Litigation Update

42nd Annual Retirement and Benefits Management Seminar

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The Good....

- *Hecker v. Deere & Co.* (Seventh Circuit 2009)
  - Revenue-sharing is not material and need not be disclosed to participants
  - Offering allegedly expensive fund options was not a fiduciary breach
The Good....

- Renfro v. Unisys  (Third Circuit 2011)
  - Courts should look at "the characteristics of the mix and range of investment options and then evaluate...claims challenging fund selection against the backdrop of the reasonableness of the mix and range of options"
  - Plan included over 73 investment options. Retail funds had a variety of risk and fee profiles, including low risk/low-fee options (.1% to 1.21%)
  - Rejected claim that Unisys should have paid per-participant fees, rather than asset-based fees
The Good....

- *Loomis v. Exelon* (Seventh Cir., 2011)
  - 32 investment options, including 24 mutual funds
  - Expense ratios from .03% to .96%, included passively managed and actively managed funds
  - Rejected claim that fiduciaries should not have used retail share class
  - Pros and cons of flat fee structure
The Good....

*Kanawi v. Bechtel* (N.D. Cal. 2008)

- Fiduciaries did not breach their duties by using “proprietary” mutual funds
- Fiduciaries were procedurally prudent— they met regularly, monitored and reviewed the proprietary funds, and obtained independent advice
- No prohibited transaction in hiring affiliated investment adviser to the extent that the plan sponsor paid the investment adviser’s fees
The Bad....

- *Braden v. Wal-Mart* (Eighth Circuit 2009)
  - Fiduciaries could have a duty to disclose more information than is in the SPD and fund prospectuses about fund performance and fees charged
  - A participant could be misled if defendants did not disclose:
    - The mutual funds used in the plan charged higher fees than comparable funds
    - Wal-Mart had access to the more cost-effective institutional class shares
    - Defendants did not select or evaluate plan investment options on the basis of fees charged
    - The mutual funds were selected because the fund managers paid revenue sharing to the trustee
The Bad....

- *George v. Kraft* (Seventh Circuit 2011)
  - Plaintiffs can proceed with claim that, as to unitized stock fund, fiduciaries should have taken steps to minimize “investment drag” and “transaction drag”
  - Plaintiffs also can proceed with claim that Kraft fiduciaries should have solicited competitive bids from recordkeepers on a periodic basis
The Bad....

- *Tibble v. Edison* (9th Cir. Mar. 21, 2013)
  - Court rejects continuing violation theory for statute of limitations purposes.
  - 9th Circuit joined the 4th, 6th and 7th circuits holding the DOL’s interpretation of 404(c) was consistent with statutory language.
  - Failure to investigate institutional share class was a breach of fiduciary duty. Court noted lack of procedural process in evaluating investment options.
The Ugly....

- **Nationwide** –
  - Nationwide may be a plan fiduciary because it retained discretion to add and delete the fund options offered to plans.
  - Revenue sharing payments from funds could be plan assets on the basis of Nationwide's receiving revenue sharing payments from the mutual funds.
  - Even if revenue sharing payments are not plan assets, Nationwide’s receipt of revenue sharing could involve illegal "kickbacks"
The Ugly....

*John Hancock* –

- The right to change the lineup of investment options could give rise to ERISA fiduciary status
- John Hancock is an ERISA fiduciary because it
  - Retained discretion to set and modify the amount of the administrative fees charged to its plan clients
  - Retained discretion to substitute mutual funds offered as investments to plan clients
- Court found sufficient factual questions existed as to whether the company:
  - Breached its fiduciary duties in receiving administrative fees in compensation for its services to its clients
  - Offset the full amount of the revenue sharing payments it received against the fees owed by its plan clients
The Ugly....

- **Hartford** –
  - Plaintiffs alleged sufficient facts in support of their claim that Hartford is a fiduciary, including that Hartford had discretion to make unilateral changes to the menu of investment options offered to plan participants.
Cases in the Pipeline


- Using float income to pay itself fees above and beyond the fees authorized in the trust agreements
- Remitting float income into the mutual fund options selected by plan participants, without crediting amount of float income to plan or participant contributions