



Fiduciary Case Studies

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Recent Developments

- ✦ Supreme Court decision in *Tibble*
- ✦ Scope of equitable relief post-*Amara*
- ✦ ESOP pleading developments post-*Dudenhoeffer*
- ✦ ESOP stock valuations
- ✦ Enforceability of plan-specified limitations period to bring a lawsuit for benefits
- ✦ Enforceability of venue clauses
- ✦ Church Plan Cases

The Duty to Continually Monitor Investments: Supreme Court's Decision in *Tibble v. Edison Int'l*

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Supreme Court Decision in *Tibble v. Edison*

- ✦ ERISA Statute of Limitations for Breach of Fiduciary Duty
- ✦ Breach of fiduciary duty claims are subject to the earlier of a 3 or 6- year statute of limitations
 - > 3 years after the earliest date the plaintiff had "actual knowledge of the breach of violation"
 - > 6 years after the date of the "last action which constituted a part of the breach of violation" or "in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation"
 - > In cases of fraud or concealment, 6 years after the date of discovery of the breach or violation

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Tibble: Background

- ✦ Plan participants alleged that 401(k) plan fiduciaries breached their duties of loyalty and prudence by including retail-class mutual funds as options in the plan and by engaging in revenue sharing
- ✦ Ninth Circuit held that the six-year statute of limitations applied to the plaintiffs' claims and started to run from when the initial decision was made to include the challenged investments as options, absent significant change in circumstances
- ✦ Ninth Circuit rejected the "continuing violation" argument by the plaintiffs and the DOL because it "would make hash out of ERISA's limitation period and lead to an unworkable result."

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Tibble: Supreme Court Holding

- ✦ Supreme Court held that a trustee has "a continuing duty to monitor investments and remove imprudent ones," even where there was no significant change in circumstances
- ✦ Trustees must "systematically consider all the investments of the trust at regular intervals to ensure that they are appropriate." When investments are inappropriate, the trustee is under a duty to dispose of them within a reasonable time
- ✦ Thus, a plaintiff may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones, and the claim will be timely so long as the alleged breach occurred within six years of filing
 - > The Court reasoned that fiduciary duties under ERISA are derived from the common law of trusts, and because a duty of continued monitoring obtains at common law, the Ninth Circuit should have considered the plaintiff's claim that the trustee violated that duty

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***Tibble*: Questions for Future Litigation**

- ✦ The Supreme Court in *Tibble* expressed no view as to the scope of the fiduciary's duty to review investments, but instead remanded to the Ninth Circuit for consideration
- ✦ Questions for future litigation:
 - > What kinds of investments must be reviewed?
 - > What kind of review is required?
 - > How often should investments be reviewed?
 - > What characterizes an inappropriate investment?

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Revival of Compensatory Damages in the Guise of an ERISA "Equitable Remedy"?

The Supreme Court's Decision in *Cigna Corp. v. Amara* and its Progeny

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Revival of ERISA Compensatory Damages?

- ✦ ERISA § 502(a)(3) enables courts to enter “appropriate equitable relief” to remedy violations of ERISA or the applicable plan
- ✦ For many years, relief under § 502(a)(3) was limited to the kinds of remedies typically available at equity, such as injunctions, mandamus, or restitution, and “make-whole” monetary damages was not considered to be within its scope.
- ✦ In *Cigna Corp. v. Amara*, the Supreme Court noted that the equitable remedy of “surcharge” was a remedy typically available in equity
- ✦ Many courts have since seized on this language to revive the ability of participants and beneficiaries to obtain “make-whole” monetary damages as a remedy under § 502(a)(3)

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ERISA § 502(a)(3), 29 U.S.C. § 1132(a)(3)

- ✦ (a) Persons empowered to bring a civil action
- ✦ A civil action may be brought -
 - > . . .
 - > (3) by a participant, beneficiary, or fiduciary
 - (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or
 - (B) to obtain other appropriate equitable relief
 - (i) to redress such violations or
 - (ii) to enforce any provisions of this subchapter or the terms of the plan
- ✦ Permits a participant or beneficiary to obtain “appropriate equitable relief” to redress violations of ERISA or the plan

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Limitation of Remedies Under § 502(a)(3)

- ✦ *Mertens v. Hewitt Assocs.* (1993)
 - > Participants sued plan actuary for failing to change the plan's actuarial assumptions to reflect the additional retirement costs of early retirees, causing the plan to be inadequately funded and eventually terminated
 - > § 502(a)(3) does not authorize a suit for money damages against a non-fiduciary who participated in the plan fiduciary's breach of duty
- ✦ *Great-West Life & Annuity Ins. Co. v. Knudson* (2002)
 - > Insurance company sought an injunction for money damages as restitution against plan beneficiary who violated plan subrogation clause by refusing to reimburse Great West for tort recovery from lawsuit
 - > Legal restitution, which seeks to impose personal liability for breach of a legal duty, not available under § 502(a)(3)
- ✦ Courts interpreted these Supreme Court precedents to prohibit claims for money damages under § 502(a)(3)

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Cigna Corp. v. Amara

- ✦ Supreme Court opined that certain "traditional equitable remedies" under § 502(a)(3) could potentially provide participants with the remedy they sought, *i.e.* the level of benefits represented in the SPD:
 - > Reformation of the plan was available in equity to prevent fraud or mistake
 - > Equitable estoppel was a classic remedy in equity, and thus also available under § 502(a)(3)
 - > Equity courts "possessed the power to provide relief in the form of monetary 'compensation' for a loss resulting from a trustee's breach of duty, or to prevent the trustee's unjust enrichment." Known as "surcharge," this remedy "extended to a breach of trust committed by a fiduciary encompassing any violation of duty imposed upon that fiduciary"
- ✦ The Court vacated and remanded the case, leaving the district court to determine which (if any) equitable remedies were appropriate under § 502(a)(3) under the circumstances of the case

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Surcharge as a remedy...

McCravy v. Metro. Life Ins. Co.

- ✦ Facts:
 - > Plaintiff participated in her employer's life insurance plan issued by MetLife
 - > Plaintiff purchased coverage for her daughter and paid premiums, which MetLife accepted, from daughter's 18th birthday until she was murdered at age 25
 - > MetLife denied plaintiff's claim for benefits, asserting that daughter did not qualify for coverage under the plan's "eligible dependent" provision because she was over the age of 19 at the time of her death
 - > Instead, MetLife attempted to refund the premiums paid for daughter's coverage, which plaintiff refused
- ✦ The first *McCravy* opinion, holding that plaintiff's remedy was limited to a premium refund, was published the same day as *Amara*
- ✦ The panel granted a petition for rehearing in light of *Amara*

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***McCravy*: Second Fourth Circuit's Holding**

- ✦ Following rehearing, the Fourth Circuit held that, "The Supreme Court has made quite clear that surcharge is available to plaintiffs suing fiduciaries under [§ 502(a)(3)]. We therefore agree with *McCravy* that her potential recovery in this case is not limited, as a matter of law, to a premium refund"
- ✦ The Fourth Circuit remanded the case to the district court to determine whether plaintiff's claim for breach of fiduciary duty would succeed and whether surcharge is an appropriate remedy under § 502(a)(3)

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Surcharge as a remedy...

Gearlds v. Entergy Servs., Inc.

- ✦ Facts:
 - > Plaintiff alleged he agreed to retire early because of oral and written representations that he would continue to receive medical benefits and he waived medical benefits available under his wife's medical plan because of the assurances from Entergy
 - > In 2010, Entergy discovered that an error in computing plaintiff's service time under the retirement plan incorrectly caused Entergy to determine he was eligible for medical coverage
 - > Entergy discontinued the medical coverage
 - > Plaintiff filed suit, alleging claims for breach of fiduciary duty and equitable estoppel
- ✦ The district court dismissed the complaint, reasoning that plaintiff sought only compensatory money damages, which were not available under § 502(a)(3)

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***Gearlds*: Fifth Circuit's Holding**

- ✦ The Fifth Circuit reversed the district court's decision, citing *Amara* to find that a surcharge remedy was "an expansion of the kind of relief available under § 502(a)(3) when the plaintiff is suing a plan fiduciary and the relief sought makes the plaintiff whole for losses caused by the defendant's breach of a fiduciary duty"
- ✦ The court instructed that plaintiff "has at least stated a plausible claim for relief, and therefore further proceedings are required. We leave to the district court whether Gearld's breach of fiduciary duty claim may prevail on the merits and whether the circumstances of the case warrant the relief of surcharge"

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Surcharge as a Remedy...

Kenseth v. Dean Health Plan, Inc.

- ✦ Facts:
 - > Plaintiff underwent gastric bypass surgery intended to facilitate significant weight loss. This procedure was covered by her insurer
 - > At the time of a second surgery, plaintiff's insurance excluded coverage for treatment of obesity and related services
 - > Prior to undergoing the second surgery, plaintiff called her insurer's customer service number and spoke with a representative who assured her that the procedure would be covered subject to a \$300 deductible
 - > Plaintiff had the surgery and her insurer immediately denied coverage for excluded services
- ✦ Plaintiff sued for breach of fiduciary duty and the district court granted summary judgment to insurer, concluding that plaintiff's requested remedy constituted compensatory damages

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Kenseth: Seventh Circuit's Holding

- ✦ The Seventh Circuit reversed, holding that *Amara* "significantly altered the understanding of equitable relief available under [§ 502(a)(3)]"
- ✦ "We can now comfortably say that if *Kenseth* is able to demonstrate a breach of fiduciary duty . . . , and if she can show that the breach caused her damages, she may seek an appropriate equitable remedy including make-whole relief in the form of money damages"
- ✦ "[W]e leave it to the district court in the first instance to fashion the appropriate relief, and to determine whether surcharge or some other equitable remedy is appropriate under the particular circumstances presented here"

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Surcharge as a Remedy...

Gabriel v. Alaska Elec. Pension Fund

- ✦ Facts:
 - > Plaintiff participated in the Alaska Electrical Pension Plan
 - > After completing 8 years as a participant, plaintiff became a sole proprietor and the business made contributions on behalf of plaintiff and other employees to the Plan
 - > After it was determined that plaintiff was an owner, rather than an employee, and therefore ineligible to participate in the Plan, the plan refunded his contributions
 - > Because plaintiff had only 8 years of service, he never met the 10 year threshold for vesting under the plan
 - > Plaintiff later asked for a pension benefit calculation if he retired and was mistakenly told he would receive a monthly pension benefit
 - > Plaintiff alleged he retired early in reliance on this representation
 - > The error was discovered and plaintiff's pension benefit was cut-off
- ✦ Plaintiff sued, alleging a breach of fiduciary duty under § 502(a)(3). The district court granted defendants summary judgment on this claim, finding that the relief plaintiff sought was compensatory and equitable restitution would not lie without fraud

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Gabriel: Ninth Circuit's Revised Holding

- ✦ The Ninth Circuit initially held the plaintiff was not entitled to a surcharge remedy as a matter of law
- ✦ On a petition for rehearing, the court withdrew its earlier opinion and issued a new decision
- ✦ While the court continued to hold that equitable estoppel and reformation were not "appropriate equitable remedies" for the harm alleged by Gabriel, the court reversed course regarding a surcharge remedy for Gabriel
- ✦ The appeals court remanded the case to the district court to consider the availability of a surcharge remedy to Gabriel

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Sixth Circuit Limits *Amaral's* Reach

Rochow v. Life Ins. Co. of North America

- ✦ Background: insurer improperly denied long-term disability benefits to plan participant. District court held that plaintiff was entitled to both his unpaid benefits under the plan *and* a \$3.7 million disgorgement of profits from the insurer
- ✦ Sixth Circuit vacated, holding that equitable relief (i.e., disgorgement) was available under ERISA § 502(a)(3) only where the plaintiff cannot be made whole by recovering relief under a claim for benefits § 502(a)(1)(B)
- ✦ Reaffirmed the Supreme Court's holding in *Varity* that § 502(a)(3) claims function as a "safety net," offering relief for injuries that ERISA does not adequately remedy elsewhere

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Rochow and Denial of Benefits

- ✦ Sixth Circuit also noted that equitable relief is only available where the claim is based on an injury that is separate and distinct from the denial of benefits
- ✦ "By withholding payment of benefits until the denial was either finalized or rectified [the fiduciary] did not violate a second, distinct duty owed to Rochow and did not inflict a second injury."
- ✦ Found that plaintiff's breach-of-fiduciary-duty claim was "nothing but a repackaged claim for benefits wrongly denied"

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Key Takeaways

- ✦ The law is unsettled and rapidly changing regarding a participant's or beneficiary's potential entitlement to money damages , or "make-whole" equitable relief under ERISA as compensation for a breach of fiduciary duty
- ✦ Plan fiduciaries need to be aware that they face potential exposure to damages award as a result of actions that could be characterized as breaches of fiduciary duty
- ✦ None of the appeals court cases have yet actually awarded damages as a surcharge remedy

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Supreme Court Cases to Watch for in the 2015-2016 Term



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Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan, 593 Fed.Appx. 903 (11th Cir. 2014)

- ✦ Question Presented: Does a lawsuit by an ERISA fiduciary against a participant to recover an alleged overpayment by the plan seek "equitable relief" within the meaning of ERISA section 502(a)(3), 29 U.S.C. § 1132(a)(3), if the fiduciary has not identified a particular fund that is in the participant's possession and control at the time the fiduciary asserts its claim?

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Tyson Foods Inc. v. Bouaphakeo, 765 F.3d 791 (8th Cir. 2014)

- ✦ Not an ERISA case but it will impact ERISA class litigation.
- ✦ Supreme Court will review 2 questions of which the second question could greatly impact ERISA class actions.
- ✦ **Questions Presented:** Whether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages.

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***Spokeo, Inc. v. Robins*, 742 F.3d 409 (9th Cir. 2014)**

- ✦ Not an ERISA case but a Fair Credit Reporting Act case
- ✦ This case may impact whether ERISA plan participants have Article III standing to bring claims based on a statutory violation of ERISA.
- ✦ Question Presented: Whether Congress can confer Article III standing on a plaintiff who suffers no concrete harm, but who can recover statutorily imposed penalties for a mere violation of a federal statute?

9/29/2015

***Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014)**

- ✦ The Supreme Court has asked the Solicitor General to file a brief expressing the views of the United States regarding a venue selection clause in an ERISA plan
- ✦ An invitation to the solicitor general signals the justices' interest in a particular topic and increase the likelihood that the Supreme Court will review the case

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***Dudenhoeffer* One Year Out: ESOP ERISA Pleading in the Lower Courts**

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“Stock Drop” Cases

- ✦ Numerous actions have been brought against fiduciaries of defined contribution plans with employer stock investments when stock values have declined
- ✦ Claims typically include the following:
 - > An individual account defined contribution plan includes company stock as an investment option, and participants suffered losses because the company stock declined, often as the result of some purported wrongdoing by the company or insiders
 - > The company, its board of directors, and its senior officers are ERISA fiduciaries who allegedly breached their duties by: (1) investing plan assets in company stock; (2) failing to freeze or divest company stock from the plan; (3) making false statements about company stock to plan participants; and (4) failing to monitor fiduciaries

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Fifth Third Bancorp v. Dudenhoeffer

- ✦ Prior to the Supreme Court's decision in *Dudenhoeffer*, a majority of the courts had adopted a presumption of prudence for ESOP fiduciaries in holding employer stock
- ✦ Supreme Court unanimously held that when an ESOP fiduciary's decision to buy or hold the employer's stock is challenged in court, the fiduciary is not entitled to a special presumption that the fiduciary acted prudently in managing the plan's assets
- ✦ ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general under ERISA, except that they need not diversify the fund's assets as otherwise required under ERISA

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Dudenhoeffer: Supreme Court's Reasoning

- ✦ Plaintiffs are not required to allege that the employer was on the 'brink of collapse,' under 'extraordinary circumstances,' or the like
- ✦ The presumption at issue was not an appropriate way to eliminate meritless lawsuits, which could be better accomplished through careful, context-sensitive scrutiny of a complaint's allegations under the pleading standard discussed in *Bell Atlantic Corp. v. Twombly* and *Ashcroft v. Iqbal*
- ✦ Where a stock is publicly traded, allegations that a fiduciary should have recognized on the basis of publicly available information that the market was overvaluing or undervaluing the stock are generally implausible and thus insufficient to state a claim

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***Dudenhoeffer*: Supreme Court's Reasoning**

- ✦ To state a claim for breach of the duty of prudence, a complaint must "plausibly allege an alternative action that the defendant could have taken, that would have been consistent with the 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."
- ✦ ERISA's duty of prudence never requires a fiduciary to break the law, and so a fiduciary cannot be imprudent for failing to buy or sell stock in violation of the insider trading laws
- ✦ Lower courts faced with such claims should "consider whether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position could not have concluded that stopping purchases ... or publicly disclosing negative information would do more harm than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund."

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Practical Impact of *Dudenhoeffer*

- ✦ Following *Dudenhoeffer*, ESOP fiduciaries may no longer rely on plan language requiring that an ESOP invest primarily in employer stock or that a plan, like a 401(k) plan, must maintain an employer stock fund as an available investment option
- ✦ ESOP fiduciaries should establish and document a process for monitoring an employer stock fund similar to their review of other investment options under the plan, recognizing that the duty to diversify plan assets does not apply to the employer stock fund
- ✦ For publicly-traded employer stock, this may include regular monitoring of market price and checking for any "special considerations"
- ✦ Plan documents and communications to participants should be reviewed in light of *Dudenhoeffer*

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Ninth Circuit Applies *Dudenhoeffer*

Harris v. Amgen

- ✦ Facts:
 - > Amgen maintained plans where participants could choose to invest in an Amgen common stock fund
 - > Amgen stock dropped in value after revelation that important Amgen products were unsafe for some uses, and that Amgen had engaged in illegal off-label marketing
 - > Plaintiffs claimed that plan fiduciaries knew about the problems that caused Amgen's stock drop before the drop occurred, and thus that the fiduciaries acted imprudently under ERISA by continuing to invest in artificially-inflated Amgen stock
 - > District court dismissed pre-*Dudenhoeffer* because plaintiffs had failed to overcome presumption of prudence

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Ninth Circuit's Holding in *Harris v. Amgen*

- ✦ Invoking *Dudenhoeffer*, Ninth Circuit reversed the district court's dismissal
- ✦ Held that absent the presumption of prudence, the plaintiffs' pleadings were sufficient to survive motion to dismiss
 - > Alleged that, given the facts then known about Amgen's activity in the period before the stock drop, defendants knew or should have known about Amgen's artificially inflated stock price
- ✦ Ninth Circuit issued an amended opinion with dissent from denial of rehearing en banc in May 2015
- ✦ Dissent argued that the *Amgen* majority had failed to uphold the context-sensitive inquiry into the content of pleadings that the Court envisioned in *Dudenhoeffer*, including the possibility that the fiduciaries' termination of employee investments would itself create losses by spooking the market
- ✦ Predicted that *Amgen*, in combination with *Dudenhoeffer*, would result in a "proliferation of ERISA fiduciary suits"

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Northern District of California Applies *Dudenhoeffer*: *In re HP ERISA Litigation*

- ✦ *In re HP ERISA Litig.*, N.D. Cal., No. 3:12-cv-06199-CRB, 6/15/15
- ✦ Court revisited prior dismissal of stock-drop suit in light of *Dudenhoeffer* and *Harris v. Amgen*
- ✦ Background: Plaintiffs claimed that HP Fund fiduciaries violated their ERISA duties by concealing material facts about HP's acquisition of a company that was engaged in accounting fraud
- ✦ Plaintiffs relied on two Financial Times articles as the factual support for their claims. The articles stated that HP knew the company it acquired had reported unusually large hardware sales in the months leading to its purchase—but did not reveal any inside information indicating that HP knew about the fraud

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In re HP ERISA Litigation

- ✦ Court held that the news articles the plaintiffs relied on were not sufficient to establish “an alternative action that the defendant could have taken,” or that a “prudent fiduciary” would have acted differently as required by *Dudenhoeffer*
- ✦ The court distinguished *Amgen*. While *Amgen* involved fraud within the fiduciaries' company that they “knew or should have known” about, here the plaintiffs had not alleged facts plausibly suggesting that HP knew or should have known about the third-party company's fraud

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Post – Dudenhoeffer: *Gedek v. Perez*, 2014 WL 7174249 (W.D.N.Y., Dec. 17, 2014)

- ✦ Court denied Defendants' motion to dismiss claims based on publicly available information.
- ✦ "The complaint recites a history not just of Kodak's inexorable slide toward bankruptcy, but of publicly available information contemporaneously documenting that slide, step by painful step, and accurately forecasting Kodak's bleak future."
- ✦ "A reasonable factfinder could conclude that at some point . . . the ESOP fiduciary should have stepped in and, rather than blindly following the plan directive to invest primarily in Kodak stock, shifted the plan's assets into more stable investments, as permitted by the plan document, and as consistent with the plan's and ERISA's purposes."

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Post – Dudenhoeffer: *In re BP p.l.c. ERISA Litig.*, Slip. Op. No. 4:10-cv-04214 (S.D. Tex., Jan. 15, 2015)

- ✦ Denied Plaintiffs leave to amend their complaint to add a prudence claim based on public information.
- ✦ Granted Plaintiffs leave to amend to add a prudence claim based on non-public information: applying general pleading guidance of *Twombly* and *Iqbal*, court "could not determine, on the basis of the pleadings alone, that *no* prudent fiduciary would have concluded" that removing the BP stock fund as an investment option, or disclosing the status of BP's safety reforms, would do more good than harm.

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ESOP Stock Valuations

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ESOP Stock Valuation Settlement: *Perez v. GreatBanc Trust Co.*

✦ Facts:

- > Acting as trustee of closely-held company's ESOP, GreatBanc allegedly failed to make adequate inquiry into an appraisal that presented "unrealistic and aggressively optimistic" projections of future profitability
- > Department of Labor sued and GreatBanc settled
- > Settlement agreement included a set of process requirements GreatBanc agreed to follow when engaging in future purchases and sales of closely-held securities

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GreatBanc Key Settlement Terms

- ✦ The settlement terms do not purport to create any direct obligation on ERISA trustees other than GreatBanc
- ✦ But they do provide insight into what the DOL expects of ESOP trustees
- ✦ Key terms include:
 - > New requirements as to selection of valuation advisors
 - GreatBanc cannot use an advisor with prior relationship to the ESOP sponsor, any counterparty involved, any entity involved in structuring the transaction (e.g., investment bank), or with a prior familial or corporate relationship to GreatBanc itself.
 - > New supervision requirements
 - GreatBanc must thoroughly document the valuation analysis, and request that the company being valued provide the valuator with audited unqualified financial statements for the preceding five years.

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GreatBanc Key Settlement Terms

- ✦ Fair Market Value required
 - > GreatBanc cannot cause an ESOP to purchase employer securities for more than their FMV or sell employer securities for less than their FMV
 - > Applies irrespective of favorable interest rates or other terms of the debt used to finance the transaction
- ✦ Consideration of claw-back provisions
 - > GreatBanc is required to consider and document in writing whether it is appropriate to request a claw-back arrangement or other purchase price adjustments to protect the ESOP against the possibility of significant corporate events or changed circumstances

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Contractual Statute of Limitations and Venue Clauses

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Statute of Limitations: Supreme Court's Decision in *Heimeshoff v. Hartford Life & Accident Ins. Co.*

- ✦ Question before the Court: May a plan specify a limitations period that starts to run before the cause of action accrues?
- ✦ Holding: A contractual limitations period that is written into a plan document, even if the limitations period begins before the cause of action accrues, is enforceable under ERISA as long as the period is reasonable

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Heimeshoff: Statute of Limitations – Generally

- ✦ ERISA provides no statute of limitations for civil actions arising from denied benefit claims
- ✦ Federal common law has looked to the analogous state statute of limitations
- ✦ Permissible for plan sponsors to write a limitations period into their plans

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Heimeshoff: Key Takeaways

- ✦ Reinforces that the terms of the plan document must be enforced so long as they are clear, unambiguous and don't run afoul of ERISA
- ✦ Requires that participants file claims within a reasonable time period
- ✦ Leaves open for future litigation the question of reasonableness of a contractual limitations period
- ✦ Bad faith delays by a plan administrator in an attempt to limit judicial review can be deterred through ERISA penalties. Also, traditional defenses (e.g., waiver, estoppel, equitable tolling) could be applied where bad faith is found

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What is a Reasonable Contractual Limitations Period?

- ✦ *Claeys v. Aetna Life Ins. Co.*, 548 F. App'x 344 (6th Cir. 2013)
 - > Upheld a health plan's six-month limitations period that began upon exhaustion of administrative remedies
- ✦ *Nelson v. Standard Ins. Co.*, 2014 WL 4244048 (S.D. Cal. Aug. 26, 2014)
 - > 100 days to sue is not reasonable "in a case such as this one, where the plan administrator had not issued a final decision prior to the expiration of the limitations period."

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Disclose the Contractual Limitations Period

- ✦ *Mirza v. Insurance Administrator of America, Inc.*, 2015 WL 5024159 (3d Cir. Aug. 26, 2015)
 - > Held that plan administrators must inform claimants of plan-imposed deadlines for judicial review in their claim denial notifications
- ✦ *Spinedex Physical Therapy USA, Inc. v. United Healthcare of Arizona, Inc.* (9th Cir. 2014)
 - > Held contractual limitations period that may result in disqualification, ineligibility or denial or loss of benefits must be clearly disclosed in the SPD

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Venue Clauses

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Include a Forum Selection Clause

✦ Sample Language:

> *A participant or beneficiary may only bring an action in connection with the Plan in Federal District Court in the Northern District of California*

- ✦ The majority of courts have enforced forum selection clauses in claims arising out of the plan or will at least consider it a strong factor in a motion to transfer

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Forum Selection Clauses

- ✦ *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922 (6th Cir. 2014) (“the venue selection provision applies to all actions brought by a participant or beneficiary, not just claims for benefits.”)
- ✦ *Mroch v. Sedgwick Claims Mgmt Svcs, Inc.*, 2014 WL 7005003 (N.D. Ill. Dec. 10, 2014) (“Based upon the plain statutory language of ERISA’s venue provision and the weight of authority, it cannot be said that mandatory forum selection clauses are contrary to public policy.”)

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Church Plan Cases

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Church Plan Cases

- ✦ A number of challenges to the application of ERISA's church plan exemption have been filed
- ✦ Participants in retirement plans maintained by church-related tax-exempt entities (mostly hospitals) have sued to enforce ERISA rights
- ✦ District courts have split on the issue, but no appellate court has yet ruled

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District Courts Split Over Church Plans

- ✦ Since 2013, district courts in three circuits have decided in favor of church plans
 - > *Lann v. Trinity Health Corp.*
 - > *Medina v. Catholic Health Initiatives*
 - > *Overall v. Ascension Health*
- ✦ But district courts in three other circuits have decided in favor of beneficiaries
 - > *Rollins v. Dignity Health*
 - > *Kaplan v. Saint Peter's Healthcare Sys.*
 - > *Stapleton v. Advocate Health Care Network*
- ✦ Five other cases remain pending in the district courts

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Church Plan Cases: Key Dispute

- ✦ Conflict is over statutory interpretation
- ✦ Whether a plan must be established by a true “church” to qualify for the exemption, or an “organization...controlled by or associated with a church” will suffice
 - > Conflict between language in 29 U.S.C. § 1002(33)(A) and 1022(33)(C)
- ✦ Plaintiffs have also raised constitutional Establishment Clause arguments, but no court has reached that issue

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Statutory Conflict in Church Plan Exemption

- ✦ Courts finding in favor of employees argue that they are reading the plain language of the statute by requiring that a church plan be “established” by an actual church
- ✦ Courts finding in favor of church plans argue that the plain language does not dictate that reading, and that a broader reading better effectuates the will of Congress

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