Berkshire Hathaway
Specialty Insurance

Fiduciary Liability Ledger

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Quite a lot has happened since our last installment of the *Fiduciary Ledger*, including significant court rulings, eight-figure settlements of ERISA cases, and a flurry of new ERISA class actions against plan sponsors and their directors and officers. Below is a round-up of the most impactful rulings and cases, from contributing attorneys René Thorne, William Payne, K.C. Weafer, and Kellie Thomas of Jackson Lewis P.C.

Rhonda Prussack, Head of Fiduciary and Employment Practices Liability

Supreme Court Finds an Ongoing Duty to Monitor Plan Investments

In May of 2015, the U.S. Supreme Court announced its decision in *Tibble v. Edison International*, a case in which the Court addressed the question of whether ERISA's six year limitations period barred imprudent investment claims where the initial investment decision was made more than six years prior to suit. Bypassing the question before them, the Supreme Court sent the case back to the trial court for consideration of a fiduciaries' ongoing duty to monitor the prudence of investments, which requires a "regular review." This decision seems to have provided the impetus for at least a dozen subsequent class actions (see below). Investment fiduciaries should keep an eye on the decision of the trial court for the steps it concludes are required for meeting the ongoing duty to monitor investments.

A Slew of New 401(k) Fee Class Actions

Bell v. Anthem, Inc., Pension Comm. of ATHW Holding Co., filed December 29, 2015, is a class-action suit alleging that Anthem's 401(k) plan fiduciaries "selected and retained high-cost and poor-performing investments," leading to millions in unnecessary fees and losses. The proposed class—approximately 59,000 participants and beneficiaries—fault Anthem with failing to leverage the large size of its 401(k) plan to secure lower record-keeping fees. The complaint also accuses the health insurer of imprudently investing in high-fee mutual funds when lower-cost identical mutual fund and non-mutual fund alternatives, such as collective trusts and separately managed accounts, were "readily available" to plans of similar size. Notable here - the investments and recordkeeping were provided by Vanguard, often cited by plaintiffs' counsel in similar 401(k) excessive fee suits as an example of a more prudent investment alternative. Also notable is that Anthem had already taken action in 2013 to reduce the plan's expenses, but, according to the complaint, simply hadn't gone far enough, or acted quickly enough.

In *Sulyma v. Intel Corp. Investment Policy Committee*, filed October 29, 2015, plaintiffs allege that Intel's investment policy committee breached its fiduciary duties when it invested a portion of its "target-date" and diversified funds in allegedly risky and costly hedge funds, private and international equity funds, and commodities, causing losses to the plans. The complaint further alleges that the modified portfolios underperformed peer-group funds, resulting in "hundreds of millions of dollars" of losses. The investment committee and plan administrators also are accused of failing to adequately disclose to the participants and the beneficiaries the risks, fees, and expenses associated with hedge funds and the other risky investment alternatives, depriving them of the ability to make informed decisions with regard to the management of their individual accounts.

These cases come on the heels of some very large settlements of similar fee cases, including $57 million paid by Boeing, $62 million by Lockheed Martin, and $32 million by Novant Health. Companies that have recently seen similar suits include Allianz, Deutsche Bank, Oracle, BB&T, TIAA-CREF and Insperity, Inc.

High Court Sets Higher Pleading Standard for ESOP Plaintiffs

The Supreme Court's second ruling in *Amgen Inc. v. Harris*, an employer "stock-drop" case, demonstrates that claims brought by employees against fiduciaries of employee stock ownership plans ("ESOPs") must involve specific factual allegations about what plan fiduciaries could have known and should have done. After it abolished the "presumption of prudence" for ESOP fiduciaries in *Fifth Third Bancorp v. Dudenhoeffer*, the Court sent *Amgen* back to the lower courts to apply the new pleading standard. Applied to the facts in *Amgen, Dudenhoeffer* required plaintiffs to assert that ESOP fiduciaries had plausible alternative actions and could not have concluded that freezing purchases of employee stock would do more harm than good. The Ninth Circuit appeals court assumed that freezing ESOP investments and disclosing negative information would not have done more harm to participants. The case was appealed again, and in *Amgen II*, the Supreme Court held that employees must assert these facts specifically to state a claim for breach of the duty of prudence in a "stock-drop" case, and courts should not make assumptions about how fiduciaries evaluate the effects of information on the market. This case may not be over yet, however, as the Court left open the opportunity for the plaintiffs to amend their complaint in light of the higher standard. As for future stock drop cases, it is likely that plaintiffs will hone their arguments to meet the new standard.

Plans Can Only Recover Identifiable Funds

In *Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan*, decided on January 20, 2016, the Supreme Court addressed whether a plan fiduciary can recover medical payments made on behalf of a participant when the plan fiduciary has not identified the precise funds in the participant's possession. After Montanile suffered injuries in a car wreck, his employer-provided medical plan paid his medical expenses. When Montanile sued the other driver and recovered settlement funds, the plan sought to be reimbursed. However, because the plan did not act quickly enough to secure those funds and Montanile spent the money, the Supreme Court held that under ERISA the plan could not obtain a judgment against Montanile's other assets. In short, for a plan to be reimbursed for payments to or on behalf of a participant, the plan must both establish that it has an equitable lien (the plan must contain the appropriate language on this point), and then act promptly to enforce the lien.

First Appellate Court Weighs in on "Church Plan" Cases

In *Kaplan v. St. Peter's Healthcare System*, the Third Circuit Court of Appeals on December 29, 2015 was the first federal appellate court to issue a decision in so-called "church plan" cases, a series of suits against hospitals and healthcare providers who have claimed they are exempt from ERISA based on a religious affiliation These suits allege, among other things, that pension plans were underfunded, in violation of ERISA. The *Kaplan* court sided with the plaintiffs, and affirmed the district court's decision that ERISA's church plan exemption does not apply to the St. Peter's plan. The defendants have filed a request for rehearing, which asks for an "en banc" decision – that is, a decision from the entire Third Circuit, as opposed to the three-judge panel.

René E. Thorne is Office Managing Principal of the New Orleans, Louisiana, office of Jackson Lewis P.C. Her practice covers the full range of employee benefit litigation matters, including representation of employers, plans, plan fiduciaries, and trustees.

William H. Payne is an Associate in the New Orleans, Louisiana, office of Jackson Lewis P.C. His practice is focused on representing employers in all aspects of workplace law with a focus of employee benefits litigation.

Kenneth C. Weafer is an Associate in the Albany, New York, office of Jackson Lewis P.C. He concentrates his practice on all aspects of employee benefits, which includes retirement pension and profit-sharing plans, health and welfare plans, and ERISA fiduciary counseling.

Kellie M. Thomas is an Associate in the Baltimore, Maryland office of Jackson Lewis P.C. Her practice focuses on a variety of employee benefits, executive compensation, and employment law matters.