RECENT DEVELOPMENTS IN EMPLOYEE BENEFITS LAW

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This article surveys recent developments in employee benefits law from Fall 2011 through Fall 2012. The first portion of the survey reviews important cases impacting aspects of plan administration, interpretation, and litigation under the Employee Retirement Income Security Act of 1974, as amended (ERISA).[1] For example, two additional circuits adopted the *Moench* presumption, while the Fourth and Ninth Circuits grappled

1. 29 U.S.C. §§ 1001-1461 (2010).

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with the scope of remedies available in light of *CIGNA Corp. v. Amara*.[2] The second part focuses on regulatory developments in employee benefits law, including regulations from the U.S. Department of Labor's Employee Benefits Security Administration.

I. CASES

A. *In re Citigroup ERISA Litigation*

On October 19, 2011, the Second Circuit affirmed the dismissal of an employer-stock drop class action and adopted the *Moench* presumption of prudence.[3] Plaintiffs were participants in retirement plans sponsored by defendants Citigroup Inc. and Citibank, N.A.[4] The retirement plans mandated that a fund comprised of shares of employer stock be included as an investment option.[5] Plaintiffs brought suit after a precipitous drop in the price of Citigroup stock following the market crash of 2008.[6]

Plaintiffs alleged that the defendants: (1) "breached their fiduciary duties of prudence and loyalty" by failing to divest employer stock from the retirement plans; and (2) "breached their fiduciaries duties by failing to provide complete and accurate information" regarding the employer stock and "risks associated with the subprime market."[7] Plaintiffs also included additional derivative claims.[8]

On appeal, the Second Circuit first considered plaintiffs' prudence claim.[9] After looking to decisions from its sister circuits, the Second Circuit officially joined the Third, Fifth, Sixth and Ninth Circuits in adopting the *Moench* presumption of prudence for both eligible individual account plans (EIAPs) and employee stock ownership plans (ESOPs).[10] It rationalized that the *Moench* presumption "provides the best accommodation between the competing ERISA values of protecting retirement assets and encouraging investment in employer stock."[11] In determining the boundaries of the presumption, the Second Circuit endorsed the Ninth Circuit's "guiding principle" test whereby

2. 131 S. Ct. 1866 (2011).
3. *In re* Citigroup ERISA Litig., 662 F.3d 128 (2d Cir. 2011); *see also* Gearren v. McGraw-Hill Cos., 660 F.3d 605 (2d Cir. 2011). The *Moench* presumption was first adopted in *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).
4. *Citigroup*, 662 F.3d at 132.
5. *Id.* at 133.
6. *Id.* at 134.
7. *Id.*
8. *Id.*
9. *Id.* at 136.
10. *Id.* at 137–38. *See Moench*, 62 F.3d 553; Kirschbaum v. Reliant Energy, Inc., 526 F.3d 243 (5th Cir. 2008); Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995); Quan v. Computer Scis. Corp., 623 F.3d 870 (9th Cir. 2010).
11. *Citigroup*, 662 F.3d at 138.

> judicial scrutiny should increase with the degree of discretion a plan gives its fiduciaries to invest. Thus a fiduciary's failure to divest from company stock is less likely to constitute an abuse of discretion if the plan's terms require—rather than merely permit—investment in company stock.[12]

The Second Circuit also joined those circuits applying the *Moench* presumption at the motion to dismiss stage, noting that the presumption "is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary."[13]

After adopting the *Moench* presumption, the Second Circuit next turned to analyzing "whether plaintiffs . . . pled facts sufficient to overcome the presumption"[14] to survive a motion to dismiss for failure to state a claim pursuant to Federal Rule of Civil Procedure 12(b)(6). It noted that "only circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the settlor could require fiduciaries to override plan terms."[15] Further, it stressed that the test of prudence "is . . . one of conduct rather than results, and the abuse of discretion standard ensures that a fiduciary's conduct cannot be second-guessed so long as it is reasonable."[16] Ultimately, the Second Circuit concluded "plaintiffs fail to allege facts sufficient to show that defendants either knew or should have known that Citigroup was in the sort of dire situation that required them to override Plan terms in order to limit participants' investments in Citigroup stock."[17] Further, "[w]hile fiduciaries' decisions are not to be judged in hindsight, we note [that] Citigroup's share price fell from $55.70 to $28.74, a drop of just over 50%. Other courts have found plaintiffs unable to overcome the *Moench* presumption in the face of similar stock declines."[18] Thus, the Second Circuit dismissed plaintiffs' prudence claim pursuant to Rule 12(b)(6).

The Second Circuit next considered plaintiffs' communications claim.[19] For this claim, plaintiffs alleged both a failure to provide information and material misrepresentations regarding the soundness of Citigroup's stock.[20] Regarding the failure to provide information claim, plaintiffs did not allege violations of ERISA's reporting and disclosure requirements.[21] Instead, they alleged a failure to provide information

12. *Id.* (citation omitted).
13. *Id.* at 139.
14. *Id.*
15. *Id.* at 140.
16. *Id.*
17. *Id.* at 141.
18. *Id.*
19. *Id.* at 142–45.
20. *Id.*
21. *Id.* at 142.

regarding the expected future performance of Citigroup stock.[22] In rejecting this claim, the Second Circuit declined "to create a duty to provide participants with nonpublic information pertaining to specific investment options."[23]

With respect to plaintiffs' second communications theory, plaintiffs based their claim on misrepresentations made in SEC filings incorporated by reference into the summary plan descriptions (SPDs). First, the Second Circuit rejected an argument that the parties responsible for preparing the SEC filings could be liable under ERISA because such actions had been undertaken in a corporate capacity, not an ERISA fiduciary capacity.[24] Second, the court rejected an argument that any individuals distributing the SPDs knew or should have known of the misstatements.[25] Further, no " 'warning flags,' specific to Citigroup . . . triggered the need for an investigation" of the accuracy of the SEC filings.[26] Thus, the Second Circuit dismissed the communications claim pursuant to Rule 12(b)(6). Plaintiffs' remaining derivative claims were also dismissed due to their dependence on the prudence and communications claims.[27] Finally, the Second Circuit "agree[d] with the many courts that have refused to hold that a conflict of interest claim can be based solely on the fact that an ERISA fiduciary's compensation was linked to the company's stock."[28] Thus, the Second Circuit affirmed the district court's dismissal of all claims pursuant to Rule 12(b)(6).

Judge Straub filed a lengthy dissent in *Citigroup*,[29] in which he rejected the *Moench* presumption as "arbitrary line-drawing [that] leaves employees wholly unprotected from fiduciaries' careless decisions to invest in employer securities."[30] Instead of the deference afforded by the *Moench* presumption, he advocated plenary review of plaintiffs' prudence claims.[31] In applying plenary review to the facts of the case, he found sufficient facts that defendants "knew about Citigroup's massive subprime exposure" such that plaintiffs' complaint should survive a motion to dismiss.[32] Regarding plaintiffs' communications claim, he found that "ERISA fiduciaries must disclose material information that plan participants reasonably

22. *Id.*
23. *Id.* at 143.
24. *Id.* at 143–44.
25. *Id.* at 145.
26. *Id.*
27. *Id.* at 145–46.
28. *Id.* at 146.
29. *Id.* at 146–66 (Straub, J., dissenting).
30. *Id.* at 147 (Straub, J., dissenting).
31. *Id.* at 148 (Straub, J., dissenting).
32. *Id.* at 155 (Straub, J., dissenting).

need to know in order to adequately protect their retirement interests."[33] He also found that "plaintiffs plausibly alleged that the misstatements here at issue were knowingly made" by at least some defendants.[34] Finally, Judge Straub determined he would vacate dismissal of the additional claims, except for the conflict of interest claim based on defendants' receipt of stock-based compensation.[35]

On October 15, 2012, the U.S. Supreme Court denied without comment the petition for writ of certiorari in *Citigroup*.[36]

B. *Pfeil v. State Street Bank & Trust Co.*

In *Pfeil v. State Street Bank & Trust Co.* the Sixth Circuit addressed whether the presumption of "reasonableness" it had previously adopted in *Kuper* applies at the motion to dismiss stage.[37] In *Pfeil*, plaintiffs alleged that State Street Bank and Trust, as fiduciary for the two primary retirement plans offered by General Motors, "breached its fiduciary duty [under ERISA] by continuing to allow participants to invest in GM common stock, even though reliable public information indicated that GM was headed for bankruptcy."[38] The district court had granted State Street's motion to dismiss.[39] On appeal, acknowledging that State Street is entitled to the benefits of the *Kuper/Moench* presumption, the Sixth Circuit recognized that it had not previously addressed whether that presumption applies at the pleading stage. Accordingly, it took the "opportunity to address whether a plaintiff must plead enough facts to overcome the *Kuper* presumption in order to survive a motion to dismiss."[40]

The Sixth Circuit held that the *Kuper* presumption does not apply at the pleading stage because of "the plain language of *Kuper* where we explained that an ESOP plaintiff could 'rebut the presumption of reasonableness by showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.' "[41] Moreover, because the presumption "was cast as an evidentiary presumption" in *Kuper*, the Sixth Circuit applied the presumption to a "fully developed evidentiary record, and not merely the pleadings."[42] The Sixth Circuit

33. *Id.* at 160 (Straub, J., dissenting).
34. *Id.* at 165 (Straub, J., dissenting).
35. *Id.* (Straub, J., dissenting).
36. *See* Gray v. Citigroup Inc., No. 11-1531, 2012 WL 2375361, at *1 (U.S. Oct. 15, 2012).
37. 671 F.3d 585, 588 (6th Cir. 2012) (citing Kuper v. Iovenko, 66 F.3d 1447 (6th Cir. 1995)).
38. *Id.*
39. *Id.*
40. *Id.* at 592.
41. *Id.* (citation omitted).
42. *Id.* at 593.

noted that this holding is consistent with the standard for motions to dismiss in general because application of the presumption necessarily concerns weighing questions of fact that would be inconsistent with the Rule 12(b)(6) standard.[43]

In so holding, the Sixth Circuit acknowledged that several "sister circuits have reached the opposite conclusion and held that the *Kuper* [*Moench*] presumption should be considered at the pleadings stage."[44] However, the Sixth Circuit distinguished these cases because the *Kuper* presumption does not contain "a specific rebuttal standard that requires proof that the company faced a 'dire situation,' something short of the 'brink of bankruptcy' or 'impending collapse,'" which is the standard that has been articulated by some of the other appellate courts.[45] Instead, plaintiffs in the Sixth Circuit need only demonstrate that a "'prudent fiduciary acting under similar circumstances would have made a different investment decision.'"[46] Thus, the Sixth Circuit concluded that "[b]ecause *Kuper*'s standard for rebutting the presumption is not as narrowly defined to require proof of a 'dire situation' or an 'impending collapse,'" it would be "inappropriate to apply it to the pleadings on a motion to dismiss," contrary to those standards in other appellate courts.[47]

The *Pfeil* defendants filed a petition for writ of certiorari to the Supreme Court, which was denied on December 3, 2012.[48]

C. *Lanfear v. Home Depot, Inc.*

On May 8, 2012, the Eleventh Circuit joined the Second Circuit and other appellate courts in applying the *Moench* presumption of prudence to employer-stock drop actions.[49]

In *Lanfear*, plaintiffs were employee-participants in Home Depot, Inc.'s 401k retirement plan. The plan, which is both an EIAP and ESOP, "requires that one of the available [plan] investment funds be a 'Company Stock Fund' . . . invested primarily in shares of [Home Depot] stock."[50] Following drops in the price of Home Depot stock and allegations of internal misconduct, plaintiffs brought suit claiming defendants breached their duty of prudence by "continu[ing] to offer and approve the Home Depot Stock as an investment option for the Plan."[51] Plaintiffs also alleged that

43. *Id.*
44. *Id.* at 594 (citing Edgar v. Avaya, Inc., 503 F.3d 340 (3d Cir. 2007); *In re* Citigroup ERISA Litig., 662 F. 3d 128 (2d Cir. 2011)).
45. *Id.* at 595 (citations omitted).
46. *Id.* (citation omitted).
47. *Id.* at 595–96.
48. 133 S. Ct. 758 (U.S.).
49. Lanfear v. Home Depot, Inc., 679 F.3d 1267 (11th Cir. 2012).
50. *Id.* at 1271–72.
51. *Id.* at 1274.

defendants breached their duty of loyalty by providing inaccurate information to plan participants and not disclosing Home Depot's "deceitful business practices and how these activities adversely affected Company stock as a prudent investment option under the Plan."[52] The defendants filed a motion to dismiss, which the district court granted in full.[53] On appeal, the Eleventh Circuit reviewed this determination de novo.[54]

First, the Eleventh Circuit considered plaintiffs' prudence claim.[55] As an initial matter, the Eleventh Circuit noted the plan required only that the company stock fund be "primarily," rather than entirely, invested in Home Depot stock.[56] Nevertheless, the Eleventh Circuit elected to adopt the *Moench* presumption of prudence to "review only for an abuse of discretion the defendants' decision to continue investing in and holding Home Depot stock in compliance with the directions of the Plan."[57] Applying this standard, the Eleventh Circuit affirmed dismissal of plaintiffs' prudence claim.[58] It noted that a "16.5% decrease in stock price over a period of more than two months, followed by a rebound in the price a few months later, does not indicate that the undisclosed problem was the 'type of dire situation' " that would require divesting the plan of Home Depot stock.[59] Notably, the Eleventh Circuit considered and rejected the Sixth Circuit's reasoning in *Pfeil*, holding that the *Moench* analysis is not an evidentiary presumption, but can be applied to dismiss a claim under Rule 12(b)(6).[60]

The Eleventh Circuit also affirmed dismissal of plaintiffs' duty of loyalty claims.[61] Regarding their claim that defendants provided inaccurate information in SEC filings that were incorporated by reference into the plan documents, the Eleventh Circuit noted that "[w]hen the defendants in this case filed the Form S-8s and created and distributed the stock prospectuses, they were acting in their corporate capacity and not in their capacity as ERISA fiduciaries."[62] Thus, the defendants could not liable under ERISA for any inaccuracies in the SEC filings.[63] Lastly, the Eleventh Circuit rejected plaintiffs' claim that defendants had a duty to disclose Home Depot's "deceitful business practices" involving return-to-vendor

52. *Id.*
53. *Id.*
54. *Id.* at 1275.
55. *Id.*
56. *Id.* at 1277.
57. *Id.* at 1279.
58. *Id.* at 1282.
59. *Id.*
60. *Id.* at 1281 n.16.
61. *Id.* at 1283.
62. *Id.* at 1284.
63. *Id.*

chargebacks, noting "[w]e will not create a rule that converts fiduciaries into investment advisors."[64]

D. *Stephan v. Unum Life Insurance Company of America*

The Ninth Circuit held that the attorney-client privilege does not apply to communications between an insurer and counsel before a claims decision is made. That is, the court held that the "fiduciary exception" to the attorney client privilege should be extended to insurers that administer benefit plans governed by ERISA and act in a fiduciary capacity.[65]

In *Stephan v. Unum*, plaintiff was a participant in a long-term disability plan sponsored by his employer and insured by Unum Life Insurance Co. He "had a bicycling accident that resulted in a spinal cord injury, rendering him quadriplegic and thus permanently disabled."[66] Although there was no dispute over his eligibility to receive long-term disability benefits, "Stephan dispute[d] Unum's calculation of his pre-disability earnings, upon which his disability benefits were based."[67] Specifically, in calculating his earnings for benefit purposes, Unum included only his monthly salary but not his annual bonus. Stephan's monthly long-term disability benefits would be much higher if the calculation of his earnings included his bonus.[68]

One of the primary issues in this case was a dispute regarding the discovery of internal memoranda between Unum's claims analyst and its in-house counsel regarding whether to include Stephan's bonus in the calculation of his monthly benefit. Plaintiff argued that the "fiduciary exception" to the privilege permitted discovery of the memoranda because Unum is a fiduciary of the plan.[69] The Northern District Court of California did not permit discovery, holding that such internal correspondences were protected by the attorney-client privilege, and that the fiduciary "exception [to the attorney-client privilege] did not apply in this case."[70]

On appeal, the Ninth Circuit "agree[d] that the fiduciary exception applies to wholly-insured ERISA plans," but disagreed with the district court's holding in this instance.[71] The Ninth Circuit held that "[t]he jus-

64. *Id.* at 1285.
65. Stephan v. Unum Life Ins. Co. of Am., 697 F.3d 917 (9th Cir. 2012).
66. *Id.* at 921.
67. *Id.*
68. *Id.*
69. The "fiduciary exception" to the attorney-client privilege generally provides that an " 'ERISA fiduciary is disabled from asserting the attorney-client privilege against plan beneficiaries on matters of plan administration.' " United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999).
70. *Stephan*, 697 F.3d at 930–31.
71. *Id.* at 931.

tifications for excepting ERISA fiduciaries from attorney-client privilege apply equally to insurance companies."[72] The court noted that there are "two rationales for applying an exception to the attorney-client privilege to ERISA fiduciaries."[73] First, " '[s]ome courts have held that the exception derives from an ERISA trustee's duty to disclose to plan beneficiaries all information regarding plan administration.' "[74] However, "[o]n this view, the attorney-client privilege is subordinated to the fiduciary's disclosure obligation."[75] Second, " '[o]ther courts have' reasoned that because the ERISA fiduciary is 'a representative for the beneficiaries of the trust which he is administering,' it is not the fiduciary, but rather the plan beneficiary that is the 'real client.' "[76] "On this view," the court reasoned, "the fiduciary exception is not really an exception at all."[77] Rather, the "[a]ttorney-client privilege is maintained; there is only a different understanding of the identity of the client."[78]

Thus, the Ninth Circuit held:

> Neither of these theories provides any basis for distinguishing ERISA trustees, to whom the Ninth Circuit has already extended the fiduciary exception, from insurance companies also serving in the role of ERISA fiduciary. The duty of an ERISA fiduciary to disclose all information regarding plan administration applies equally to insurance companies as to trustees.[79]

The court went on to hold that "the obligation that an ERISA fiduciary act in the interest of the plan beneficiary does not differ depending on whether that fiduciary is a trustee or an insurer."[80] Therefore, the court held there is "no principled basis for excluding insurers from the fiduciary exception."[81]

This decision is notable because the Ninth Circuit acknowledged that the Third Circuit had issued a contrary decision in *Wachtel v. Health Net, Inc.*, holding that the fiduciary exception was not applicable to insurance companies.[82] However, the Ninth Circuit did not distinguish its decision from *Wachtel*, arguably creating a circuit split on this issue.

72. *Id.*
73. *Id.*
74. *Id.* (quoting United States v. Mett, 178 F.3d 1058, 1063 (9th Cir. 1999)).
75. *Id.*
76. *Id.* (quoting *Mett*, 178 F.3d at 1063).
77. *Id.*
78. *Id.*
79. *Id.*
80. *Id.* at 932.
81. *Id.*
82. *Id.* at 931 n.6 (citing Wachtel v. Health Net, Inc., 482 F.3d 225 (3d Cir. 2007)).

E. *Skinner v. Northrop Grumman Retirement Plan B*

In *Skinner v. Northrop Grumman Retirement Plan B*,[83] the Ninth Circuit became the first federal appellate court to consider the availability of "reformation" and "surcharge" under ERISA § 502(a)(3) after the Supreme Court's decision in *CIGNA Corp. v. Amara*.[84] In *Skinner*, the plaintiffs/appellants were participants in employer-sponsored retirement plans.[85] Plaintiffs sought reformation and surcharge on the basis of an inaccurate summary plan description (SPD).[86] However, as a crucial concession, they "conceded, both in their brief and at oral argument, that they presented no evidence of reliance on the inaccurate SPD and that they do not claim estoppel."[87]

The Ninth Circuit first considered a reformation claim under ERISA § 502(a)(3),[88] noting its uncertainty regarding "whether we should analyze reformation in the context of trust law or contract law because retirement plan documents are similar to both trusts and contracts."[89] This distinction proved irrelevant because both theories required mistake or fraud.[90] The court determined reformation may be appropriate under a mistake theory where plan terms fail to reflect the drafter's true intent.[91] Under the facts of *Skinner*, however, there was no evidence that the plan did not reflect the drafter's true intent.[92] The court also rejected an argument that the inaccurate SPD was evidence of the drafter's true intent because there was no evidence of authorship of the SPD or that the SPD had "any intent at all, other than the intent to create an 'accurate and comprehensive' summary" of the plan.[93]

The court also rejected a claim for reformation under a fraud theory,[94] finding no evidence that the plan contained "terms that were induced by fraud, duress, or undue influence."[95] The inaccurate SPD was not evidence of fraudulent inducement because "[t]he SPD summarizes the plan, so it appears to have been created after the plan, and Appellants have provided no evidence to allow us to infer otherwise."[96] The court

83. 673 F.3d 1162 (9th Cir. 2012).
84. 131 S. Ct. 1866 (2011).
85. 673 F.3d at 1164.
86. *Id.* at 1165–66.
87. *Id.* at 1165.
88. *Id.* at 1166–67.
89. *Id.* at 1166.
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.* at 1166–67.
95. *Id.* at 1166.
96. *Id.* at 1166–67.

specifically distinguished *Amara* as involving "materially distinguishable" facts where the employer had " 'intentionally misled its employees.' "[97] In *Skinner*, there was no evidence that the employer materially misled its employees, and "even if it had, . . . Appellants have conceded that they did not rely on any of the misleading information."[98] Thus, the court rejected the claim for reformation under ERISA § 502(a)(3).

The court next considered plaintiffs' remaining claim for surcharge.[99] It noted that ERISA contains "a statutory duty to provide participants with an SPD that was 'sufficiently accurate and comprehensive to reasonably apprise' " participants of their rights and obligations under a plan.[100] Thus, the court determined surcharge may be an appropriate remedy "for benefits [defendants] gained through unjust enrichment or for harm caused as the result of [their] breach."[101] Despite recognizing the possibility of a surcharge remedy, the court determined surcharge was not appropriate under the facts of *Skinner*.[102] First, there was no evidence of unjust enrichment because there was no evidence that any benefit was gained by the inaccurate SPD.[103] Second, there was no evidence of actual harm sufficient for compensatory relief.[104] Plaintiffs expressly conceded that they did not rely on the inaccurate SPD, and the court held "they establish[ed] no harm for which they should be compensated."[105] Significantly, the court rejected a claim that the "harm" of being deprived of an accurate SPD was compensable, noting that such a holding would make plan administrators "strictly liable for every mistake in summary documents."[106] Thus, the court rejected the claim for surcharge under ERISA § 502(a)(3) and affirmed the district court's grant of summary judgment in favor of the defendants.

F. *McCravy v. Metropolitan Life Insurance Company*

In *McCravy v. Metropolitan Life Insurance Company*,[107] the Fourth Circuit took its turn to consider the scope of remedies under ERISA § 502(a)(3) in light of *CIGNA Corp. v. Amara*. Debbie McCravy was a participant in her employer's life insurance and accidental death and dismemberment

97. *Id*. at 1167.
98. *Id*.
99. *Id*.
100. *Id*. (quoting 29 U.S.C. §§ 1022(a), 1024)).
101. *Id*.
102. *Id*.
103. *Id*.
104. *Id*.
105. *Id*.
106. *Id*.
107. 690 F.3d 176 (4th Cir. 2012).

plan.[108] The plan allowed participants to "purchase coverage for 'eligible dependent children.'"[109] McCravy elected to "buy [such] coverage for her daughter, Leslie McCravy, and paid premiums [for such coverage] . . . from before Leslie's nineteenth birthday until she was murdered in 2007 at the age of 25."[110] Upon her daughter's death, McCravy filed a claim for benefits under the plan.[111] Metropolitan Life Insurance Company (MetLife), the plan administrator, denied McCravy's claim on the basis that Leslie did not qualify for coverage under the plan's definition of "eligible dependent children," which included a maximum age limit of 24.[112] Since Leslie was 25 at the time of her death, MetLife denied McCravy's claim and attempted to refund the premiums it had previously accepted for Leslie's coverage.[113]

McCravy refused to accept the premium refund, and instead brought suit against MetLife.[114] The district court entered summary judgment for McCravy, but limited her damages to return of the premiums.[115] The Fourth Circuit affirmed this judgment in May 2011, but later granted a petition for panel rehearing on the basis of the Supreme Court's decision in *Amara*.[116]

On rehearing, the Fourth Circuit considered *Amara's* impact on McCravy's available remedies under ERISA § 502(a)(3).[117] The Fourth Circuit summarized *Amara* as "stand[ing] for the proposition that remedies traditionally available in courts of equity, expressly including estoppel and surcharge, are indeed available to plaintiffs suing fiduciaries under Section 1132(a)(3)."[118] With this finding, the Fourth Circuit determined that McCravy's damages were not limited to a premium refund.[119] Instead, surcharge and equitable estoppel were potentially appropriate remedies for McCravy's fiduciary breach claim under ERISA § 502(a)(3).[120] Ultimately, the Fourth Circuit remanded for the district court to consider whether surcharge and equitable estoppel would be appropriate remedies under the specific facts of the case.[121]

108. *Id.* at 178.
109. *Id.*
110. *Id.*
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.* at 179.
116. *Id.*
117. *Id.* at 179–80.
118. *Id.* at 181.
119. *Id.* at 181–83.
120. *Id.*
121. *Id.* at 183.

G. *US Airways, Inc. v. McCutchen*

On November 16, 2011, a panel of the Third Circuit issued the year's most significant reimbursement opinion, *U.S. Airways, Inc. v. McCutchen*.[122] James McCutchen was in a serious automobile accident that left him functionally disabled.[123] On account of this accident, his health benefit plan paid medical expenses amounting to $66,866.[124] Following the accident, he brought an action against the driver of the car who caused the accident.[125] With the assistance of counsel, he recovered $110,000.[126] In response, the plan administrator of the health benefit plan sought reimbursement of the entire $66,866 it had paid in accordance with plan terms allowing full reimbursement.[127] This demand was "without allowance for McCutchen's legal costs" and was thus for an amount higher than McCutchen's net recovery.[128] When McCutchen refused to reimburse the plan, US Airways, in its capacity as plan administrator, brought suit under § 502(a)(3) "seeking 'appropriate equitable relief' in the form of a constructive trust or an equitable lien."[129] Relying on the plan's term and previous decisions from the Third Circuit, the district court granted summary judgment to US Airways.[130]

On appeal, the Third Circuit created a circuit split when it agreed with McCutchen that "the phrase 'appropriate equitable relief' means more than just that the relief US Airways seeks must be of an equitable type; courts must also exercise their discretion to limit that relief to what is 'appropriate' under traditional equitable principles."[131] In particular, McCutchen argued, and the court agreed, that the principle of unjust enrichment limited US Airways' claim.[132] Ultimately, the Third Circuit remanded for the district court to determine "what *would* constitute appropriate equitable relief for US Airways."[133]

Following issuance of this opinion, the Third Circuit denied a request for rehearing en banc. However, the Supreme Court granted certiorari and will thus soon have the opportunity to revisit the scope of equitable relief under § 502(a)(3).[134]

122. 663 F.3d 671 (3d Cir. 2011).
123. *Id.* at 673.
124. *Id.* at 672.
125. *Id.* at 673.
126. *Id.*
127. *Id.*
128. *Id.* at 672.
129. *Id.* at 673.
130. *Id.* at 674.
131. *Id.* at 676.
132. *Id.*
133. *Id.* at 679.
134. No. 11-1285, 2012 WL 1439294 (June 25, 2012).

H. *Cinotto v. Delta Air Lines, Inc.*

The Eleventh Circuit recently held that Delta Air Lines, Inc. did not violate ERISA's anticutback rule when it amended the Delta Family-Care Retirement Plan to freeze future accrual of benefits.[135] The Delta plan calculated "a participant's retirement benefit factors in (1) years of service, (2) earnings at Delta, and (3) an offset for the amount of the participant's Social Security benefit. The earliest retirement age under the Plan is age 52."[136] Effective December 31, 2005, the Delta plan was amended to freeze future benefit accruals:

> By virtue of Amendment Seven, the amended Introduction to the Plan provided that "[e]ffective December 31, 2005, all benefits under the Plan are frozen for all Participants and there shall be no further accruals of benefits under this plan after that date." Amendment Seven also added [the following] language to the end of the Plan's definition of "Accrued Benefit": "A Participant shall not accrue any additional benefits under the Plan after December 31, 2005."[137]

In short, this meant that even though "a participant continued to work for Delta, no additional months of service or earnings would be taken into account in calculating either his retirement or termination benefit under the Plan."[138] Two years later, Delta again amended the Plan:

> Amendment Eight modified who was eligible for a favorable Social Security offset, but left intact the benefit accrual freeze. . . . Amendment Eight changed the calculation of the Social Security offset for only an employee who was under age 52 on March 31, 2007 (the effective date of Amendment Eight), and not yet eligible for a retirement benefit but who subsequently continued to work for Delta until age 52 and then became eligible for a retirement benefit. Amendment Eight eliminated the possibility that an under-age-52 participant could decrease his Social Security offset (and thereby increase his future retirement benefit) by continuing to work at Delta past age 52 and becoming eligible for a retirement benefit under Amendment Seven's more favorable offset formula (i.e., of 2003 level pay to December 31, 2005, and no pay thereafter).[139]

"At the time Amendment Eight went into effect, [Plaintiff] Cinotto was still under age 52 and still employed by Delta."[140] The Delta defendants moved to dismiss Cinotto's complaint and the district court granted the motion. The court held that because Cinotto had not yet become

135. Cinotto v. Delta Air Lines Inc., 674 F.3d 1285, 1291 (11th Cir. 2012).
136. *Id.* at 1287.
137. *Id.*
138. *Id.*
139. *Id.* (emphasis omitted).
140. *Id.*

eligible for the calculation based on service to Delta after age 52, the amendment could not violate the anticutback rule. Rather, Cinotto's articulation of a "future benefit expectation" is not something protected under ERISA.[141]

In affirming, the Eleventh Circuit began by distinguishing what is an "accrued benefit for purposes of the anti-cutback rule versus a future benefit accrual or a vesting requirement not subject to the rule," and went on to conclude that Cinotto had not accrued this more favorable Social Security offset benefit at the time Amendment Eight went into effect.[142] Recognizing that "the [Delta] Plan arguably gave a participant a right to a certain offset formula upon reaching age 52 and becoming entitled to a retirement benefit," the Eleventh Circuit noted "that right was dependent upon future service."[143] Instead,

> [b]oth the day before and the day after Amendment Eight, the lower Social Security offset for a retirement benefit had not become part of Cinotto's accrued benefit because she was under age 52 and depended on future employment with Delta to become eligible for a retirement benefit. Under Amendment Seven, Cinotto expected that if she continued to work at Delta and retired from Delta after reaching age 52, the Plan would estimate her Social Security benefits by assuming "no pay" after December 31, 2005. That did not mean the retirement formula using that particular offset was part of her accrued benefit.[144]

In short, the *Cinotto* panel held that the "Amendment Eight d[id] not come within the scope of ERISA's anti-cutback rule" because "[t]he anti-cutback rule protects only an accrued benefit from being reduced by plan amendment."[145] The Eleventh Circuit explained that

> [w]here the right to future benefit accruals are contingent on additional service, such future increases are not *presently* accrued benefits. Put another way, a plan may freely amend how benefits are accrued in the future (or even end their accrual) so long as the amendment "goes to the terms of compensation for continued, future employment."[146]

Although "Cinotto had an expectation for how the Social Security offset would work if she continued to work until age 52 and then retired from Delta," the Eleventh Circuit held that "[t]he anti-cutback rule

141. *See* Cinotto v. Delta Air Lines, Inc., No. 1:09-cv-01739-JOF, slip op. at 18, (N.D. Ga. Sept. 10, 2010), ECF No. 30.
142. *Cinotto*, 674 F.3d at 1291.
143. *Id.* at 1296.
144. *Id.* at 1296–97.
145. *Id.* at 1297.
146. *Id.* at 1297 (quoting Central Laborers' Pension Fund v. Heinz, 541 U.S. 739, 747 (2004)).

does not protect a mere expectation based on anticipated years of future employment."[147]

On October 29, 2012, the U.S. Supreme Court denied without comment the petition for a writ of certiorari.[148]

II. REGULATORY DEVELOPMENTS

On February 3, 2012, the Department of Labor published a final rule requiring certain disclosures to be made by service providers under ERISA § 408(b)(2).[149] The rule applies to covered service providers who expect to make at least $1,000 in compensation for services provided to ERISA-covered defined benefit and defined contribution pension plans.[150] In short, it requires that covered service providers disclose information regarding their compensation and potential conflicts of interest. For example, services providers must describe the services to be provided and the direct and/or indirect compensation that they "reasonably expects" to receive for such services.[151] Failure to disclose this information will result in a prohibited provision of services under ERISA § 406(a)(1)(C).

The final rule contains changes in response to comments received on the interim final rule, including: expansion of the information that must be disclosed regarding "indirect compensation;" exemption for certain Internal Revenue Code § 503(b) annuity contracts and custodial accounts; addition of disclosure requirements regarding annual operating expenses; and clarification of the definition of "compensation." Disclosure errors or omissions must be corrected "as soon as practicable, but not later than 30 days from the date on which the covered service provider knows of such error or omission."[152]

Although this fee disclosure rule provides guidance, many gray areas remain. For example, it is uncertain whether ERISA reimbursement accounts and marketing allowances are "indirect compensation" subject to disclosure. Further, it will ultimately be upon the plan sponsors to determine, after reviewing disclosure statements from service providers, whether the fees are "reasonable." To safeguard against the gray area of determining "reasonableness," plan sponsors have been advised to utilize benchmarking reports to compare costs.

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147. *Id.*

148. Cinotto v. Delta Air Lines, Inc., et al., No. 12-233, 2012 WL 4007583, at *1 (U.S. Oct. 29, 2012).

149. 29 C.F.R. § 2550.408b-2.

150. 29 C.F.R. § 2550.408b-2(c)(1)(iii).

151. 29 C.F.R.§ 2550.408b-2(c)(1)(iv)(C)(1)-(2).

152. 29 C.F.R.§ 2550.408b-2(c)(1)(vii).

The final rule went into effect on July 1, 2012.[153] The applicability dates for the participant-level disclosure rule were modified to coincide with the fiduciary-level disclosure rule.[154] As set forth in the Final Rule, the Employee Benefits Security Administration stated that "[t]his linkage will ensure that the 408(b)(2) regulation becomes effective first, and that all plans (regardless of whether they are calendar year plans) will be able to take advantage of the transition period following the 408(b)(2) regulation's effective date."[155] Consequently, based on the July 1, 2012, effective date for the service provider fee disclosure rule, the first participant-level initial annual fee disclosures were due August 30, 2012, for calendar year plans (i.e., sixty days after July 1, 2012).[156] The participant-level fee disclosure rule requires that participants be provided with certain plan-related and investment-related information.[157] To summarize, the final regulation provides that participants in 401(k)-type pension plans must be "made aware of their rights and responsibilities with respect to the investment of assets held in, or contributed to, their accounts and [be] provided sufficient information regarding the plan and the plan's investment options. . . ."[158]

III. CONCLUSION

It has always been a bit of a mine field for fiduciaries complying with ERISA's strict fiduciary requirements; however, that playing field appears to be changing at an even faster pace. This is particularly true given the Supreme Court's decision in *Cigna v. Amara* in 2010, which opened up new avenues for potential equitable relief under ERISA. Further, the Third Circuit's decision in *McCutcheon*, which was argued before the Supreme Court in November 2012 and will be addressed in next year's survey, will have tremendous impact on the extent to which fiduciaries can rely on the plan's terms in administrative decisions.

153. 29 C.F.R.§ 2550.408b-2(c)(1)(xi).

154. Requirements for Fee Disclosures to Plan Fiduciaries and Participants—Applicability Dates, 29 C.F.R. § 2550 (2011).

155. *Id.*

156. *Id.*

157. U.S. Dept. of Labor, Emp. Benefits Sec. Admin., Fact Sheet: Final Rule to Improve Transparency of Fees and Expenses to Workers in 401(k)-Type Retirement Plans (Oct. 14, 2010), *available at* http://www.dol.gov/ebsa/pdf/fsparticipantfeerule.pdf.

158. *Id.*