RECENT DEVELOPMENTS IN EMPLOYEE BENEFITS LAW

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I. INTRODUCTION

This article surveys recent developments in employee benefits law from Fall 2014 through Fall 2015. The first portion of the survey reviews two important U.S. Supreme Court cases from last term, *Tibble v. Edison International* and *M&G Polymers USA, LLC v. Tackett*. In *Tibble*, the Supreme Court recognized a continuing duty to monitor investments

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and remove imprudent ones. In *M&G Polymers*, the Supreme Court rejected the Sixth Circuit's *Yard-Man* presumption that collective bargaining agreements create a vested right to retiree health care benefits.

The second portion of the survey reviews eight important decisions issued by U.S. Courts of Appeals during the past year. The past year saw a wide range of decisions from the circuit courts, including a decision considering whether disgorgement of profits was available in addition to the payment of wrongfully withheld disability benefits and a case involving medical provider standing and exhaustion. The circuit courts also provided additional analysis of recent Supreme Court cases from the past few years, including several opinions interpreting *Heimeshoff v. Hartford Life & Accident Insurance Co.* and *Fifth Third Bancorp v. Dudenhoeffer*.

The final portion of the survey reviews a proposed rule from the Department of Labor that would provide long-anticipated guidance regarding when financial investment advisors become fiduciaries to employee benefit plans.

II. SURVEY OF CASE LAW

A. *Supreme Court Cases*

1. *Tibble v. Edison International*[1]

Under ERISA, a breach of fiduciary duty complaint is timely if filed no more than six years after "the date of the last action which constituted a part of the breach or violation" or "in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation. . . ."[2] In *Tibble*, the U.S. Supreme Court considered whether a "fiduciary's allegedly imprudent retention of an investment is an 'action' or 'omission' that triggers the running of the six–year limitations period."[3]

In 2007, several individual beneficiaries of the Edison 401(k) Savings Plan filed suit, claiming that defendants breached their fiduciary duties to the plan and its beneficiaries with respect to three mutual funds added to the plan in 1999 and three mutual funds added to the plan in 2002.[4] The plaintiffs argued that the defendants acted imprudently by offering six higher priced retail-class mutual funds as investment options when materially identical lower priced institutional-class mutual funds were available.[5]

1. 135 S. Ct. 1823 (2015).
2. 29 U.S.C. § 1113 (1989).
3. 135 S. Ct. at 1826.
4. *Id.*
5. *Id.*

With respect to the three mutual funds added to the plan in 1999, the U.S. District Court for the Central District of California held that the plaintiffs' claims were "untimely" because, "unlike the other contested mutual funds, these mutual funds were included in the plan more than six years before the complaint was filed in 2007. As a result, the 6–year statutory period had run."[6] The district court nevertheless allowed the plaintiffs to argue that their complaint was still timely "because these funds underwent significant changes *within* the 6–year statutory period that should have prompted respondents to undertake a full due-diligence review and convert the higher priced retail-class mutual funds to lower priced institutional-class mutual funds."[7] The district court concluded, however, that the plaintiffs did not meet their burden of showing that a "prudent fiduciary would have undertaken a full due-diligence review of these funds as a result of the alleged changed circumstances" and "the circumstances had not changed enough to place respondents under an obligation to review the mutual funds and convert them to lower priced institutional-class mutual funds."[8] The Ninth Circuit affirmed, holding that the plaintiffs' claims regarding the mutual funds selected in 1999 were untimely "because petitioners had not established a change in circumstances that might trigger an obligation to review and to change investments within the 6–year statutory period."[9] The plaintiffs petitioned for certiorari.

Vacating the Ninth Circuit's holding, the Supreme Court held that the Ninth Circuit "erred by applying a statutory bar to a claim of a 'breach or violation' of a fiduciary duty without considering the nature of the fiduciary duty."[10] The Supreme Court noted that a fiduciary "has a continuing duty of some kind to monitor investments and remove imprudent ones" and that this "continuing duty exists separate and apart from the trustee's duty to exercise prudence in selecting investments at the outset."[11] Accordingly, the Supreme Court held that a plaintiff "may allege that a fiduciary breached the duty of prudence by failing to properly monitor investments and remove imprudent ones."[12] The Supreme Court went on to hold that "so long as the alleged breach of the continuing duty occurred within six years of suit, the claim is timely."[13]

6. *Id.* (citing 639 F. Supp. 2d 1074, 1119–20 (C.D. Cal. 2009)).
7. *Id.* at 1827 (emphasis in original).
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.* at 1828–29.
12. *Id.* at 1829.
13. *Id.*

2. *M&G Polymers USA, LLC v. Tackett*[14]

On January 26, 2015, the Supreme Court rejected the Sixth Circuit's *Yard-Man* presumption that collective bargaining agreements create a vested right to retiree health care benefits.

In *M&G Polymers*, a group of retired employees and their former employer disagreed over whether certain expired collective bargaining agreements created a right to lifetime health care benefits for the retirees.[15] The retirees claimed that the health care benefits were vested, while the employer claimed that the provisions regarding the health care benefits terminated when the agreements expired.[16] The Sixth Circuit sided with the retirees, relying on its prior precedent in *International Union, United Automobile, Aerospace, & Agricultural Implement Workers of America v. Yard-Man, Inc.*[17] In *Yard-Man*, the Sixth Circuit relied on the "context" of labor negotiations to resolve an ambiguity in a collective bargaining agreement in favor of the retirees' interpretation that such agreement created a vested right to retiree health care benefits.[18]

The Supreme Court granted certiorari and vacated the Sixth Circuit's decision, finding the reasoning of *Yard-Man* to be "incompatible with ordinary principles of contract law."[19] The Court began its analysis of the dispute by noting ERISA's different treatment of pension benefits versus welfare benefits.[20] While pension benefits are subject to strict rules regarding vesting and cutbacks, welfare benefits are exempt from such rules.[21] Instead, "plan sponsors are generally free under ERISA, for any reason at any time, to adopt, modify, or terminate welfare plans."[22] Thus, the Court noted the importance of "the rule that contractual 'provisions ordinarily should be enforced as written is especially important when enforcing an ERISA [welfare benefits] plan.' "[23] With that background, the Supreme Court held that collective bargaining agreements, including those establishing ERISA plans, should be interpreted pursuant to "ordinary principles of contract law, at least when those principles are not inconsistent with federal labor policy."[24]

14. 135 S. Ct. 926 (2015).
15. *Id.* at 930.
16. *Id.*
17. *Id.* (citing 716 F.2d 1476 (1983)).
18. *Id.* at 932.
19. *Id.* at 930.
20. *Id.* at 933.
21. *Id.*
22. *Id.* (quoting Curtiss-Wright Corp. v. Schoonejongen, 514 U.S. 73, 78 (1995)).
23. *Id.* (quoting Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604, 611–12 (2013)).
24. *Id.* (citation omitted).

The Supreme Court next considered the Sixth Circuit's argument that its *Yard-Man* inferences were drawn from ordinary contract law.[25] In *Yard-Man*, the Sixth Circuit noted that the collective bargaining agreement had provisions for terminating active employees' insurance benefits, but no provisions specifically addressing retiree benefits.[26] Thus, the Sixth Circuit inferred an intent to vest the retiree benefits for life.[27] The Sixth Circuit also purported to apply the rule that contracts should be interpreted to avoid illusory promises, finding that the retiree benefits provision would be illusory for many retirees who had not yet reached age requirements if the benefits terminated when the contract expired.[28] Finally, the Sixth Circuit concluded that the context of labor negotiations supported an inference that the benefits were vested.[29] Since retirees were not "'mandatory subjects of collective bargaining'" and the union "'owes no obligation to bargain for continued benefits for retirees[,]'" the Sixth Circuit held it was "'unlikely that such benefits . . . would be left to the contingencies of future negotiations.'"[30]

The Supreme Court "disagree[d] with the appellate court's assessment that the inferences applied in *Yard-Man* and its progeny represent ordinary principles of contract law[,]" finding instead that *Yard-Man* "violates ordinary contract principles by placing a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements."[31] The Supreme Court criticized the *Yard-Man* inferences as not being based on any record evidence regarding the parties' actual intentions.[32] The Supreme Court also noted that the Sixth Circuit had improperly refused to apply general durational clauses to provisions governing retiree benefits and misapplied other traditional principles, e.g., "courts should not construe ambiguous writings to create lifetime promise."[33] The Sixth Circuit also misapplied the illusory promises doctrine since a promise that benefits at least some class of retirees is not "illusory."[34]

The Supreme Court concluded by noting that there was "no doubt that *Yard-Man* and its progeny affected the outcome here."[35] Accordingly, since the Court had rejected the *Yard-Man* inferences, *M&G Polymers*

25. *Id.* at 933–34.
26. *Id.* at 934.
27. *Id.*
28. *Id.*
29. *Id.*
30. *Id.* (quoting *Yard-Man*, 716 F.2d at 1482).
31. *Id.* at 935.
32. *Id.* at 936.
33. *Id.*
34. *Id.*
35. *Id.* at 937.

was vacated and remanded for the Sixth Circuit to apply ordinary principles of contract law in the first instance.[36]

B. *Circuit Court Cases*

1. *Rochow v. Life Insurance Co. of North America*[37]

On rehearing *en banc*, the Sixth Circuit vacated and remanded a prior Sixth Circuit decision and held that a participant was not entitled under ERISA to the disgorgement of profits connected with the denial of his claim for long-term disability benefits.

Daniel Rochow was forced to resign from his job in 2002 after experiencing memory loss, chills, sweating, and stress at work.[38] Shortly thereafter, he was diagnosed with a rare and severely debilitating brain infection.[39] Later that year, Rochow filed a claim for long-term disability benefits from his former employer's plan.[40] His claim and subsequent appeals were denied based on the insurer's conclusion that Rochow's employment ended before his disability began.[41]

In 2004, Rochow filed a lawsuit seeking to recover the disability benefits and also alleging a fiduciary breach based on the failure to pay benefits.[42] Rochow was successful in arguing that the failure to pay benefits was arbitrary and capricious.[43] Subsequent litigation focused on whether Rochow (and, after he passed away, his estate) was also entitled to the disgorgement of profits based on the wrongfully retained benefits.[44]

In 2009, the U.S. District Court for the Eastern District of Michigan granted Rochow's motion for an equitable accounting and disgorgement of profits and, in 2012, ordered the insurer to pay approximately $3.8 million in addition to the wrongfully retained benefits.[45] On appeal, a panel of the Sixth Circuit affirmed the disgorgement award.[46] The Sixth Circuit then granted the insurer's petition for an *en banc* rehearing and vacated the panel's decision.[47]

On review of the panel's decision, the *en banc* court concluded that Rochow was "made whole under § 502(a)(1)(B) through recovery of his disability benefits and attorney fees, and potential recovery of prejudgment

36. *Id.*
37. 780 F.3d 364 (6th Cir. 2015).
38. *Id.* at 366.
39. *Id.* at 366–67.
40. *Id.* at 367.
41. *Id.*
42. *Id.*
43. *Id.*
44. *Id.* at 368–69.
45. *Id.*
46. *Id.* at 369.
47. *Id.*

interest" and that allowing further recovery under § 502(a)(3) "would—absent a showing that the § 502(a)(1)(B) remedy is inadequate—result in an impermissible duplicative recovery, contrary to clear Supreme Court and Sixth Circuit precedent."[48]

In reaching this conclusion, the Sixth Circuit looked to the Supreme Court's opinion in *Varity Corp. v. Howe*.[49] The Sixth Circuit noted that *Varity* "emphasized that ERISA remedies are concerned with the adequacy of relief to redress the claimant's injury, not the nature of the defendant's wrongdoing."[50] The Sixth Circuit noted that, in contrast to holding in *Varity*, the disgorgement award reflected concern that the insurer "had wrongfully gained something, a consideration beyond the ken of ERISA make-whole remedies."[51] The Sixth Circuit also noted that allowing a disgorgement award to Rochow would mean similar equitable relief "would be potentially available whenever a benefits denial is held to be arbitrary or capricious. This would be plainly beyond and inconsistent with ERISA's purpose to make claimants whole."[52]

In rejecting Rochow's request for disgorgement of profits, the Sixth Circuit also found that Rochow asserted only a single injury, i.e., "the denial of benefits and withholding of the same benefits."[53] Further, Rochow's loss (the denial of benefits) was the same regardless of what the insurer did with the wrongfully retained benefits.[54] Thus, "[b]ecause Rochow was able to avail himself of an adequate remedy for [the] wrongful denial of benefits pursuant to § 502(a)(1)(B), he cannot obtain additional relief for that same injury under § 502(a)(3)."[55] The Sixth Circuit did agree, however, to remand for the district court to consider Rochow's request for prejudgment interest, finding that it was "a remedy the district court could have granted, though not at an excessive rate."[56]

2. *Wilson v. Standard Insurance Co.*[57]

On June 3, 2015, the Eleventh Circuit affirmed summary judgment in favor of a defendant insurer on the basis that a contractual limitations period was enforceable against the disability claimant's untimely lawsuit,

48. *Id.* at 371.
49. *Id.* (citing 516 U.S. 489 (1996)).
50. *Id.*
51. *Id.*
52. *Id.* at 372.
53. *Id.* at 373.
54. *Id.* at 374.
55. *Id.* at 373.
56. *Id.* at 376.
57. 613 F. App'x 841 (11th Cir. 2015).

even though the administrative denial letter did not provide notice of the limitations period.[58]

In *Wilson*, the disability policy prescribed a three-year limitations period for bringing a lawsuit.[59] Harriet Wilson filed her lawsuit thirty-four months after that period expired, contending that the limitations period should be equitably tolled because the letter denying her administrative claim did not provide notice of the limitations period.[60]

In analyzing the timeliness of the lawsuit, the Eleventh Circuit looked to ERISA's claims procedure regulation, which provides in pertinent part:

> [T]he plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination. . . . The notification shall set forth, in a manner calculated to be understood by the claimant . . . [a] description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review. . . .[61]

The Eleventh Circuit found an ambiguity as to whether this language requires that the denial letter include the time limit for filing a lawsuit, noting that "[i]t can also reasonably be read to mean that notice must be given of the time limits applicable to 'the plan's review procedures,' and the letter must also inform the claimant of her right to bring a civil action without requiring notice of the time period for doing so."[62]

Faced with this ambiguity, and for the purposes of this case only, the Eleventh Circuit construed the regulation in the claimant's favor and assumed that the denial letter must provide notice of the limitations period.[63] Even with that assumption, however, the Eleventh Circuit refused to "simply assume unenforceability."[64] In doing so, the Eleventh Circuit referenced the Supreme Court's recent opinion in *Heimeshoff v. Hartford Life & Accident Insurance Co.*, noting: "As the Supreme Court has emphasized: 'The principle that contractual limitations provisions ordinarily should be enforced as written is especially appropriate when enforcing an ERISA plan.'"[65]

Thus, the Eleventh Circuit held that contractual limitations periods are enforceable unless the claimant can establish equitable tolling, which

58. *Id.* at 845–46.
59. *Id.* at 842.
60. *Id.*
61. *Id.* at 843 (quoting 29 C.F.R. § 2560.503-1(g)(1)(iv)) (alterations in original).
62. *Id.* at 844.
63. *Id.*
64. *Id.*
65. *Id.* (quoting Heimeshoff v. Hartford Life & Accident Ins. Co., 134 S. Ct. 604, 611–12 (2013)).

"requires the party invoking it to show both extraordinary circumstances and diligence in pursuing her rights."[66] Here, Wilson failed to meet the initial hurdle of diligence.[67] The Eleventh Circuit noted that the basis for Wilson's lawsuit "was no mystery" and that once her claim was denied she was informed of the right to bring a lawsuit and request any documents needed to pursue her claim.[68] Nonetheless, Wilson waited until four years after the administrative review process was complete to request a copy of the disability policy, "which was central to her claim, and one of whose terms was the contractual limitations period."[69] Thus, the Eleventh Circuit concluded that Wilson failed to exercise reasonable diligence because "[a] plaintiff is not reasonably diligent when she fails to investigate basic issues that are relevant to her claim or to proceed with it in a reasonably prompt fashion."[70] Accordingly, the limitations period was enforced, making Wilson's lawsuit untimely and resulting in the Eleventh Circuit affirming summary judgment in favor of the defendant insurer.

3. *Mirza v. Insurance Administrator of America, Inc.*[71]

Just over two months after the Eleventh Circuit issued its decision in *Wilson*, the Third Circuit issued a contrary ruling in *Mirza* on August 26, 2015. Similar to *Wilson*, the defendant insurer in *Mirza* failed to provide notice of the plan's limitations period in the claimant's administrative denial letter.[72] Unlike in *Wilson*, however, the Third Circuit found that the appropriate remedy for this failure was to set aside the plan's limitations period.[73]

Like the Eleventh Circuit, the Third Circuit began its analysis by looking to ERISA's claims procedure regulation.[74] Unlike the Eleventh Circuit, however, the Third Circuit concluded that Section 2560.503-1(g)(1)(iv) does in fact "require[] written disclosure of plan-imposed time limits on the right to bring a civil action."[75] The Third Circuit noted that "practical considerations" support this interpretation, including that claimants are more likely to read a denial letter than the plan document.[76] The Third Circuit expressed "no view" as to whether ERISA plans without

66. *Id.* (citing Motta *ex rel.* A.M. v. United States, 717 F.3d 840, 846 (11th Cir. 2013)).
67. *Id.* at 845–46.
68. *Id.* at 845.
69. *Id.*
70. *Id.* (citing *Irwin*, 498 U.S. 89, 96 (1990); *Motta ex rel. A.M.*, 717 F.3d at 846–47).
71. 800 F.3d 129 (3d Cir. 2015).
72. *Id.* at 130.
73. *Id.* at 131.
74. *Id.* at 134.
75. *Id.* at 136.
76. *Id.* at 135.

contractual limitations periods must still provide notice of the limitations period under state law.[77]

The Third Circuit also held that the appropriate remedy for failure to comply with the regulatory requirement to provide notice of the limitations period was to set aside the plan's limitations period altogether.[78] In *Mirza*, with the plan's limitations period set aside, the Third Circuit looked to the limitations period for the most analogous state-law claim and found that the lawsuit was timely filed.[79] Accordingly, the Third Circuit concluded that the U.S. District Court for the District of New Jersey erred by dismissing the lawsuit as untimely.[80]

Of note, the Third Circuit also addressed the applicability of the doctrine of equitable tolling and found that it had no bearing on the case.[81] The court explained:

> If we allowed plan administrators in these circumstances to respond to untimely suits by arguing that claimants were either on notice of the contractual deadline or otherwise failed to exercise reasonable diligence, plan administrators would have no reason at all to comply with their obligation to include contractual time limits for judicial review in benefit denial letters.[82]

Thus, the fact that the claimant may have had notice of the limitations period was irrelevant in determining whether to apply the limitations period.[83] Instead, a failure to include the limitations period in the denial letter resulted in the strict liability result of throwing out the limitations period altogether.[84]

4. *LeGras v. Aetna Life Insurance Co.*[85]

The Ninth Circuit also offered guidance this year regarding limitations periods, this time in the context of an internal appeal.[86] Andre LeGras appealed from an order by the U.S. District Court for the Central District California granting judgment in favor of the defendant insurer on the basis of a failure to exhaust administrative remedies.[87] In a matter of first impression, the Ninth Circuit held that when a deadline for a participant to file an administrative appeal falls on a Saturday, that deadline is

77. *Id.* at 136.
78. *Id.* at 137.
79. *Id.* at 138.
80. *Id.*
81. *Id.* at 137.
82. *Id.*
83. *Id.*
84. *Id.* at 137–38.
85. 786 F.3d 1233 (9th Cir. 2015).
86. *Id.* at 1235.
87. *Id.*

extended to the following Monday and, thus, LeGras timely exhausted administrative remedies.[88]

LeGras suffered a serious back injury while working in October 2008.[89] He thereafter received long-term disability benefits for about two years before being informed that his benefits would be terminated if he could not establish that he was totally disabled.[90] Subsequently, his benefits were terminated on the basis that he did not submit sufficient evidence of total disability.[91] The letter terminating his benefits informed LeGras that he had 180 days to appeal the termination.[92] That 180-day period happened to expire on a Saturday.[93] LeGras mailed his appeal the following Monday and it was denied as untimely.[94]

On review, the Ninth Circuit began by noting that neither the governing statute nor the implementing regulation specified a method of computing time.[95] Thus, there were "a number of unresolved ambiguities" regarding how precisely to calculate the deadline.[96] The Ninth Circuit next noted that Congress empowered federal courts to develop federal common law to govern employee benefit plans.[97] Using its power to create federal common law, the Ninth Circuit concluded "where the deadline for an internal administrative appeal under an ERISA-governed insurance contract falls on a Saturday, Sunday, or legal holiday, the period continues to run until the next day that is not a Saturday, Sunday, or legal holiday."[98]

In adopting this time-computation rule, the Ninth Circuit noted that it protected the "interests of insureds" and that "it would be contrary to the purposes of ERISA to adopt a method that is decidedly protective of plan administrators, not plan participants."[99] The Ninth Circuit recognized the potential burden on administrators to track state holidays, but found "this burden must be counter-balanced with the clarity and consistency attained by applying the time computation method that we hold applies to calculating the 180-day period within which LeGras had to mail his notice of appeal."[100]

88. *Id.*
89. *Id.*
90. *Id.*
91. *Id.*
92. *Id.*
93. *Id.*
94. *Id.*
95. *Id.* at 1236.
96. *Id.*
97. *Id.* (quoting Menhorn v. Firestone Tire & Rubber Co., 738 F.2d 1496, 1499 (9th Cir. 1984)).
98. *Id.* at 1238.
99. *Id.* at 1237–38.
100. *Id.* at 1240.

Based on the above, the Ninth Circuit concluded it was error for the district court to find LeGras's administrative appeal was untimely.[101] Accordingly, the Ninth Circuit reversed and remanded with directions for the district court to remand to the administrator for consideration of LeGras's appeal.[102]

5. *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*[103]

In *Spinedex Physical Therapy USA Inc. v. United Healthcare of Arizona, Inc.*, the Ninth Circuit addressed, inter alia, (1) whether an assignee of a patient's claim for payment of benefits under an ERISA plan has Article III standing to bring such a claim, and (2) whether a claimant must exhaust administrative remedies under an ERISA plan that does not expressly require exhaustion.

United Healthcare was the claims administrator for forty-four defendant health plans, most (but not all) of which were also insured by United.[104] Spinedex was a physical therapy clinic whose patients included plan beneficiaries.[105] After treating patients covered by defendant Plans, Spinedex submitted claims to United, which paid some claims but denied others in whole or in part.[106] Spinedex filed suit against United and the plans seeking payment of denied benefit claims as "assignee" and "would-be assignee" of plan beneficiaries.[107] The U.S. District Court for the District of Arizona granted summary judgment to all defendants, holding, inter alia, that Spinedex lacked Article III standing to bring claims as an "assignee."[108]

The Ninth Circuit reversed, holding that Spinedex had standing to bring these claims as an assignee and remanded the case to the district court.[109] The Ninth Circuit went on to consider the issue of whether any of the claims should be barred for failure to exhaust administrative remedies, an issue previously not addressed by the district court because it had held that Spinedex lacked Article III standing to bring claims as an assignee. The plaintiffs argued that "because a number of patients' plans did not expressly require exhaustion, those claims should not [] be barred

101. *Id.*
102. *Id.*
103. 770 F.3d 1282 (9th Cir. 2014).
104. *Id.* at 1287.
105. *Id.*
106. *Id.* at 1288.
107. *Id.*
108. *Id.* at 1287.
109. *Id.*

for failure to exhaust" administrative remedies.[110] The plaintiffs further argued that "even where the plans require exhaustion of administrative remedies, the claims should be 'deemed' exhausted as a result of United's failure to follow appropriate claims procedures."[111]

Noting that "[s]everal of the Plans contain language which could reasonably be read as making optional the administrative appeals process[,]" the Ninth Circuit held that "[w]here plan documents could be fairly read as suggesting that exhaustion is not a mandatory prerequisite to bringing suit, claimants may be affirmatively misled by language that appears to make the exhaustion requirement permissive when in fact it is mandatory as a matter of law."[112] Accordingly, the Ninth Circuit "explicitly" endorsed a rule that a claimant "need not exhaust [administrative remedies] when the plan does not require it."[113] The Ninth Circuit also held that if United's failure to comply with claims procedures "went beyond mere *de minimis* violations, patients' claims must be deemed exhausted under [ERISA]."[114]

Since the district court had previously held that Spinedex lacked Article III standing to bring claims as an assignee, it did not perform a claim-by-claim analysis of whether administrative remedies had been exhausted.[115] On remand, the Ninth Circuit instructed the district court that, for each claim for which failure to exhaust is at issue, the district court should determine whether: "(1) the plan required exhaustion of administrative remedies, (2) the claim must be deemed exhausted due to United's noncompliance with the claims procedures, and (3) the claim was in fact exhausted."[116]

6. *Witt v. Metropolitan Life Insurance Co.*[117]

In a case of first impression, the Eleventh Circuit rejected the notion that the statute of limitations for an ERISA § 502(a)(1)(B) claim may begin to run only upon receipt from a formal denial letter. Joining the majority of circuits that have opined on this issue, the Eleventh Circuit held that an ERISA § 502(a)(1)(B) cause of action accrues, and the limitations period begins to run, when a participant has "reason to know" that the claims administrator has "clearly repudiated" the claim, even if the participant has not received a final or formal denial of the claim.[118]

110. *Id.* at 1298.
111. *Id.*
112. *Id.* at 1298–99.
113. *Id.* at 1299.
114. *Id.*
115. *Id.*
116. *Id.*
117. 772 F.3d 1269 (11th Cir. 2014).
118. *Id.* at 1276.

This case involved Metropolitan Life Insurance Company's decision to terminate long-term disability (LTD) benefits for Don Witt.[119] MetLife initially approved LTD benefits for Witt, but stopped paying benefits in 1997 because he failed to provide proof of continued disability.[120] Although Witt stopped receiving benefits in 1997, he did not challenge the termination of his LTD benefits at that time, nor did he make any inquiries of MetLife regarding his LTD benefits for twelve years.[121] In 2009, Witt's attorney commenced the administrative process on his behalf, which culminated in a final denial letter dated May 4, 2012.[122] The plaintiff thereafter filed suit in 2012.[123]

Congress did not specify a limitations period for claims under ERISA § 502(a)(1)(B).[124] Rather, it is well-established that "district courts must apply the forum state's statute of limitations for the most closely analogous action."[125] In this case, the parties did not dispute that Alabama's six-year statute of limitations applied, but rather they disputed when the six-year limitations period begin to run on Witt's ERISA § 502(a)(1)(B) claim.[126] Witt argued that the limitations period did not begin to run until May 4, 2012, when MetLife issued a final, conclusive, and written decision denying him benefits.[127] Witt claimed that he "never received" the 1997 letter from MetLife terminating his benefits and, therefore, the statute of limitations did not begin running at that time.[128] On the other hand, MetLife argued that the limitations period began to run when MetLife stopped making monthly payments to Witt because, at that time, he "knew or should have known that his claim had been denied."[129]

Although Witt claimed that he never received MetLife's initial denial letter in 1997, the Eleventh Circuit reasoned that "MetLife's conduct nonetheless demonstrated a clear and continuing repudiation of Witt's rights by failing to provide him any monthly benefits. . . ."[130] The court further reasoned that Witt would "undoubtedly have had reason to know" that his rights were repudiated after missing his monthly LTD benefit payments for some period of time.[131] The Eleventh Circuit did not opine on the "exact number of missing monthly benefits payments

119. *Id.* at 1271.
120. *Id.* at 1271–72.
121. *Id.* at 1272.
122. *Id.* at 1272–73.
123. *Id.* at 1273.
124. *Id.* at 1274–75.
125. *Id.* at 1275.
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.* at 1278.
131. *Id.*

that were required to put Witt on notice that his claim had been clearly repudiated and thus denied[,]" but instead held that "after the 12 months of nonpayment under the facts of this case, Witt could not have reasonably believed but that his claim had been denied."[132]

The Eleventh Circuit rejected Witt's "attempt to inexorably tie the start of the limitations period to a formal denial letter that must also be produced in order to enforce the statute."[133] The court reasoned that "[a]dopting Witt's position would undermine the very purpose of statutes of limitations, which 'characteristically embody a policy of repose, designed to protect defendants' and 'foster the elimination of stale claims, and certainty about . . . a defendant's potential liabilities.'"[134] Accordingly, the Eleventh Circuit concluded that Witt's complaint filed in 2012 was barred by the six-year statute of limitations.[135]

7. *Smith v. Delta Air Lines Inc.*[136]

On remand from the Supreme Court for reconsideration in light of *Fifth Third Bancorp v. Dudenhoeffer*,[137] the Eleventh Circuit re-affirmed dismissal of the complaint in *Smith v. Delta Air Lines Inc.*[138]

Delta Air Lines Inc.'s defined contribution savings plan has a variety of different investment options, including Delta stock.[139] Dennis Smith was a former Delta employee who participated in the plan and lost money when the price of Delta stock declined between 2000 and 2004.[140] Smith filed a class action against Delta and the fiduciaries of the plan in 2005, alleging that they breached their duty to prudently manage the plan's assets, their duty to monitor, their duty to disclose, and their duty of loyalty.[141] Smith alleged "that the fiduciaries imprudently invested in Delta securities in the face of disappointing financial performance, loss in competitive advantage, and concerns about Delta's ability to survive in the industry" and "that the fiduciaries failed to investigate the viability of Delta stock and maintained its adherence to the plan documents, regardless of the harm to the plan participants, thus breaching their duty to prudently manage the plan's assets."[142] The U.S. District Court for the Northern District of Georgia, relying upon *Lanfear v. Home Depot*,

132. *Id.*
133. *Id.*
134. *Id.* (quoting Lozano v. Montoya Alvarez, 572 U.S. 1224, 1234 (2014)).
135. *Id.*
136. 2015 WL 4546170 (11th Cir. July 29, 2015).
137. 134 S. Ct. 2459 (2014).
138. *Smith*, 2015 WL 4546170, at *1.
139. *Id.*
140. *Id.*
141. *Id.*
142. *Id.*

Inc.,[143] ultimately dismissed the complaint for failure to state a claim and the Eleventh Circuit affirmed.[144] The Supreme Court thereafter decided *Fifth Third* and, upon Smith's filing of a writ of certiorari, granted Smith's petition, vacated the judgment, and remanded the case to the Eleventh Circuit for further consideration in light of *Fifth Third*.[145]

In *Fifth Third*, the Supreme Court rejected the presumption of prudence that was endorsed in *Lanfear* and instead held that "ESOP fiduciaries are subject to the same duty of prudence that applies to ERISA fiduciaries in general, except that they need not diversify the fund's assets."[146] In so doing, the Supreme Court set forth a new "plausibility" standard for evaluating breach of the fiduciary duty of prudence claims like those asserted by Smith.[147] Relying on the Supreme Court's guidance in *Fifth Third*, the Eleventh Circuit held that Smith's prudence claim fell "squarely within the class of claims the Supreme Court deems 'implausible as a general rule.'"[148] Specifically, the Eleventh Circuit held:

> The crux of his prudence claim is that the Delta fiduciaries should have foreseen that Delta stock would continue to decline. There is no allegation in the amended complaint that the fiduciaries had material inside information about Delta's financial condition that was not disclosed to the market, nor is there any allegation of a special circumstance that rendered reliance on the market price imprudent, such as fraud, improper accounting, illegal conduct or other actions that would have caused Delta stock to trade at an artificially inflated price. Absent such circumstances, the Delta fiduciaries cannot be held liable for failing to predict the future performance of the airline's stock. Thus, while *Fifth Third* may have changed the legal analysis of our prior decision, it does not alter the outcome.[149]

8. *Pfeil v. State Street Bank and Trust Co.*[150]

In *Pfeil*, the plaintiffs were employees of General Motors and participants in an employee stock ownership plan for employees of GM.[151] In 2008, "GM faced severe business problems that resulted, ultimately, in its bankruptcy."[152] As a result of these financial difficulties, the common stock

143. 679 F.3d 1267 (11th Cir. 2012).
144. *Smith*, 2015 WL 4546170, at *1 (citing Smith v. Delta Air Lines, 563 F. App'x 681, 682 (11th Cir. 2014)).
145. *Id.* at *1 (citing Smith v. Delta Air Lines, Inc., 135 S. Ct. 1421, 1421 (2015)).
146. *Id.* at *2 (citing Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2463 (2014)).
147. *Id.* (citing *Fifth Third*, 134 S. Ct. at 2471).
148. *Id.*
149. *Id.* (internal citations and quotation omitted).
150. 2015 WL 6874769 (6th Cir. Nov. 10, 2015).
151. *Id.* at *1.
152. *Id.*

plan of GM lost money.[153] State Street Bank and Trust Company, which served as the fiduciary of certain pension plans, including the common stock plan, continued to buy GM stock until November 8, 2008, and did not divest the fund of GM stock until March 31, 2009.[154] The plaintiffs filed suit against State Street, claiming that its investment decisions to continue to buy and decline to sell GM common stock were "imprudent" under ERISA.[155]

After class certification, State Street moved for summary judgment.[156] The U.S. District Court for the Eastern District of Michigan granted State Street's motion, applying the "presumption of prudence" doctrine.[157] Pfeil appealed.[158] In the meantime, the Supreme Court abrogated the "presumption of prudence" doctrine in *Fifth Third*.[159] Accordingly, the Sixth Circuit considered whether summary judgment in favor of the defendants in *Pfeil* was still proper in light of the Supreme Court's decision in *Fifth Third*.[160]

The Sixth Circuit affirmed, finding that *Pfeil* failed to demonstrate a genuine issue about whether State Street satisfied its statutory duty of prudence.[161] The court evaluated State Street's actions "according to a prudent-process standard."[162] Specifically, the court noted that the "test for determining whether a fiduciary has satisfied his duty of prudence is whether the individual trustees, at the time they engaged in the challenged transactions, employed the appropriate methods to investigate the merits of the investment and to structure the investment."[163] In this case, the evidence submitted showed that State Street held a number of meetings and "repeatedly discussed at length whether to continue the investments in GM that [were] at issue in th[e] case."[164] Indeed, State Street held "more than forty meetings" during the period of "less than nine months to discuss whether to retain GM stock."[165] At these meetings, State Street discussed the performance of both GM stock and its business and held "decisive votes."[166] State Street was also advised by outside legal and

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.*
158. *Id.*
159. *Id.* at *2 (citing *Fifth Third*, 134 S. Ct. at 2467).
160. *Id.*
161. *Id.*
162. *Id.* at *5.
163. *Id.* (quoting Hunter v. Caliber Sys., Inc., 220 F.3d 702, 723 (6th Cir.2000)).
164. *Id.* at *8.
165. *Id.*
166. *Id.*

financial advisors.[167] The Sixth Circuit held that State Street's actual processes demonstrated prudence and, given this "prudent process," State Street's actions were not actionably imprudent.[168]

In so holding, the Sixth Circuit took the opportunity in *Pfeil* to provide its interpretation of the Supreme Court's decision in *Fifth Third*.[169] Specifically, the Sixth Circuit held that "a plaintiff claiming that an ESOP's investment in a publicly traded security was imprudent must show special circumstances to survive a motion to dismiss."[170] In this case, Pfeil had alleged that State Street's process was imprudent to the extent that it relied upon public announcements about GM's future and failed to recognize that the market was over or undervaluing GM stock.[171] The Sixth Circuit rejected this allegation as "implausible" because Pfeil failed to show a "special circumstance" such that State Street should not have relied on market pricing.[172]

III. REGULATORY DEVELOPMENTS

On April 20, 2015, the Department of Labor's Employee Benefits Security Administration published a proposed rule that, upon adoption, would define who is a "fiduciary" of an employee benefit plan under ERISA as a result of giving "investment advice" to a plan or its participants or beneficiaries.[173] Under this proposed rule, a person renders "investment advice" by providing certain defined investment or investment management "recommendations" or "appraisals" to a plan.[174] When such "investment advice" is provided for a fee or other compensation, the person giving the advice is deemed to be a "fiduciary" under the proposed rule.[175] The proposed rule also includes, however, a number of carveouts to exempt certain activities from being treated as a fiduciary act, as well as a number of proposed changes to the prohibited transaction rules.[176]

After soliciting comments to this proposed rule, DOL held a four-day long public hearing in August 2015 and thereafter solicited additional

167. *Id.*
168. *Id.* at *8–9.
169. *Id.* at *5–6.
170. *Id.* at *6.
171. *Id.*
172. *Id.*
173. The proposed regulation is available at 80 Fed. Reg. 21928 (proposed Apr. 20, 2015) (to be codified at 29 C.F.R. parts 2509 and 2510).
174. 80 Fed. Reg. 21929.
175. 80 Fed. Reg. 21928.
176. 80 Fed. Reg. 21929.

comments during the weeks following the publication of the hearing transcript.[177] The public comment period closed on September 24, 2015.[178]

IV. CONCLUSION

The past year has resulted in significant authority from those circuit courts taking the first crack at interpreting the new pleading standards for "stock-drop" actions that were articulated by the Supreme Court in *Fifth Third*. Significantly, the Supreme Court noted in *Fifth Third* that the Securities and Exchange Commission had yet to advise the Court of its views on pleading standards for such "stock-drop" matters and further noted how such views "may well be relevant."[179] Such "relevant" views may finally be announced by the SEC in an appeal currently pending before the Fifth Circuit captioned as *Whitley v. BP, P.L.C.*[180] In this closely watched "stock-drop" appeal, both DOL and the SEC have sought leave to submit *amicus curiae* briefs on what plausible factual allegations are required to meet the "more harm than good" pleading standard articulated by the Supreme Court in *Fifth Third*.

Next year, the Supreme Court will consider at least two interesting ERISA issues, including whether ERISA preempts Vermont's Health Care Uniform Reporting and Evaluation System, which requires self-insured health plans to submit claims data to statewide database,[181] and what an ERISA fiduciary must show to recover an overpayment erroneously made to a plan participant.[182]

Finally, ERISA practitioners are still waiting to see if DOL adopts a final rule defining who becomes a "fiduciary" of an employee benefit plan under ERISA as a result of giving "investment advice" to a plan or its participants. DOL had previously proposed a similar rule in 2010, but that proposed rule was withdrawn in 2011 after DOL received significant public commentary. DOL then took four years to re-propose a new rule, which was similarly met with a large degree of commentary and criticism. It will be interesting to see whether DOL finally adopts the rule it proposed on April 20, 2015, adopts a modified version of that rule incorporating the public comments, or goes back to the drawing board yet again.

177. Employee Benefits Sec. Admin., U.S. Dep't of Labor, Announcement of Transcript Availability and Comment Period Closing Date (Sept. 8, 2015), *available at* http://www.dol.gov/ebsa/regs/1210-AB32-2-HearingTranscriptAnnouncement.html (last visited Dec. 1, 2015).

178. *Id.*

179. Fifth Third Bancorp v. Dudenhoeffer, 134 S. Ct. 2459, 2473 (2014).

180. No. 15-20282 (5th Cir. 2015).

181. Gobeille v. Liberty Mut. Ins. Co., 135 S. Ct. 2887 (2015) (granting *certiorari*).

182. Montanile v. Bd. of Trs. of the Nat'l Elevator Indus. Health Benefit Plan, 135 S. Ct. 1700 (2015) (granting *certiorari*).