment would be inappropriate.

- Similarly, the court found that the plaintiffs offered enough evidence to create disputed questions of fact as to whether the defendants discussed or even understood the difference between certain types of fee arrangements, whether they periodically checked to see if the plan could pay lower administrative fees, and whether the defendants acted prudently regarding the fees paid by the plan.

- "Plaintiffs cited deposition testimony of Anthem employees and Pension Committee members who indicated they do not understand the difference between different kinds of share classes or did not ask Vanguard whether lower-cost fee arrangements were available for the plan."

Kirkendall v. Halliburton, Inc., 2019 WL 325649 (2d Cir. Jan. 24, 2019) :

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- 2d Circuit rejected plaintiffs' argument that because defendant suffered from a "categorical potential conflict of interest"—because it both funded the plan and was the claim's decision-maker—the *Firestone* arbitrary and capricious standard of review should not apply. The court requires a showing by the plaintiffs that the conflict actually affected the plan administrator's process.

- Applying the *Firestone* standard of review, the court concluded that it could not overturn the benefits committee's decision denying the claim, even though the court believed the plaintiffs' reading of the plan language was "more reasonable."

- To overturn the committee's decision, plaintiffs would have had to show that it was without reason, unsupported by substantial evidence, or erroneous as a matter of law, a standard the plaintiffs were unable to meet.

Wilcox v. Georgetown University, 2019 WL 132281 (D.D.C. Jan. 8, 2019):

- Under Federal Civil Rule 12, District of Columbia district court dismissed ERISA fiduciary breach claims by participants in Georgetown's 403(b) retirement plans that were predicated on allegations that the trustees invested in funds that allegedly charged excessive fees and underperformed relative to alleged comparable funds, and that the fund paid excessive recordkeeping fees.

- Plaintiffs lacked standing (they didn't incur damages) regarding three of the challenged investments because they failed to allege that: (1) they were invested in the challenged funds; (2) the challenged funds outperformed plaintiffs' alleged comparable investment fund, and/or; (3) that they had withdrawn, or planned to withdraw from, one of the funds that charged an allegedly excessive early withdrawal fee in exchange for a lump-sum payout.

- Plaintiffs failed to allege that the fees were excessive relative to the services that were being offered.

Short v. Brown University, 17-318 WES, (R.I.D.C. July 11, 2018):

- In another Civil Rule 12 case, the Rhode Island district court dismissed most, but not all, of plaintiffs' ERISA duty of prudence and duty of loyalty claims arising from alleged imprudent management of the university's retirement accounts.

- The court denied Brown University's motion to dismiss certain duty of prudence claims, holding that plaintiffs' allegation that a prudent fiduciary would have chosen one, rather than two, recordkeepers suffices to state a plausible claim. In addition, the court said the plaintiffs' claim that a prudent fiduciary in like circumstances would have solicited competitive bids plausibly alleges a breach of the duty of prudence.

- Also, the question whether it was imprudent to pay a particular amount of recordkeeping fees generally involved questions of fact that cannot be resolved on a motion to dismiss.

Peterson v. UnitedHealth Group, Inc., 2019 U.S. App. LEXIS 1270 (8th Cir. Jan. 15, 2019):

- 8th Circuit concludes that UnitedHealth Group's practice of cross-plan offsetting—a practice where United would recover overpayments made to out-of-network providers by taking an offset from a different plan—was unreasonable.

- United attempted to rely on its broad discretion, as the plan's claims administrator, to interpret plan provisions under the individual health care plans to justify this cross-plan offsetting practice. The court held that this was not reasonable and suggested that the practice could violate ERISA.

U.S. Chamber of Commerce of United States of Am. v. United States Dep't of Labor, 885 F.3d 360 (5th Cir. March 15, 2018):

- A split panel of the 5th Circuit vacated the DOL's "fiduciary rule" in its entirety, holding that Congress had not given the DOL the authority to "expand the scope of DOL regulation" to the individual retirement account market, as the rule purported to do.

- The DOL announced that it is "considering regulatory options in light of the Fifth Circuit opinion," and is slated to issue a revised fiduciary rule in September 2019.

Tedesco v. IBEW Local 1249 Ins. Fund, 2018 WL 3323640 (2d Cir. July 6, 2018):

- 2d Circuit reversed the district court's decision denying an attorney fee award to an ERISA plaintiff who achieved some success on her claim for benefits.

- Five-factor test used to determine the propriety of a fee award: (1) the offending party's culpability or bad faith; (2) the offending party's ability to satisfy an award; (3) whether an award would deter similar conduct; (4) the merits of the parties' positions, and; (5) whether the action conferred a common benefit on other participants.

- The appellate court held that the district court relied too heavily on its conclusion that defendants demonstrated no bad faith, neglected to consider plaintiff's success on the merits, and failed to assess the extent of defendants' culpability or their ability to pay an award.

Outdated Mortality Tables:

- *William Masten v. Metropolitan Life Insurance Company*, Case No. 1:18-CV-11229-RA (S.D.N.Y. Dec. 3, 2018)
- *William DuBuske v. PepsiCo, Inc., et al.*, Case No. 7:18-CV-11618-VB (S.D.N.Y. Dec. 12, 2018)
- *Martinez Torres, et al. v. American Airlines, Inc., et al.*, 4:18-CV-00983 (N.D. Tex. Dec. 11, 2018)
- *Smith, et al. v. U.S. Bancorp*, et al. 0:18-Cv-03405 (C.D. Minn. Dec. 14, 2018)
- MetLife, PepsiCo, American Airlines and U.S. Bancorp were all sued in December 2018 by the same two law firms for alleged ERISA fiduciary duty violations arising from the use of purported "unreasonable actuarial equivalent factors, including outdated mortality tables, when calculating plan benefits payable in various annuity forms of distribution or at early retirement.
- Plaintiffs allege that the pension plans used actuarial equivalence factors that were decades old to calculate the payment amounts under the various alternative joint and survivor annuities and, in one case, early retirement benefits.

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