Spring 2008

Trends™ in Litigation

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ALSTON+BIRD LLP

The first *TRENDS* edition for 2008 highlights exciting news at Alston & Bird and important new developments in the law.

Jim Grant, Co-Leader of our Litigation & Trial Practice Group, interviews John Crews, one of the cornerstones of our new Dallas office. We are very proud of developments in Dallas, and we know you will enjoy learning more about John's practice.

Scott Hilsen's article regarding corporate fraud is highly instructive. Scott recently earned the distinction of being named a Certified Fraud Examiner. The Association of Certified Fraud Examiner's Board of Regents awards this distinction only to select professionals who meet a stringent set of criteria, including character, experience, and education.

Also well worth reading are (1) Nowell Berreth's cutting edge article on climate change as it affects agriculture and (2) Pat DiCarlo's insightful piece on 401(k) plan fee litigation.

We hope you enjoy *TRENDS* and, as always, we value your comments.

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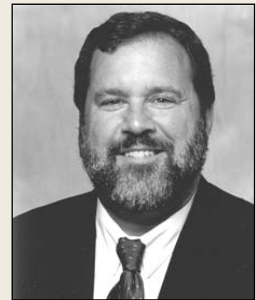

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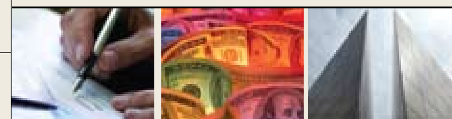

Flexibility, Experience, and Fun Are Key Ingredients to Building a Winning Team

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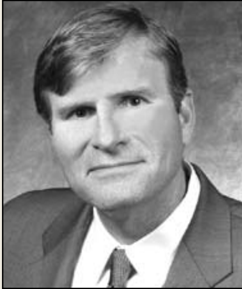

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In September, Alston & Bird opened an office in Dallas, focusing on commercial litigation. To help build our presence, we turned to a small firm that knows Texas, has a broad range of trial successes and loves its work. That firm, Crews, Shepherd & McCarty, brought its experience and entrepreneurial energy to the firm's exciting new effort. They were joined by Darren Hauck, Britt Richardson, and Gus Bahn, who moved to Dallas from our Atlanta office.

John Crews recently sat down with Atlanta-based litigator Jim Grant to discuss what it takes to start up a new office. John has been a trial lawyer for over 20 years and is recognized as one of the best all-around corporate litigators in Dallas.

Jim:

Your litigation experience is quite varied. Tell us a little bit about your practice.

John:

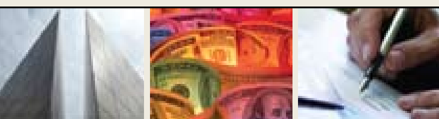
I started practicing law during an era when most people were still generalists. In those days —way back in the 1980s — I did a bit of everything from real estate to insurance bad faith, from securities to anti-trust; all kinds of commercial litigation. All told, I've probably tried about 20 cases.

Jim:

Has your practice base changed over time?

John:

Well, it's interesting. I was at a large firm (Gibson, Dunn & Crutcher) for almost 20 years where I had a pretty focused law practice — corporate economics, antitrust, securities law, and accounting liability. Then I started my own firm — Crews, Shepherd & McCarty — a few years before I came to Alston & Bird,



and found that I had gone back to becoming quite a generalist. In a small firm start-up environment, flexibility is absolutely critical. So, the last year and a half has been amazing. I have done an IRS criminal investigation, a securities investigation, investigations by the Texas State Board of Public Accountancy and the New York Attorney General's office, and some construction litigation, trade secrets, contract law. It's been great to be in the thick of things.

Jim:

What led to your decision to start your own firm?

John:

Basically, I wanted to stay in Dallas. I had the opportunity to move to New York with my former firm. It was an exciting idea, but at the end of the day, my wife and I just didn't want to leave our home here in Texas. So, with my family's support, I went off on my own.

Jim:

How has it gone?

John:

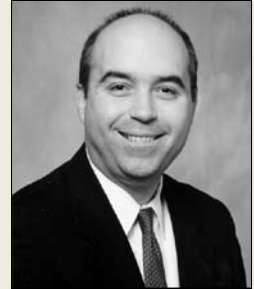
Great! I really loved practicing in a small group. And starting a firm and building something new was terrific. Really, it was amazing. We worked for a lot of new clients — lots of household names — so for a small firm we were very successful.

Jim:

With all that excitement, what led to the decision to join Alston & Bird?

John:

In fact, one of the reasons for taking the challenge of starting a new office for Alston & Bird here in Dallas was that we could replicate the excitement of building our own firm from the ground up. But by joining the Alston & Bird team, we get to do the start-up with more support — particularly the huge stable of talent in other offices — than we had as a smaller firm. So that was behind the decision to come on board.



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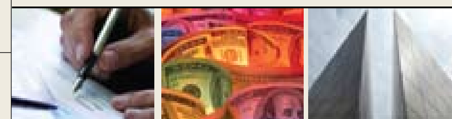

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Alston & Bird was on our very short list of firms we'd consider, because Alston & Bird had a unique reputation for combining first-class legal services in an elite firm that puts the client first…

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Jim:

How did we find each other?

John:

Well, I got a call from my friend Mike Kenny from Atlanta who had a proposition for me. At first I was hoping he was bringing our firm some business, so when he said, "I'd like you to consider becoming a partner at Alston & Bird," my initial reaction was disappointment! Then I talked about it with my partners. We'd been approached by other firms over time, which had prompted us to sit down and think about whether we would ever go back to a large firm, and under what conditions. And believe it or not, Alston & Bird was on our very short list of firms we'd consider, because Alston & Bird had a unique reputation for combining first-class legal services in an elite firm that puts the client first and allows the flexibility we wanted on client issues like rates, staffing, and other important client issues. We knew this combination would make Alston & Bird successful in Texas, even a market leader in time.

Jim:

Describe the team that came with you.

John:

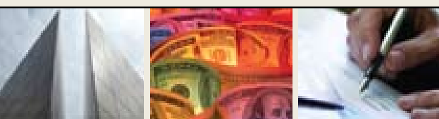
Well, for one thing, they're all great people, and very highly credentialed. Every one of them was a federal appellate court clerk from a prestigious law school (University of Michigan, William & Mary, University of Virginia, and Yale). Our goals are similar — we want to make a living, of course, but more importantly, we all want to be in a place where it is fun to go to the office each day.

Jim:

Are their practices markedly different than yours?

John:

We're all commercial litigators and have experience in complex cases, but we have slightly different sub-specialties. For example, Jon Shepherd has expertise in antitrust. Darren McCarty has a special niche in accounting liability and securities; earlier in his career he was a licensed CPA in Texas. Glen Morris is a general commercial litigator with a broad range of practice experience,



particularly on complex cases and IP. So our sub-specialties and different strengths complement each other, and that makes us a stronger team.

Jim:

What are your aspirations for Alston & Bird's Dallas office?

John:

There are three things. First, I want it to continue to be a great place to work, where everybody comes in every morning and thinks, "Am I glad to be here!" Second, I want us to become a top-tier Texas firm, with an exceptional commercial litigation practice. Third, I want to build on firm strengths and develop in our Dallas office an exceptional IP practice and corporate practice.

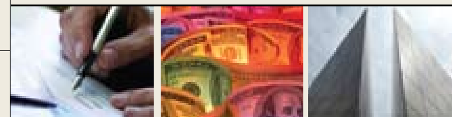
Jim:

You've mentioned several times the value of the work environment. Could you elaborate?

John:

Sure. For the past nine years Alston & Bird has been recognized by *Fortune* magazine as one of the best places in America to work. That was an important selling point for us. It's known as a great firm for a reason — people really enjoy working here — and if we didn't absolutely believe that this was a great culture, we wouldn't be here. We all wanted to be part of a culture where everybody comes into the office every morning with smiles on our faces and saying, "This is a great place to be." Otherwise, regardless of other factors, we'd still be Crews, Shepherd & McCarty and not the Dallas office of Alston & Bird!

I want to build on firm strengths and develop in our Dallas office both an exceptional IP practice and a great corporate practice.



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Preventing Corporate Fraud: The Perception of Detection

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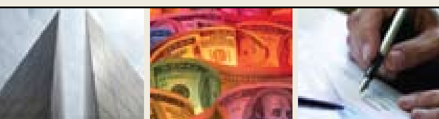
Regardless of the size of a company, it loses an estimated 5 percent of its annual revenues to occupational fraud on a dollar-for-dollar-basis. That is the result of a study by the Association of Certified Fraud Examiners (ACFE) based on 1,134 reported fraud cases in 2006.[1] For the last three years, this figure was 6 percent.[2] These amounts could be material depending upon the circumstances and certainly are at levels that would interest management. Occupational fraud, however, does not lend itself to being readily predictable or quantifiable, so it rarely is a metric that can be measured at the organizational level. When occupational fraud is viewed from a macro level, it appears that some degree exists in virtually every industry and in virtually every kind of organization, whether it is for-profit, publicly owned, or governmental.[3] Being proactive about finding and preventing fraud, therefore, not only can have a direct impact on the bottom line, but also demonstrates fiduciary responsibility.

The Delaware Supreme Court recently affirmed a corporate director's responsibilities in a case alleging that directors failed to prevent misconduct by employees, which resulted in $50 million in fines and penalties. In *Stone v. Ritter*,[4] the court held that directors can be liable in their oversight capacity when corporate employees engage in misconduct if there is a showing of bad faith. Under the affirmed *Caremark* standard, liability does not attach if directors implement a system of reporting and controls and if they monitor the system to ensure that they are being informed of risks or problems.[5] In *Stone*, the company had created and monitored a program to prevent money laundering violations and, thus, the allegations were insufficient to show bad faith. An effective fraud prevention program, therefore, is an important tool to show good faith in combating fraud and misconduct.

To prevent occupational fraud, it first is important to understand the scope, who is engaging in it, and why it is happening. Occupational fraud broadly means an employee's intentional misuse of the organization's resources or assets. The three primary categories are financial statement fraud, corruption and conflict of interest,



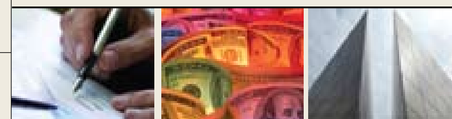
and asset misappropriation. Examples of various misconduct include accounting and financial fraud, bribery and other corrupt influence practices, and payroll and billing schemes. Whatever the flavor, they involve intentional acts for the employee's benefit at the expense of the company.

The ACFE found that over 40 percent of the individuals committing fraud were at the managerial level, and that there was no tangible difference between men and women.[6] Almost a third of the frauds were committed in the accounting department, with 20 percent in executive/upper management, and 14 percent in sales.[7] Virtually none of the individuals had criminal records, and nearly 40 percent of them colluded with another person.[8] The dollar loss associated with fraud was found to be directly proportional to a person's annual income, age, education, and tenure.[9] Regardless of the amount, however, only 40 percent of the companies recovered any of the losses.[10]

Why are these individuals committing fraud? Many theories exist, but one of the most accepted is that of Dr. Donald Cressey who devised the "fraud triangle." The fraud triangle graphically represents the three elements that must exist for fraud to occur – pressure, opportunity, and rationalization.[11] Individuals committing fraud are in positions that give them opportunity and that come hand-in-hand with pressures to perform. The rationalization oftentimes is the result of these pressures, and a difficult work environment is a common reason fraud is committed.[12] Pressures outside the workplace have been found to lead to a disproportionately large amount of fraud. The obvious ones are marital problems, substance abuse, and gambling problems, which frequently are apparent to others. But there are some that are more subtle. The desire to obtain a level of financial or social status, for instance, has been found to be a strong rationalization for some people to commit fraud and oftentimes it is not noticeable.[13]

There are some signs, however, that could signal a potential problem. In one study, the most common characteristics shared by those committing fraud were living beyond a person's means, high personal debt, an overwhelming desire for personal gain, and a feeling that pay was not commensurate with responsibility.[14] These may be manifested as unusual purchases of luxury items and property, or uncharacteristic complaints about the person's job or income, the company's stock price, or the market in general. More often than not, though, fraud is not readily detectable.

Occupational fraud broadly means an employee's intentional misuse of the organization's resources or assets.



A lot of time and money has been devoted to detecting occupational fraud. Audits of public companies must involve reasonable procedures designed to detect fraud,[15] and internal audit departments are becoming commonplace in certain industries. By far, however, the most common manner in which a fraud is discovered is by a tip. In nearly two out of three of the frauds studied by the ACFE, a tip from an employee, customer, or vender was the reason a fraud was detected.[16] It is no solace to those paying fees to outside auditors to learn that external audits were only the fifth most effective way to detect fraud, following internal audit and internal controls.[17] More disconcerting is that the second most common reason fraud is discovered is by sheer accident, accounting for over 25 percent.[18] Difficulties in detecting fraud highlight why it is vital that a company also focus on prevention.

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Effective controls, of course, must be in place to try to detect fraud, but creating the perception of detection may prevent misconduct before it occurs.

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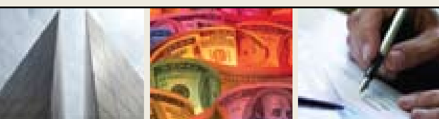
The widely accepted view among fraud prevention professionals is that the most effective fraud prevention method is to create the perception of being detected.[19] A person is less likely to commit a fraud if he or she thinks that it will be detected, regardless of the punishment, because the risk of being exposed poses the greatest threat.[20] This may explain why white-collar criminals frequently suffer a great deal more from the loss of respect and injury to their reputation than from sanctions or imprisonment. Effective controls, of course, must be in place to try to detect fraud, but creating the perception of detection may prevent misconduct before it occurs.

To do so, a company should consider working with counsel to develop a fraud prevention policy that is communicated to all levels of employees. Education about the company's prevention efforts and general controls may prevent misconduct, and employees need to know that hotlines are being monitored and that tips are being researched. Management should consider distributing information about instances in which misconduct has been discovered. Sanctions need to be enforced and, importantly, they need to be enforced consistently. In a recent interview, Sherron Watkins, the Enron whistleblower, explained that "[a]n organization just cannot afford to keep ethically challenged individuals . . . . Giving them a reprimand and stern marching orders to never break the rules again just solidifies for these type of folks that they got away with it."[21] Most importantly, as it is oft repeated, management must instill a high ethical culture and communicate its mission to prevent fraud. By understanding who is committing fraud and why, a company can create an effective plan to prevent fraud before it occurs.



Endnotes

[1] *Report to the Nation on Occupational Fraud and Abuse* ("ACFE Report"), Association of Certified Fraud Examiners (2006) at 4.

[2] *Id.* at 9.

[3] *Id.* at 18-19.

[4] No. 93, 2006, Holland, J. (Del. Nov. 6, 2006).

[5] *In re Caremark Int'l Inc. Deriv. Litig.*, 698 A.2d 959, 971 (Del. Ch. 1996).

[6] ACFE Report at 43, 44.

[7] *Id.* at 46.

[8] *Id.* at 54, 55.

[9] *Id.* at 43-44.

[10] *Id.* at 59.

[11] Donald R. Cressey, *Other People's Money: A Study in the Social Psychology of Embezzlement* (Montclair: Patterson Smith, 1973) at 30.

[12] *Id.* at 57.

[13] *Id.* at 53-57.

[14] Dr. Steve Albrecht, Keith R. Howe, and Marshall B. Romney, *Deterring Fraud: The Internal Auditor's Perspective* (1980) at 32.

[15] *See, e.g.*, Statement on Auditing Standards ("SAS") No. 99; PCAOB Auditing Standard No. 2.

[16] ACFE Report at 28.

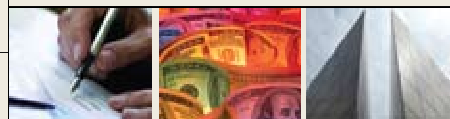
[17] *Id.* at 29.

[18] *Id.*

[19] Richard C. Hollinger and John P. Clark, *Theft By Employees* (Lexington Books 1983) at 54, 117.

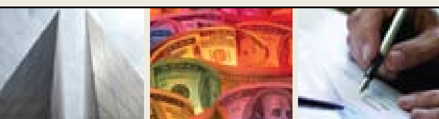
[20] *Id.* at 117.

[21] *Fraud Magazine*, "Interview with Sherron Watkins: Constant Warning," January/February 2007 at 41.



ABOUT THE AUTHOR

Scott Hilsen is a partner focusing his practice on securities and fraud litigation and corporate investigations. He is a Certified Fraud Examiner and serves as special counsel to companies in connection with internal and government investigations. Scott is on the Forensic Accounting Advisory Board of the School of Accountancy at Georgia Southern University and is a founder and co-chair of the Securities and Corporate Litigation subsection of the Atlanta Bar Association.



The Agricultural Carbon Market Working Group: Climate Change and the Role of the U.S. Agricultural Sector

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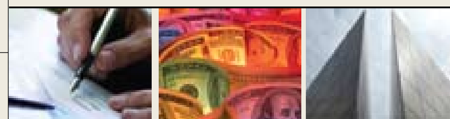
Congress is moving ahead rapidly to develop legislation to establish a cap and trade system for greenhouse gases in the United States. More than 100 bills, resolutions and amendments addressing climate change were introduced in the 110th Congress, and that legislative activity will no doubt increase as the 2008 Farm Bill is debated and implemented. Led by Alston & Bird's former farm-state senators and former Senate majority leaders Bob Dole and Tom Daschle, the firm is addressing how potential climate change legislation will affect and potentially benefit agriculture, which is one of our country's largest economic sectors.

In connection with this effort, Alston & Bird is working with the Agricultural Carbon Market Working Group, which is comprised of national farm leaders from all three major agricultural commodities, the biofuels industry and other key agricultural stakeholders. The Working Group spent the past year studying and addressing potential carbon-offset markets for agriculture that could result from national policy. The Working Group has also worked with other agricultural organizations supporting carbon markets for agriculture, such as the nine-university Consortium for Agricultural Soil Mitigation of Greenhouse Gases.

What is a cap and trade system?

Cap and trade is an approach used to control emissions of greenhouse gases in which a cap on the amount of emissions is set by a government agency or other regulating body. Credits are allocated or auctioned to emitters by the governing body. The total amount of credits cannot exceed the cap, which limits total emissions to that level. Emitters needing to increase their emissions above their allotment must purchase credits from emitters that have not used their allotment. Credits thus become a commodity that is bought and sold, i.e., traded.



Agriculture as both a source and sink of greenhouse gases

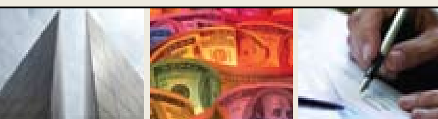
Agriculture is both a source of greenhouse gases that are released into the atmosphere and a reservoir or "sink" that can reduce those emissions by sequestering carbon in the soil. Agricultural activities impact both the release and removal of three major greenhouse gases: carbon dioxide, methane and nitrous oxide.

As a source of greenhouse gases, the agriculture sector contributes approximately 6 to 8 percent of U.S. annual emissions.

As a source of greenhouse gases, the agriculture sector contributes approximately 6 to 8 percent of U.S. annual emissions. The bulk of these emissions from agriculture involve nitrous oxide and methane. Agricultural sources of nitrous oxide emissions include soils, fertilizers and the use of manure on croplands. Methane from agriculture is largely emitted by livestock (enteric fermentation) and livestock manure.

There are significant opportunities to reduce these emissions through improvements in fertilizer applications and fertilizer technology, and through other crop and livestock management practices. And new technologies, such as advanced biofuels production processes and anaerobic digesters that convert animal waste to methane, which can be used to generate electricity, can allow farmers to produce valuable energy outputs and to achieve greenhouse gas reductions by displacing fossil-fuel use.

As a sink, agricultural soil sequestration currently offsets about 10 percent of emissions from the sector itself, and less than 1 percent of total U.S. emissions. Agriculture has the potential to contribute much more to the national effort to reduce atmospheric concentrations of greenhouse gases by enhancing carbon absorption through changed agricultural practices, like low-till or no-till cultivation, which allow the soil to absorb and retain more carbon, and by other practices. Tilling the soil with each year's plantings releases carbon into the atmosphere by disturbing the soil and increasing the exposure of carbon in the soil to the air. Tilling also removes plant residue from the prior year's crop that would have maintained the amount of carbon sequestered in the soil. No-till farming (where farmers plant seeds in narrow rows in the soil and leave residue from prior plantings intact) significantly enhances the amount of carbon that remains sequestered in the soil and significantly limits the amount of carbon released into the atmosphere with each year's plantings. In addition, as farmers rotate which crops they grow on their land from year to year, they can enhance sequestration through frequent use of cover crops—



particularly those, like hay, that do not require tillage and that fix carbon in the soil through their extensive root systems. Other practices that help sequester carbon include planting grasses on the edges of cropland and streams to prevent soil erosion and changing grazing management on rangeland and pasture (for example, by rotating grazing areas and using improved plant species). Analysis of the additional sequestration potential of the nation's existing croplands alone range from 260 to 810 million metric tons of carbon dioxide per year.

Policy options for agriculture

The Working Group has identified a series of key policy principles that it believes form the basis for informed discussion on agricultural carbon greenhouse gas markets:

- Whether legislation should be enacted to protect agriculture's opportunity to participate in new revenue streams that derive from carbon-offset markets related to conservation practices and renewable fuels.
- Whether there should be limits on the agriculture sector as an eligible carbon-offset provider.
- Whether agricultural producers should be allowed to market the value of management practices and renewable fuel-related greenhouse gas offsets that result in demonstrable improvements to global climate both through emission reductions and additional carbon sequestered terrestrially.
- Whether U.S. agriculture should participate in an international carbon market so long as countries that have agreed on limits on emissions are treated under non-discriminatory protocols.
- Whether carbon credit prices should be established in the marketplace assuring a free, open, transparent trading environment.
- Whether individual states should be allowed to choose to develop trading rules and protocols for agriculture-related carbon offsets, and whether national standards should be developed similar to other commodities that provide

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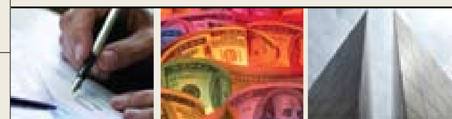


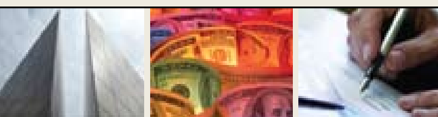
consistency and standardization through agriculture in the United States.

- Whether the United States Department of Agriculture should play a lead role in providing education, research and measurement support to agricultural entities interested in defining and marketing the value of management activities and projects that store carbon and/or reduce emissions.

The Working Group invites you to participate in this process. After holding meetings during late-2007, the Group intends to deliver its policy recommendations to Congress in early 2008. For more information, please visit the Working Group's website at *http://www.21stcenturyag.org/index.php/c/Reports/d/Sept._24_Meeting_on_Agricultural_Carbon_Markets*.

ABOUT THE AUTHOR

Nowell Berreth focuses his practice on representing agribusinesses in litigation and with respect to legislative and public policy matters. He is a member of Alston & Bird's climate change and carbon management team and serves as the vice-chair of the Agriculture Law Section of the State Bar of Georgia. He received his J.D. from Georgia State University in 1998 and his B.A. in journalism in 1991 from the University of Georgia.



401(k) Plan Fee Litigation

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Within the past year, a number of companies have been sued over the fees paid by participants in their 401(k) plans. Plaintiffs allege that defendants breached their fiduciary duties by allowing the plan's service providers to charge excessive and undisclosed fees.[1] More recently there has been a growing trend to include the service providers themselves as defendants.

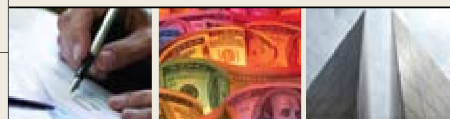
Retirement plan service fees have also been of substantial interest to Congress and regulators. The chairman of the House Committee on Education and Labor has introduced proposed legislation that would expand requirements for disclosing service fees. Similarly, the Department of Labor (DOL) has proposed regulations that would impose additional requirements for disclosures concerning fees paid to (and among) service providers.

Plaintiffs' Allegations

The service providers in the new suits include trustees, recordkeepers, brokers, plan administrators and investment providers. In a typical situation, a company hires a plan administrator to manage the plan, and the administrator employs various entities to serve as trustees, recordkeepers, brokers or investment option providers to the plan. These entities may or may not be affiliated with the administrator.

Some of the fees charged for these services are invoiced directly to the plan. However, the plan's investment options also include fees embedded in the fund's expense ratio (i.e., asset-based fees that are deducted from fund assets to calculate net returns). The expense ratio must be disclosed in the fund's prospectus and broken down into three subcategories: (1) management fees, (2) 12b-1 fees; and (3) other expenses.[2] The 12b-1 fees are generally assessed for the costs of marketing and distributing fund shares.

Plaintiffs are alleging that plan administrators (or other service providers) are requiring investment companies to "share" with them a portion of the fees earned through the expense ratio. In other words, the allegation is that service providers are making a quid pro quo deal to include certain funds as investment options in



401(k) plans in exchange for the fund's agreement to share some of the revenue it receives as a result of the plan's investment. Plaintiffs refer to such an arrangement as "revenue sharing"; however, the term "revenue sharing" appears to be a generic term used to describe a variety of payments between service providers.

Defendants deny that these payments are made to influence the choice of investment options. Rather, investment companies are reimbursing other service providers for costs such as recordkeeping, prospectus distribution, participant communication and other services.

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The decision most favorable to defendants at this point is Hecker v. Deere & Co.

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However, plaintiffs have also alleged that, even without a quid pro quo agreement, plan service fees are still excessive because they are assessed as a percentage of plan assets, and bear no relation to the actual cost of providing the services.

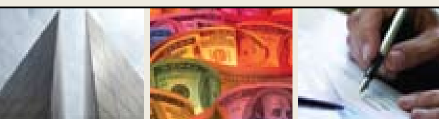
These allegations are significant because it is a breach of ERISA's fiduciary duty and prohibited by transaction rules for a fiduciary or party in interest to receive plan assets other than as "reasonable" compensation for necessary services.[3]

Fee Litigation Opinions

Although most of the fee cases are at an early stage, there have been a few rulings on dispositive motions that highlight the legal issues involved and provide clues as to where this litigation is headed.

The Hecker *Decision*

The decision most favorable to defendants at this point is *Hecker v. Deere & Co.*[4] In *Hecker*, the district court addressed a motion to dismiss allegations of excessive fees and non-disclosure brought against a plan sponsor and its investment advisor. The court dismissed the fiduciary breach claim based on excessive fees because the plan contained an open investment window that allowed participants to invest in over 2,500 funds. According to the court, the fees charged by all funds were market rates that could not all be excessive. Thus, any excessive fees were the result of participant selection, and the fiduciaries could not be held liable under the ERISA § 404(c) safe harbor, which protects fiduciaries from liability for the way participants allocate funds within their accounts.



The court also found that current legislative and regulatory proposals to require disclosure of revenue sharing payments indicate that such disclosure is not currently required. Finally, the court concluded that the service providers were not fiduciaries because they did not exercise discretionary control over plan assets or administration.

The Haddock *Decision*

The decision most favorable to plaintiffs at this point is *Haddock v. Nationwide*. In *Haddock*, the trustees of several 401(k) plans sued the plans' "investment provider" Nationwide. The trustees alleged that Nationwide's arrangements with mutual funds and retention of "revenue sharing payments" constituted breaches of fiduciary duty and prohibited transactions.

The court found that Nationwide selected a set of mutual funds from which the plans and/or participants could choose and maintained authority to delete and substitute funds from the set.[5] The mutual funds available for investment through the plans made payments to Nationwide based on a percentage of the assets invested in the mutual funds through Nationwide. The trustees alleged Nationwide engaged in a quid pro quo arrangement with the mutual funds, agreeing to include their funds as investment options for the plans in exchange for the revenue sharing payments.[6]

The court first addressed whether Nationwide acted as a fiduciary in negotiating and receiving revenue sharing payments. The court found that Nationwide may have acted as a fiduciary to the extent it exercised authority or control over plan assets by determining which mutual funds to include in the set of available investment options from which the sponsors could choose.

The court next turned its attention to the question of whether the revenue sharing payments from the mutual funds to Nationwide constituted plan assets. The *Haddock* court concluded that "plan assets" include "items a defendant holds or receives: (1) as a result of its status as a fiduciary or its exercise of fiduciary discretion or authority, and (2) at the expense of plan participants or beneficiaries."[7] Accordingly, the court concluded that the revenue sharing payments may be plan assets.

Finally, the *Haddock* court found that, even if the challenged payments were not plan assets, Nationwide may still have engaged

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The decision most favorable to plaintiffs at this point is Haddock v. Nationwide.

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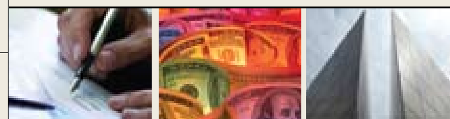


The newly proposed legislation and regulations substantially strengthen the argument that any new disclosure requirements should come from Congress or the DOL.

in prohibited transactions because (under 29 U.S.C. § 1106(b)(3)) prohibited transactions need only "relate to transactions involving assets of the plan, although the consideration received by the fiduciary need not itself constitute plan assets."[8] Accordingly, Nationwide's motion for summary judgment was denied.

The Boeckman *Decision*

In *Boeckman*, plaintiff alleged that A.G. Edwards breached its fiduciary duty and engaged in prohibited transactions by authorizing the payment of revenue sharing fees through a 401(k) plan that it sponsored. In addressing the parties' cross-motions for summary judgment, the court held that defendants were entitled to summary judgment on plaintiff's prohibited transaction claim, but neither party was entitled to summary judgment on plaintiff's prudence claims.

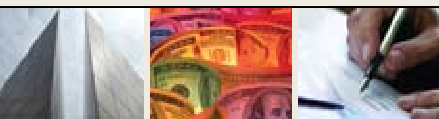
According to the *Boeckman* court, revenue sharing "costs are a normal incidence of investment and mutual fund shares," and plaintiff's prohibited transaction claim "would effectively eviscerate the statutory exemption of mutual funds from the prohibited transaction rules."

However, the court also found that plaintiff's breach of fiduciary duty claim survived summary judgment. The court found that this claim could not be resolved on a motion for summary judgment because the question of whether a fiduciary acted prudently was a question of fact for trial. Accordingly, the cross motions for summary judgment on plaintiff's prudence claims were denied.

Conclusion

There seems to be an emerging trend toward dismissing the prohibited transaction and disclosure aspects of these cases, but allowing the fiduciary breach allegations to go forward. This is not a surprising result. The newly proposed legislation and regulations substantially strengthen the argument that any new disclosure requirements should come from Congress or the DOL. Further, prohibited transaction claims tend to turn on legal questions, such as whether revenue sharing payments are plan assets, and are, thus, more amenable to disposition on motions to dismiss.

In contrast, whether a fiduciary breached his or her duties by paying or receiving "unreasonable" fees is a more fact intensive



inquiry. By the summary judgment stage, it should be apparent whether the fees at issue are consistent with market averages. If they are, plaintiffs will have an uphill battle to prove that such fees are unreasonable because they exceed the cost of providing the service by an "excessive" amount. However, cases where fees are substantially out of step with market averages may prove difficult to defend.

Endnotes

[1] These allegations are made pursuant to the Employee Retirement Income Security Act of 1974 ("ERISA").

[2] 17 C.F.R. parts 210, 239, 249, 270 and 274.

[3] ERISA § 406, 29 U.S.C. § 1106; ERISA § 408(b)(2), 29 U.S.C. §1108(b)(2).

[4] 2007 WL 1874367 (W.D. Wis. 2007).

[5] *Id.*, p. 161.

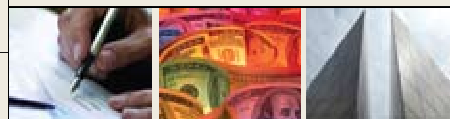
[6] *Id.*, p. 163-64.

[7] *Id.*, p. 170.

[8] *Id.*, p. 171.

ABOUT THE AUTHOR

Patrick DiCarlo focuses his practice on ERISA litigation with a particular emphasis on the ERISA and securities issues that arise in the retirement plan context. His practice has long focused on disclosure issues under ERISA, as well as the federal and state securities laws. Patrick received his J.D. from the University of Georgia School of Law in 1994 and his B.A. from the University of Georgia in 1991.



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