LABOR DEPARTMENT PARTICIPATION IN ERISA LITIGATION AND SIGNIFICANT ISSUES IN LITIGATION

Compiled by the Plan Benefits Security Division

Office of the Solicitor

CALENDAR YEAR 2017

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A. Employer Stock

Perez v. BAT Masonry (W.D. Va.)

On August 28, 2015, the Secretary filed a complaint against BAT Masonry Company, Inc. in connection with an employer stock purchase by the company's ESOP. Also named as defendants are trustee and former company owner and officer Wayne Booth, as well as a trust and another company controlled by Wayne Booth, trustees and former officers Gregory Booth and Melvin Hinton, former officer John Rosser, special independent ESOP trustee James Joyner, M.H. Masonry & Associates, the successor to BAT Masonry, and Sheldrick, McGhee & Kohler LLC ("SMK"), which provided valuation services to the ESOP. The complaint alleges that Wayne Booth sold BAT Masonry stock to the BAT ESOP in July 2010 for approximately $13.5 million (consisting of cash and notes), a price exceeding the company's fair market value. The original valuation was excessive because, among other reasons, it was based on a $5.8 million "officer notes receivable" from Wayne Booth held by the company that simply represented funds that he withdrew from the company while he controlled it and that he never intended to repay. The complaint further alleges that in July 2012, Gregory Booth and Hinton abandoned the company and the BAT ESOP. In the months leading up to the closure of BAT, Gregory Booth and Hinton formed MH Masonry as a competitor masonry subcontractor. On September 18, 2015, the Secretary filed an adversary complaint in Wayne Booth's Chapter 7 bankruptcy, alleging that his debts are non-dischargeable. On October 2, 2015, the Secretary filed a motion to withdraw that adversary proceeding from the bankruptcy court to the district court. On November 3, 2015, the district court granted the Secretary's motion and ordered the adversary proceeding withdrawn from the bankruptcy court and consolidated with the district court action. On August 16, 2016, the court entered a consent order against SMK, requiring SMK to disgorge the profits it obtained in issuing its valuation. On October 26, 2016, the court entered a consent order against Rosser, requiring him to pay $36,000 in restitution to the ESOP and entering a five-year fiduciary bar against him. On April 14, 2017, the Secretary filed a motion for summary judgment against Gregory Booth, Hinton, Joyner, BAT Masonry and M.H. Masonry & Associates and on May 1, 2017, responded to motions for summary judgment filed by the defendants. On May 8, 2017, the court held a hearing regarding the motions and ordered additional briefing. The court entered consent orders with James Joyner on October 11, 2017, with Wayne Booth on October 12, 2017 and with Gregory Booth on October 16, 2017. The trial is currently scheduled for March 12-16, 2018 and the summary judgment motion regarding M.H. Masonry remains pending. On December 8, 2017, the bankruptcy court approved the consent judgment entered into with Wayne Booth, thereby allowing a claim for $4.8 million related to the Secretary's civil action in Booth's Chapter 7 bankruptcy proceeding. Philadelphia Office

Perez v. Big G (E.D. Tenn.)

On November 29, 2017, the Secretary filed a complaint against Big G Express, Inc., David Nolan, Stephen Thompson, and the Big G ESOP, in connection with the creation of the ESOP. The complaint alleges that the ESOP purchased 100% of the outstanding shares of Big G Express at an amount that far exceeded fair market value. The company had retained Thompson to serve as the ESOP's independent trustee. Thompson acquiesced to the selection of 2nd Generation Capital, LLC to conduct an appraisal of the company's fair market value. This valuation report concluded that the company was worth $21,000,000, but contained a multitude of errors that resulted in a wildly inflated share price. In conducting its appraisal, 2nd Generation Capital allegedly failed to consider nearly $4 million in interest-bearing debt, incorrectly applied the discounted cash flow ("DCF") analysis, failed to exclude the value of a related investment entity that owned most of the company's real estate, utilized outdated financial data, failed to utilize the mid-year convention in its DCF analysis, failed to adjust for lack of control, and predicted a growth rate for the company that far exceeded its past performance. The errors should have been readily apparent to anyone with a very general knowledge of accounting. However, Thompson accepted the conclusions of the valuation without question, as did the company's Chief Financial Officer and chair of its ESOP Exploratory Committee, David A. Nolan. Nolan advised the other three selling shareholders to agree to the deal, and the complaint alleges that he was a knowing participant in the fiduciary breaches of Big G and Thompson. The complaint seeks restitution of all losses caused by these breaches, as well as appropriate injunctive relief. Atlanta Office

<u>Acosta v. Boettner</u> (D.N.D.)

On September 29, 2017, the Secretary filed a complaint against Custom Aire, Inc., Custom Holdings, Inc., Scott Boettner, Randal Boettner, and Rickie Bohm, alleging that the company and the ESOP's trustees (two of whom were the company's former owners) sold the shares of the company to the ESOP for more than fair market value. The complaint seeks restoration of losses to the ESOP, as well as an injunction against the trustees. Denver Office

<u>Acosta v. Bruister</u> (S.D. Miss. and 5th Cir.)

On April 29, 2010, the Secretary filed suit against Herbert Bruister, Jonda Henry, Amy Smith and Michael Bruce, as trustees of the Bruister ESOP, based on the ESOP's purchase, in each of five transactions, of stock in Bruister & Associates, Inc., from Herbert Bruister for more than its fair market value. On July 1, 2011, the Secretary amended the complaint to add a kickback claim to allege that Bruister had promised ESOP trustee Bruce that, if Bruister sold any of his Bruister & Associates stock, Bruister would pay Bruce a five percent commission on any such sale. On December 20, 2013, the district court dismissed as time-barred the Secretary's claims arising from the two earliest transactions, finding that ERISA's six-year statute of limitations is jurisdictional and cannot be extended by a tolling agreement. In all other respects, the district court denied the parties' massive summary judgment motions. After a 19-day bench trial of the Secretary's case consolidated with a parallel private suit, the district court on October 26, 2014, granted judgment for the Secretary and the private plaintiffs and awarded $6.49 million (including lost opportunity cost), payable to the ESOP. The district court based this award on an average of the competing expert witnesses' valuations of Bruister & Associates, Inc., stock, rather than on the Secretary's proposed remedy of rescission, which would have resulted in recovery of $8.78 million plus interest. The judgment also permanently enjoined defendants Herbert Bruister, Jonda Henry, and Amy Smith from acting as fiduciaries or service providers to any ERISA-covered plan. (Since September 25, 2015, the ESOP has been administered exclusively by a court-appointed independent fiduciary.) The defendants appealed the entire judgment, and the Secretary cross-appealed the district court's denial of a rescission remedy. On May 16, 2016, the 5th Circuit affirmed the $6.49 million judgment on all substantive issues, rejecting the Secretary's arguments for a rescission remedy. (The Secretary did not appeal on the statute-of-limitations issue.) In the absence of a stay pending appeal, the Secretary and the private plaintiffs took extensive post-judgment discovery during 2015 and 2016 into defendants' financial condition and, on January 16, 2015, obtained a temporary restraining order ("TRO") freezing defendant Bruister's assets. One week later, all parties agreed to a preliminary injunction that continued the asset freeze order and further established procedures for maintenance and potential sale of certain of defendant Bruister's assets, with deposit of any sale proceeds into the district court's registry. On November 15, 2015, DOL, the private plaintiffs, and other parties signed a settlement agreement with David Johanson (who was not a named defendant in Acosta v. Bruister) for Johanson's payment of $2,000,000 to be applied against the Acosta v. Bruister judgment and award of costs and attorneys' fees. This agreement settled claims against Johanson arising from his actions as an attorney in structuring the Acosta v. Bruister-related 2012 fiduciary liability insurance settlement. During 2017 and with a magistrate judge acting as a mediator, all parties settled Acosta v. Bruister together with certain post-judgment lawsuits (filed by the private plaintiffs) arising from the above-mentioned unlawful 2012 fiduciary liability insurance coverage settlement relating to Acosta v. Bruister. Together with the November 2015 Johanson settlement, this global settlement will yield an estimated $3,800,000 (net of costs and attorneys' fees allocable to the Acosta v. Bruister private plaintiffs) payable to the ESOP. Additional further collections by the ESOP are possible if discovery procedures agreed upon in this global settlement reveal previously undiscovered assets held by Herbert Bruister. Atlanta Regional Office and Plan Benefits Security Division

Acosta v Cactus Feeders, Inc. (N.D. Tex.)

On March 10, 2016, the Secretary filed a complaint against Cactus Feeders, Inc., Lubbock National Bank, the Cactus Feeders board of directors, and ESOP committee members, alleging that the Bank, as the ESOP trustee, caused the ESOP to pay more than adequate consideration for company stock and that the company, as plan administrator and acting through its board of directors and designated ESOP committee members, had knowledge of the trustee's breach of duty but did nothing to remedy that breach. The ESOP, which already owned 30% of the company stock, purchased the remaining 70% of the company stock for $100 million. The complaint alleges that the purchase price failed to include sufficient adjustments for warrants and stock options that, when exercised, would dilute the ESOP's equity from 100% to 55%, failed to include any adjustments for lack of marketability as the company remains a private entity, and failed to include any adjustments for an investors' rights agreement that effectively gave the selling shareholders control over the board of directors and the company for fifteen years. On December 30, 2016, the court denied the defendants' motion to dismiss. The parties participated in court-ordered mediation on August 22, 2017. The parties reached agreement on monetary terms and continue to negotiate the non-monetary terms. Litigation has been stayed. Dallas Office

Perez v. California Pacific Bank (N.D. Cal. and 9th Cir.)

On August 15, 2013, the Secretary filed a complaint against California Pacific Bank and its CEO and Directors, who were trustees of the Bank's ESOP, in connection with (a) the Bank's failure to cash out ESOP participant accounts when the ESOP was terminated; (b) the improper diversion of ESOP assets to the Bank in connection with a real estate "receivable"; (c) the failure to hold ESOP assets in interest-bearing accounts at the Bank; and (d) a second improper diversion of ESOP assets to the Bank, which the Bank claimed was a return of an over-contribution. The parties filed cross-motions for summary judgment at the end of 2014. On July 20, 2015, the court denied defendants' motion and granted in part and denied in part the Secretary's cross-motion. The court found that the Secretary did not establish that holding plan assets in non-interest-bearing accounts is a violation as a legal matter. The court entered summary judgment in favor of the Secretary on liability for failure to distribute cash to participants and improper diversion of the receivable but left for trial the issue of losses. The other triable issues were whether the cash taken from the plan was justifiable as an employer contribution made as a "mistake of fact" under ERISA section 403(c)(2)(A)(i), and whether the one-year limitation period for return of a mistaken contribution should be tolled. A trial was held in April 2016. On October 24, 2016, the court entered judgment in favor of the Secretary, holding defendants jointly and severally liable for over $866,840 in retirement benefits, plus interest at the IRC rate advocated by the Secretary. The court found that defendants failed to adduce credible and specific evidence that the cash balance left in the plan's account was an over contribution made as "a mistake of fact," that the equities supported an award of prejudgment interest because defendants' conduct was in blatant disregard of the plan document's express terms, and that two participants who had accepted payments that were less than their entitlement under the plan should get their full benefits. On November 7, 2016, all defendants filed a joint notice of appeal from the court's final judgment and all interlocutory orders, including summary judgment. On November 15, 2016, defendants deposited $1,045,593.20 with the district court clerk to secure the judgment, post-judgment interest, and costs. Defendants filed their opening appellate brief on March 15, 2017. The Secretary filed a responsive brief on June 23, 2017. Oral argument was held on December 6, 2017. On December 15, 2017, the Ninth Circuit issued a favorable decision, upholding the judgment against all defendants on liability and losses, but remanding the award of pre-judgment interest for further fact-finding on what interest rate is appropriate to properly compensate these plan participants. Plan Benefits Security Division

<u>Perez v. Commodity Control Corp.</u> (S.D. Fla.)

On January 20, 2016, the Secretary filed a complaint against Commodity Control Corp., David J. Pilger, and the Estate of William M. Pilger, fiduciaries of the company's ESOP, alleging that they caused the ESOP to purchase employer common stock for greater than fair market value. David and William Pilger, who served as co-owners of the company and ESOP trustees, caused the ESOP to buy their entire ownership for $9.1 million, thereby causing the ESOP to acquire 100 percent of the company. The complaint alleges that the defendants failed to obtain an accurate and current appraisal of the stock, ensure that the independent appraiser had accurate and complete financial information, perform a review of the valuation reports prepared by the appraiser, and question assumptions underlying the reports. On May 4, 2016, the court denied the defendants' motion to dismiss, in which defendants claimed that ERISA's six-year limitation period set forth in Section 413(1) is a "statute of repose" which serves as an absolute bar to litigation and cannot be waived. In response, the Secretary argued that defendants voluntarily and knowingly entered a tolling agreement, which tolled the relevant statutory limitations period, so the complaint was timely filed. The court declined to determine whether Section 413(1) is a statute of repose or a statute of limitations, but, citing a series of cases from other courts, found that both types of limitation periods are subject to waiver by written agreement. Accordingly, the court denied defendants' motion and granted the Secretary an opportunity to file an amended complaint, which would include a description of the tolling agreement entered by the parties. The Secretary then filed an amended complaint. After motions for summary judgment were denied and on the eve of trial, the parties reached a settlement. On April 3, 2017, the court entered an order of judgment against the fiduciaries, completely resolving the issues. The judgment ordered defendants to extinguish $1,250,000 of principal remaining to be paid on the promissory notes, representing a reduction in the purchase price paid by the ESOP for the company. Defendants were also required to pay a civil penalty of $125,000 and are permanent enjoined from future violations of Title I of ERISA. Atlanta Office

<u>Perez v. First Bankers Trust Services, Inc.</u> (Maran) (S.D.N.Y.)

On November 28, 2012, the Secretary filed a complaint against First Bankers Trust Services, Inc. and Maran, Inc., alleging that on November 30, 2006, First Bankers caused the Maran ESOP to purchase employer stock for more than its fair market value. The complaint alleges that First Bankers, as the ESOP's trustee, relied on a valuation that projected the company would far exceed its historical financial performance, ignored its heavy reliance on a single dominant customer, and improperly compared it to companies that operated in a different segment of the apparel industry. It also alleges that First Bankers' indemnification agreements with Maran were void as against public policy under ERISA section 410(a), as the agreements potentially required Maran – and by extension, the ESOP, which owned 49% of Maran – to indemnify First Bankers for breaching its fiduciary duties. On March 22, 2013, the court denied First Bankers' motion to dismiss, in which First Bankers argued that its deference to a valuation expert insulated it from liability. The Secretary filed an amended complaint on April 1, 2013, adding as defendants Maran's top two executives, David Greenberg and Richard Huang, who appointed First Bankers and from whom the ESOP purchased the stock. The amended complaint contends that they failed to monitor First Bankers by failing to inform First Bankers of the inaccuracy of the information on which it relied and adds allegations that First Bankers imprudently retained a valuation firm that had been recommended by the sellers' agent. On September 20, 2013, the court approved the parties’ consent order prohibiting First Bankers from seeking indemnification from Maran in the event that the court finds that First Bankers violated ERISA, in exchange for dismissing the Secretary's claim regarding indemnification. On April 23, 2014, the court denied a motion for judgment on the pleadings filed by Greenberg and Huang, in which they argued, among other things, that they were not ERISA fiduciaries. The parties subsequently filed cross-motions for summary judgment. While they were pending, the Secretary and Greenberg and Huang agreed to a consent order and judgment, which the court entered on August 5, 2016. It required them to pay $909,091 to the ESOP, plus a percentage of the sale price if Maran is sold within three years, and a civil penalty of $90,909. They also agreed to cause Maran to contribute $440,000, plus accrued interest, to the ESOP to enable it to pay the entirety of an outstanding balance on a note. On September 28, 2016, the court denied the parties’ cross-motions for summary judgment. The parties conducted a nine-day trial in April 2017. Following the trial, the parties participated in mediation. On September 21, 2017, the court entered a consent order and judgment, requiring First Bankers to pay the ESOP $6,642,857.14, and to abide by a set of agreed-upon procedures when it acts as trustee in future ESOP transactions. Plan Benefits Security Division

<u>Perez v. First Bankers Trust Services, Inc.</u> (Sonnax Industries) (D. Vt.)

On December 28, 2016, the Secretary filed a complaint against First Bankers Trust Services, Sonnax Industries, Inc., and the company’s former owners, alleging that the Sonnax Industries ESOP paid more than adequate consideration for company stock on January 3, 2011, when the company redeemed all outstanding shares from the owners for $48.8 million, and simultaneously issued new shares which it sold to the ESOP for $10 million. The complaint alleges that the valuation used by First Bankers, the trustee, to justify both the $48.8 million and $10 million purchases was fundamentally flawed, resulting in a significant inflation of the purchase prices and that the trustee failed to prudently investigate the transaction's merits. Boston Office

Perez v. First Bankers Trust Services, Inc. and Frank Firor (S.D.N.Y.)

On November 28, 2012, the Secretary filed a complaint against the fiduciaries of the Rembar, Inc. ESOP, in connection with the ESOP's purchase of 100% of the plan sponsor's stock. The complaint alleges that First Bankers Trust Services, the trustee charged with determining the fair market value of Rembar's stock, failed to carry out a meaningful review of the valuation of the stock and caused the ESOP to overpay by at least $2.5 million. The complaint also alleges that Firor, the selling shareholder, was a knowing participant as well as a functional fiduciary because he appointed First Bankers but failed to monitor or remove it despite knowing that the ESOP overpaid him for his stock. First Bankers filed an answer and on March 8, 2013, Firor filed a motion to dismiss, arguing that he did not act in a fiduciary capacity and therefore, as a matter of law, cannot be held liable. On May 3, 2013, the Secretary filed an amended complaint, including additional facts supporting the Secretary's claim that Firor acted as a fiduciary. First Bankers filed an answer, and Firor again filed a motion to dismiss the amended complaint, maintaining that he did not act as a fiduciary. On August 15, 2013, the Secretary filed a brief opposing Firor's motion to dismiss, to which Firor filed a reply brief. On January 13, 2014, the court denied Firor's motion, holding that the Secretary had alleged sufficient facts to support the claim that Firor acted as a fiduciary. In January 2016, the Secretary reached a settlement agreement in principle with Firor for $1.2 million and the section 502(l) penalty. Firor filed a bar motion, which First Bankers opposed because it wanted greater reductions to its exposure as a result of the Secretary's settlement. The court endorsed the Secretary's position that First Bankers' exposure should be reduced by Firor's proportionate fault, but not by the amount Firor paid as a section 502(l) penalty. It also approved the Firor consent judgment and order dated May 4, 2016. Firor paid both the settlement amount and the penalty in May 2016. After an attempt at mediation in May 2016, First Bankers filed a motion for summary judgment on August 12, 2016. The Secretary filed a response and cross moved on November 8, 2016. First Bankers filed a reply on December 23, 2016. On March 30, 2017, the court denied the parties' cross-motions for summary judgment. In its decision, the court adopted the Secretary's view that tolling agreements can operate on the six-year prong of the statute of limitations. The court also adopted the Secretary's view that post-ESOP transaction "restructuring" activities that purport to reduce the transaction price are irrelevant to the Secretary's remedial demands. Following mediation involving this case and two others filed against First Bankers Trust Services by the Secretary, the parties reached an agreement. On September 25, 2017, the court approved the consent judgment, which requires $1.1 million in restitution and enhanced compliance. New York Office

Perez v. First Bankers Trust Services, Inc. and Vincent DiPano (D.N.J.)

On July 17, 2012, the Secretary filed a complaint against the fiduciaries of the SJP Group, Inc. ESOP, alleging that they caused the ESOP to purchase employer stock for millions of dollars in excess of the stock's fair market value. The Secretary alleges that GreatBanc, as the trustee charged with determining the fair market value of the stock, ignored obvious errors in the valuation report and failed to determine whether the financial information provided by the plan sponsor was reliable. The Secretary further alleges that the company and its president Vincent

DiPano, as the fiduciaries that appointed GreatBanc as trustee, failed to monitor GreatBanc's performance and allowed the transaction to take place knowing that the purchase price was in excess of fair market value. The defendants filed separate motions to dismiss, which the court denied on May 31, 2013. The defendants filed motions for summary judgment and the parties filed various *Daubert* motions to preclude admission of each other's experts. On September 29, 2015, the court denied the motions for summary judgment and mostly denied the *Daubert* motions without prejudice. A pre-trial conference/settlement conference took place on November 16, 2015. At that conference, a settlement agreement in principle was reached with DiPano for $2.25 million and the section 502(l) penalty (conditioned on DiPano obtaining protection against subsequent claims for contribution from First Bankers). The parties filed a consent judgment on January 8, 2016. While the Secretary agreed with DiPano on the settlement terms and the need for a bar order, the parties disagreed on the bar order terms. The bar order terms were submitted to the court for decision: the First Bankers/DiPano terms (proportionate fault reduction and reduction for Di Pano's section 502(l) payment) were submitted on January 8, 2016. The Secretary's proposed terms (pro tanto reduction of First Bankers' liability and no reduction for section 502(l) payments) were filed on January 11, 2016. First Bankers filed its opposition to the Secretary's proposed terms on February 2, 2016, to which the Secretary replied on February 9, 2016. Short follow-up briefs on the effect of the proposed bar order language on claims for contribution were submitted on March 8, 2016. Oral argument was held on April 20, 2016. The court upheld the Secretary's position that section 502(l) penalties could not reduce First Bankers' compensatory remedy exposure but also agreed with First Bankers that its exposure should be reduced by DiPano's proportionate fault. Also on April 20, 2016, the court approved the DiPano consent judgment. The parties attempted a mediated settlement in May, 2016, but did not succeed. Trial began on May 23, 2016 and lasted for 16 full days until September 23, 2016. Briefs were filed on October 25, 2016 and replies filed on November 15, 2016. On March 31, 2017, the court ruled in the Secretary's favor, awarding a judgment of $9.485 million (less an offset for earlier settlement payment but plus interest) in restitution. The court upheld the Secretary's expert valuation and adopted the theory advanced by the Secretary's prudence expert that First Bankers should have, at the very least, adhered to the standard of care prevailing among private equity investors. The decision strongly rejects the argument that ESOP transactions receive lesser scrutiny than transactions impacting other kinds of plans. First Bankers appealed this decision. The parties reached a settlement in principle whereby FBTS agreed to restore $8 million to the plan with an enhanced injunction, and submitted a consent order to the court for entry on September 21, 2017. On May 3, 2017, the independent fiduciary advised the Secretary that First American Bank, which provided a loan to the sponsoring company of the ESOP, is asserting a security interest in any recoveries the ESOP makes in the lawsuit, specifically including funds on deposit with the court from the Secretary's settlement with DiPano. On May 26, 2017, First American Bank filed its own complaint against the ESOP seeking turnover of all DOL-recovered funds; the DOL was not named as a defendant. In light of First Banker's pending appeal, the court stayed both the First American Bank's action and the Secretary's original action. The court lifted the stay on November 8, 2017, at which time it formally entered the consent order in the Secretary's case. On November 22, 2017, the Secretary filed a Rule 24 motion to intervene in the First American Bank case. If intervenor status is granted, the Secretary intends to move to dismiss First American Bank's complaint. The plan's fiduciary will also be moving to dismiss First American Bank's complaint. New York Office

Perez v. Ginsberg (S.D.N.Y.)

On February 11, 2015, the Secretary filed a complaint against the fiduciaries of the Laser and Skin Surgery Center of New York ESOP, alleging that they caused the ESOP to purchase employer stock for millions of dollars in excess of the stock's fair market value between August 2008 and February 2009. The Secretary alleged that the fiduciaries charged with determining the fair market value of the stock ignored critical and knowable errors in the valuation report and either failed to determine whether the financial information provided by the plan sponsor was accurate or relied on information they knew or should have known was materially wrong. Before trial, on July 21, 2017, the Secretary filed a consent judgment with the court, requiring $5 million in restitution to the ESOP and a $500,000 section 502(l) penalty. The court approved the consent judgment on July 25, 2017. New York Office

Perez v. Mueller (E.D. Wis.)

On November 18, 2013, the Secretary filed a complaint against the fiduciaries of the Omni Resources, Inc. ESOP in connection with the ESOP's $13.7 million purchase of the company's stock for more than adequate consideration on December 30, 2008. The defendants include Veronica Mueller and Roger Mueller (Omni's owners, officers and board members and ESOP trustees), Alpha Investment Consulting Group, Inc. (special fiduciary to the ESOP for purposes of the ESOP stock purchase), and six trusts (which held Omni stock on behalf of the Muellers' children and sold that stock to the ESOP). The complaint alleges that, among other things, the price that the ESOP paid was based on a four month old valuation that had not been updated with financial information showing a severe downturn in the company's earnings and economic information showing a severe downtown in the business in which it engaged. On May 19, 2014, the court rejected defendants' motion to dismiss the Secretary's complaint and ruled that (a) the three-year limitation period in ERISA was not jurisdictional and that it may be tolled by agreement and (b) ERISA prohibited both direct and indirect sales of shares (rejecting defendants' argument that by first selling their shares to the company and then having the ESOP buy the shares from the company, they avoided engaging in a prohibited transaction). On July 7, 2017, all parties filed cross-motions for summary judgment. Opposition briefs were filed by all parties on August 8, 2017, and reply briefs were filed on August 21, 2017. The parties engaged in mediation on October 23, 2017. Continued negotiations resulted in a consent decree and order which the court approved on December 22, 2017. The order permanently enjoins Roger and Veronica Mueller from acting as fiduciaries to ERISA-covered plans and requires Alpha to report all new fiduciary engagements to the Department for two years and to permanently follow a detailed set of procedures when acting as a fiduciary during ESOP stock purchases or sales for privately held companies. The Mueller defendants agreed to reduce the amount of the outstanding loan on the stock purchase transaction by $3.5 million and agreed to pay to the ESOP $1.5 million, pay an additional $20,681.82 within two years, and pay a civil penalty of $479,318.18. Chicago Office, Kansas City Office, and Plan Benefits Security Division

Perez v. Potts (S.D. Ohio)

On June 27, 2016, the Secretary filed a complaint against Thomas E. Potts and Fiduciary Trust Services, Inc., trustees of the Triple T Transport, Inc. ESOP. The complaint alleges that defendants approved a transaction in which the ESOP purchased 80% of the outstanding stock of Triple T Transport, Inc. for $17.46 million. The complaint also alleges that defendants knew or should have known that a valuation opinion on which they relied contained serious flaws, which resulted in the stock being significantly overvalued. As a result of the defendants' actions, the ESOP purchased the stock for a price in excess of fair market value, suffering losses in excess of $5.9 million. On December 15, 2016, the court granted the motion of Gemini Insurance Company to intervene in the case to litigate whether it is contractually obligated to defend or indemnify defendants pursuant to insurance policies it issued to defendants. Cleveland Office

Secretary v. Reliance Trust Company (D. Minn.)

On October 4, 2017, the Secretary filed a complaint against Reliance Trust Company and Steven Carlsen, Paul Lillyblad, and Kelli Watson, Board members of Kurt Manufacturing Company, Inc. and fiduciaries of the company's ESOP. Reliance became the trustee of the ESOP in connection with the ESOP's October 5, 2011, $39 million purchase of all outstanding shares from Kurt's sole shareholder. The complaint alleges that Reliance caused the ESOP to pay more than adequate consideration for company stock and that Carlsen, Lillyblad, and Watson failed to monitor Reliance's determination to have the ESOP purchase employer securities for more than adequate consideration. On December 1, 2017, the court granted defendant's request for an extension of time to file an answer or otherwise plead until February 5, 2018. Chicago Office

Acosta v. Sortino (D. Neb.)

On May 8, 2017, the Secretary filed a complaint against the selling shareholders of R&M Transportation, Inc. and the trustee of the company's ESOP. In March, 2010, the five original shareholders sold all their shares to the ESOP for $25 million. The Secretary's complaint alleges that the shareholders and the named trustee sold all their shares to the ESOP for more than the stock's fair market value without a valuation having been obtained or an independent investigation having been conducted. On May 12, 2017, the court entered a consent judgment under which the fiduciaries agreed to restore $538,511 to the ESOP and be permanently enjoined from serving as fiduciaries for any ERISA-covered plan. Kansas City Office

Tatum v. RJ Reynolds (4th Cir. and S. Ct.)

This was an appeal from a district court decision, following an earlier remand from the Fourth Circuit, holding that plan fiduciaries violated their procedural duties of prudence by selling stock in Nabisco after a corporate spin-off, but also holding that because a prudent fiduciary could have concluded that selling the stock was prudent given such factors as the general risk of holding a single-stock investment, the fiduciaries established that the plan participants were not economically harmed by their decision. The plaintiffs asserted that the proper standard is not what a hypothetical prudent fiduciary "could" have done, but what it "would" have done under the circumstances and appealed to the Fourth Circuit. The plaintiffs filed an opening brief on May 27, 2013, and the Department filed an amicus brief in support on June 25, 2013. The court, over a dissent, issued a favorable decision on August 4, 2014. The district court then applied the proper test and determined that a prudent fiduciary "would" also have divested the stock in the same timeframe. The plaintiffs appealed again and argued that the district court erred in its evaluation of the evidence under this test. In a response brief, the defendants re-raised the "could have" argument that was previously rejected by the Fourth Circuit, arguing that the Supreme Court's decision in Amgen v. Harris 136 S. Ct. 758 (2016) (per curiam) (vacating a lower court's decision in light of the guidance in Dudenhoeffer v. Fifth Third, 134 S.Ct. 2459 (2014)), calls into question the Fourth Circuit's prior holding. The Secretary filed another amicus curiae brief on September 9, 2016, urging the court to stand by its prior decision and reject the defendants' arguments based on Amgen. On April 28, 2017, the Fourth Circuit, over a dissent, issued a favorable decision on the issue briefed by the Secretary. The panel unanimously agreed that Amgen did not abrogate its prior decision and confirmed the applicability of the "would have" test. The panel disagreed on its application to the facts of the case, an issue the Secretary did not brief. Plan Benefits Security Division

Perez v. Tobacco Rag Processors Inc. Employee Stock Ownership Plan (E.D.N.C.)

On May 4 2017, the Secretary filed a complaint against Reliance Trust Company, alleging that Reliance Trust, as ESOP trustee, caused the Tobacco Rag Processors, Inc. ESOP to overpay when it purchased 100% of the shares of common stock of the company in 2011, resulting in significant losses to the ESOP. The complaint also alleges that Reliance Trust's reliance on an independent expert's valuation of the company in determining the stock price to be paid by the ESOP was not reasonably justified under the circumstances. Had Reliance Trust meaningfully reviewed the valuation report, it would have found significant flaws or "red flags" in the report, including, but not limited to: (1) unduly optimistic operating margin projections, out of line with projections within the most analogous industry; (2) the failure to adequately account for the risk associated with the company's dependence on one customer for nearly 50% of its revenue in selecting an appropriate discount rate; (3) the reliance on incomparable "comparable" companies in its market approach; (4) the failure to account for the dilutive impact on the stock of the warrants and stock appreciation rights issued as part of the stock purchase; (5) the failure to discount the value of the ESOP's shares in light of the ESOP's limited ability to control the company; and (6) the adjustment to earnings for executive compensation, where no evidence indicated that the company's executives had agreed to cut their compensation, thereby providing real savings for the company. These errors caused the valuation report to overvalue the company; at the time of the stock purchase, the company's fair market value was potentially as low as 40% of the value determined in the valuation report. Defendants requested an extension of time within which to file an answer. The Department and defendants' counsel have also discussed possible settlement and to that end, have agreed to mediate the case. The mediation is scheduled for March 2018. Atlanta Office

Perez v. TPP Holdings Inc. (W.D.N.C. and 11th Cir.)

On December 30, 2014, the Secretary filed a complaint against TPP Holdings Inc. and TPP's owner and chief executive officer Robert Nicholas Preston, alleging that the ESOP fiduciaries: (1) authorized the ESOP to purchase company stock in 2006 and 2008 for more than adequate consideration; (2) failed to act solely in the participants' interests; (3) failed to follow ESOP documents; and (4) engaged in self-dealing. The fiduciaries also allegedly permitted improper co-mingling of ESOP and corporate funds. The complaint further alleges that the ESOP did not exercise its voting rights in company decision-making, did not release the proper number of shares, and did not make the proper distributions to participants. On May 15, 2015, defendants filed a motion to dismiss, motion to stay pre-answer deadlines, and motion to extend time for defendants to file a responsive pleading. On June 1, 2015, the Secretary filed an opposition to defendants' motion to dismiss. On June 15, 2015, the defendants filed a reply. The defendants' motion to dismiss was predicated on arguments concerning enforceability of tolling agreements as to ERISA's six-year time limit. The court granted the defendants' motion, finding that ERISA's six-year time limit is a statute of repose and cannot be waived or contractually tolled.

The Secretary, citing Eleventh Circuit and Supreme Court precedent, filed a motion for reconsideration. On May 2, 2016, the court denied the Secretary's reconsideration motion, but the court invited the Secretary to file a motion for certification for interlocutory appeal. The Secretary filed the motion on September 9, 2016. The defendants filed a response. The district court granted the Secretary's motion and certified the dismissal order for interlocutory review on November 22, 2016. The Secretary filed a petition for interlocutory review with the Eleventh Circuit on December 2, 2016, arguing that the ERISA six-year limitation is subject to waiver. Defendants filed a response on December 12, 2016. On February 24, 2017, the Eleventh Circuit granted the petition for interlocutory appeal. The Secretary filed an opening brief on April 5, 2017. Defendants filed a response on May 5, 2017. The Secretary filed the reply brief on May 19, 2017. Oral argument was held on August 24, 2017. On October 12, 2017, the Eleventh Circuit issued a favorable decision, reversing the district court and agreeing with the Secretary that ERISA's six-year time limit is waivable. Defendants filed a petition for panel rehearing on November 22, 2017, which was denied on December 13, 2017. Atlanta Office and, on appeal, Plan Benefits Security Division

<u>Perez v. Vinoskey</u> (W.D. Va.)

On October 14, 2016, the Secretary filed a complaint against Adam Vinoskey, who was the selling shareholder in an ESOP stock purchase that occurred in December 2010, Evolve Bank and Trust, which was the independent fiduciary hired to approve the transaction on behalf of the Sentry Equipment Erectors, Inc. ESOP, and its senior trust officer, Michael New, who approved the transaction price and the structure of the transaction. The complaint alleges that the ESOP paid $20.7 million for the company's stock that was worth only about $13 million, that the debt taken on to fund this transaction lowered the value of the ESOP stock that had already been allocated to participant accounts from a stock purchase that had occurred several years earlier, and the fiduciaries took no action to protect existing participants from this drop in the value of the shares that they owned before the 2010 transaction. The total value of both claims is $13.34 million. On January 17, 2017, following defendants' motion to dismiss for failure to state a claim, the Secretary filed an amended complaint. On February 14, 2017, Michael New filed a motion to dismiss on the grounds that he acted only as an "employee" of the named fiduciary and therefore, an ERISA claim could not be asserted against him. On May 2, 2017, following briefing by the Secretary, the court denied New's motion to dismiss, concluding that the Secretary had sufficiently pled facts supporting that New exercised discretionary authority or control over the management of the ESOP assets such that he could be considered a fiduciary. On October 26, 2017, the Secretary filed a motion for summary judgment against all defendants. On December 1, 2017, the Secretary filed responses to the summary judgment motions of Sentry, Evolve Bank and Trust, and Michael New. Oral argument regarding these motions, along with defendants' motions to exclude the Secretary's expert are scheduled for January 17, 2018 with the trial set to begin on March 19, 2018. Philadelphia Office

<u>Acosta v. Wilmington Trust</u> (S.D.N.Y.)

On August 21, 2017, the Secretary filed a complaint against Wilmington Trust, N.A., trustee of the HMCM Legal, Inc. ESOP, alleging that Wilmington approved the ESOP's purchase of 100% of HCMC's stock for $46 million, which was millions of dollars more than the fair market value of the stock. The complaint alleges that Wilmington failed to prudently investigate the value of HCMC's stock and improperly relied on a flawed, inflated valuation of the stock's value in approving the ESOP's purchase of the stock. Specifically, the valuation included a premium for control of HCMC even though the ESOP did not acquire control of the company and failed to account for the value of millions of warrants that gave other parties to the transaction the right to buy nearly 50% of HCMC stock at a preset price in the future – and thereby dilute the ESOP's equity stake. Despite these obvious red flags, Wilmington allegedly made no effort to negotiate the ESOP's purchase price and merely accepted the price presented to it. Wilmington filed an answer to the complaint on October 23, 2017, and the court issued a case management order on November 17, 2017. Plan Benefits Security Division

Acosta v. Wilmington Trust (N.D. Ohio)

On August 22, 2017, the Secretary filed a complaint against Wilmington Trust, N.A., trustee of the Graphite Sales, Inc. ESOP, alleging that Wilmington approved a transaction in which the ESOP purchased 100% of the company's issued stock for $16 million, which was more than adequate consideration. The complaint alleges that as a result of Wilmington's actions, the ESOP suffered losses in excess of $6 million. On December 20, 2017, the court denied Wilmington Trust's motion to transfer venue of the case to District of Delaware. Cleveland Office

Perez v. Zander Group Holdings, Inc. (M.D. Tenn.)

On August 23, 2017, the Secretary filed a complaint against Jeffrey J. Zander and Stephen M. Thompson, as fiduciaries to the Zander Group Holdings, Inc. ESOP, along with the company itself. The complaint alleges that Zander, as trustee and beneficiary of the selling shareholder and as president of the company, actively participated and influenced the valuation process in order to obtain a higher conclusion as to the value of the company prior to the sale. As a result of Zander's participation in the valuation process and the valuation company's use of fundamentally flawed valuation methodologies, the complaint alleges that the company was vastly overvalued, and the ESOP overpaid when purchasing its shares. Zander also named Thompson allegedly as the ESOP trustee. Thompson failed to conduct a prudent investigation into the process by which the valuation was obtained and failed to meaningfully review the valuation report. As alleged in the complaint, had he done so, he would have noted numerous flaws, including that the valuation did not value the entity to be sold, employed stale financial data, employed inaccurate financial data, relied primarily on market approaches even though the entity to be sold was a small, privately held business, employed discounts to the market methods in an unorthodox and inconsistent manner, failed to represent the riskiness of the business, failed to employ a proper tax rate, improperly employed EBITDA as a proxy for net cash flows, and improperly included the value of an ESOP "tax shield" in the pre-transaction value of the business. Zander and the company filed a motion to dismiss the complaint, contesting their fiduciary status. On December 11, 2017, the Secretary filed a response to this motion, which is pending. Atlanta Office

B. Financing the Employer

1. Collection of Plan Contributions and Loan Repayments

In re Abeln (Bankr. E.D. Mo.); Acosta v. Abeln (E.D. Mo.)

On August 21, 2017, the Secretary filed an adversary complaint against Ryan C. Abeln alleging that a $22,722 debt owed to the Missouri Freight Equipment Group Health Plan is non-dischargeable. Instead of remitting withheld employee contributions to the plan during the period from November 2012, through January 2014, Abeln used the contributions to pay personal and corporate expenses and then filed for Chapter 7 bankruptcy. The Secretary alleged that Abeln's conduct constitutes defalcation, making his debt to the plan non-dischargeable. On November 17, 2017, Abeln stipulated to the non-dischargeability of the $21,376.64 debt representing losses to the plan plus $2,941.75 in prejudgment interest. On November 21, 2017, the bankruptcy court issued a judgment ordering that the losses to the plan plus prejudgment interest is non-dischargeable. On June 15, 2017, the Secretary filed a civil complaint against Abeln seeking to restore the specific debt deemed non-dischargeable in the bankruptcy action: the health plan losses. That action is pending. Kansas City Office

Acosta v. American Hospital Management (D.D.C.)

On December 29, 2017, the Secretary filed a complaint against American Hospital Management, LLC ("AHM") and Randall Arlett, an officer of AHM and plan trustee. The complaint alleges that from September 2012 through September 2015, employee elective deferral contributions were withheld from employees' pay but that AHM and Arlett failed to either remit those contributions to the plan in a timely fashion or to do so at all. The complaint also alleges that Arlett failed to respond to requests for distributions from an employee who resigned in November 2015. The complaint seeks restitution of $113,048.27 to the plan and a fiduciary bar against AHM and Arlett. Philadelphia Office

Acosta v. Anstett (D.N.D.)

On March 1, 2016, the court entered a consent judgment and order settling allegations in the Secretary's complaint, filed on July 15, 2015, that the Mathison Company, Marilyn Anstett, and Paul Anstett, who are the company's president and vice president and plan trustees, failed to remit and to timely remit employee contributions and loan repayments to the company's 401(k) Plan and failed to properly administer its ESOP. The consent judgment confirmed the complaint allegations and, among other things, ordered the defendants to pay $14,066.34 to 401(k) plan participants, to terminate the 401(k) plan, and freeze and to take steps to properly administer the ESOP. The court also ordered them to complete ten hours of fiduciary training. Since the filing of the consent judgment, the fiduciaries only have partially fulfilled their 401(k) Plan monetary obligations under the consent judgment ($8,066 in employee contributions is still outstanding to participants) and only partially fulfilled their ESOP monetary obligations under the consent judgment. Accordingly, on November 16, 2017, the Secretary filed a contempt petition to enforce the provisions of the consent judgment. The court has not yet taken action on the contempt petition. See also Acosta v. Anstett, Section L. Contempt and Subpoena Enforcement. Denver Office

Acosta v. Avedisian and J&T Enterprises (D. Mass.)

On December 18, 2017, the Secretary filed a complaint against Suren Der Avedesian and J&T Enterprises Inc. d/b/a/ Omni Foods Supermarkets, fiduciaries of the company's health plan, alleging that they failed to make full employer contributions to the plan while Avedesian withdrew $132,257.70 from the company's account. Because of this failure, two insurance companies could not reimburse claims. The fiduciaries also failed to inform the plan participants of the inability to reimburse claims. The participants lost $84,938.84. On December 6, 2016, Avedesian filed for Chapter 13 bankruptcy. Upon discovery of the bankruptcy, the Secretary filed an adversary complaint in the bankruptcy court on December 4, 2017. The Secretary is currently seeking to withdraw the referral of the adversary complaint and to have both cases heard in district court. Boston Office

Perez v. Calderon (D. Md.)

On April 1, 2016, the Secretary filed a complaint against Carlos Calderon, president of C.R. Calderon Construction Company and fiduciary of the Contractors & Employees 401(k) Profit Sharing Plan and against the company, as the plan administrator, alleging that they failed to remit employee and prevailing wage employer contributions to the plan. The Secretary seeks restitution of approximately $35,235 in employee contributions, $346,523.12 in prevailing wage employer contributions, and lost opportunity costs, the appointment of an independent fiduciary, and a permanent bar against Calderon and the company from serving as fiduciaries to any ERISA-covered plan in the future. Defendants answered the complaint on August 8, 2016. On March 13, 2017, the Secretary filed a motion for summary judgment which the court granted in part. The court found that the defendants breached their fiduciary duties by failing to remit employee contributions but denied the Secretary's request to recover employer contributions. The court order requires the defendants to restore to the plan $35,235 in employee contributions plus lost opportunity costs. Philadelphia Office

Acosta v. Central Sweeping Services, Inc. (M.D. Fla.)

On March 1, 2016, the Secretary filed a complaint against Central Sweeping Services, Inc., and Douglas Swatkowski, the fiduciaries of the company's Inc. 401(k) Plan, alleging that they untimely remitted employee contributions and loan repayments. The complaint also alleged that the plan was abandoned after the company ceased operations. After successfully showing the court that defendants were served but failed to answer, the Secretary filed a motion for default judgment. On, August 15, 2017, the court issued an order, adopting in part and rejecting in part the magistrate judge's report and recommendations. The court appointed an independent fiduciary, approved the independent fiduciary's fee proposal, permanently enjoined the defendants from serving as fiduciaries or service providers to any ERISA-covered plan, and ordered a setoff of $3,824.34 against Swatkowski's individual balance. The court, while ordering a fiduciary bar, declined to enter an obey-the-law injunction, citing unfavorable precedent on this issue. On August 16, 2017, the court entered a final judgment. See also Acosta v. Central Sweeping Services, Inc., Section K. Orphan Plans. Atlanta Office

Acosta v. Chainani (S.D. Tex.)

On April 20, 2015, the Secretary filed an amended complaint against AARC Environmental, Inc. (AARC) and Kishore Chainani, AARC's sole owner. The original complaint, filed on

December 26, 2014, alleged that they failed to forward employee contributions and loan repayments to the company's 401(k) Plan since December 29, 2007, resulting in more than $78,000 in losses. The amended complaint alleges that they failed to remit all employee and employer premiums to the company's Group Health Plan and allowed coverage to lapse multiple times since 2011, as a result of which they owe participants more than $40,000 in employee premiums and an additional unknown amount for unpaid medical claims. On September 20, 2016, the court entered a default judgment against defendants, granting full relief and awarding more than $86,000 in losses for the 401(k) Plan and more than $40,000 in losses for the Health Plan to 49 participants and beneficiaries. Defendants are also required to hire an independent fiduciary at their own expense and are barred from acting as fiduciaries in the future once the independent fiduciary is in place. Because defendants failed to comply with the default judgment, the Secretary on June 28, 2017, filed a motion to adjudge defendants in contempt. On September 7, 2017, the court issued an order finding defendants in civil contempt and ordered them to make immediate restitution of $86,085.43 to the 401(k) plan and immediate restitution of $39,601.47 to the health plan participants. Defendants hired counsel and entered into negotiations with the Secretary to purge themselves of contempt. On December 22, 2017, the Secretary filed a request for stay of contempt pending defendants' payment of the outstanding debt owed to both plans pursuant to an agreed repayment plan. See also Acosta v. Chainani, Section L. Contempt and Subpoena Enforcement. Dallas Office

Acosta v. Claxton (E.D. Mo.)

On December 30, 2015, the Secretary filed a complaint against James M. Claxton, owner of Claxton Consulting Engineers, Inc., alleging that Claxton, as trustee of the company's 401(k) and Health Plans, failed to forward $10,720.33 in employee contributions to the 401(k) Plan and failed to forward $1,363.38 in employee contributions to the Health Plan during 2006 to 2009. The defendant accepted service but failed to file an answer. On July 1, 2016, the Secretary filed a default judgment motion by direction of the court. On March 14, 2017, the court granted the Secretary's motion for judgment by default. Kansas City Office

Acosta v. Clifton (S.D. Tex.)

On August 8, 2017, the Secretary filed a complaint against Deborah Clifton, Integrity International, Inc. and the Integrity Consulting 401(k) Plan, alleging that Clifton and Integrity, as fiduciaries, failed to remit $10,537.34 in withheld employee contributions and $4,244.43 in participant loan repayments to the plan. Clifton had entered into an informal settlement with the Secretary in August 2016, but defaulted on the agreed-upon monthly payments. The complaint seeks the restoration of all plan losses and injunctive relief requiring the fiduciaries' compliance with ERISA and an injunction barring Clifton from serving as a fiduciary. Dallas Office

Acosta v. Coffman (W.D. Okla. and Bankr. W.D. Okla.)

On July 22, 2016, the Secretary filed a complaint against Larry Coffman, fiduciary and owner of Centerpointe Resources, Inc. alleging that they failed to remit and to timely remit employee contributions and participant loan repayments to the company's 401(K) Profit Sharing Plan and Trust beginning on January 11, 2011, resulting in approximately $76,000 in plan losses owed to 25 employees. Post-complaint, on October 28, 2016, Coffman filed a petition for personal, Chapter 7 bankruptcy relief. On January 25, 2017, the clerk of court entered default against the company. On February 6, 2017, the Secretary filed an adversary complaint in Coffman's bankruptcy to preserve the fiduciary's liability to the plan. In March 2017, the Secretary advised both courts that the parties had reached a settlement that would resolve both complaints. On June 23, 2017, the district court entered the consent judgment and order. On June 27, 2017, the bankruptcy court signed and entered the agreed order of non-dischargeabilty. Dallas Office

<u>Perez v. Cullen</u> (D. Del.)

On June 29, 2015, the Secretary filed a complaint against Thomas Cullen, president of Thomas E. Moore, Inc., and fiduciary of the Thomas Moore, Inc./Video Scene of Delaware SIMPLE IRA Plan and against the company, as plan administrator, alleging that they failed to remit employee contributions to the plan from December 2011 through May 2013, and failed to collect employer contributions due to the plan beginning in July 2010. The complaint seeks restitution, appointment of an independent fiduciary, and a permanent injunction barring the defendants from serving as fiduciaries to any ERISA-covered plan. The defendants waived service, and all deadlines are stayed pending the outcome of settlement discussions. On April 25, 2016, the Secretary obtained a default judgment against the company. On February 15, 2017, following court-ordered mediation, the Secretary reached a settlement with Cullen and filed a stipulation of dismissal without prejudice with the court. Philadelphia Office

<u>Secretary v. Davis Paige Management Systems, LLC</u> (E.D. Va.)

On April 27, 2017, the Secretary filed a complaint against Davis-Paige Management Systems, LLC, administrator of the company's 401(K) Plan, and Michael E. Davis, the company's owner and plan trustee, alleging that they failed to make contributions to the plan, amounting to approximately $250,000 in missing contributions. On December 18, 2017, the court entered a consent judgment against Davis, ordering him to restore to the 401(k) Plan $257,699.89 in missing employee, employer match, employee loan repayments, employee Roth, employer Roth, and Service Contract Act contributions, and lost opportunity costs of $33,829.77, for a total of $291,529.66. Davis was also ordered to restore over $12,000 in unpaid medical claims to health plan participants and to pay costs of $26,185.97 related to the appointment of an independent fiduciary. Philadelphia Office

<u>Perez v. Demmy</u> (S.D. Ohio)

On May 23, 2016, the Secretary filed a complaint against Demmy Sand & Gravel, LLC, Amy Demmy and the company's Retirement Savings Plan, alleging that the fiduciaries failed to segregate and remit $2,409.65 in employee contributions and $32,883.34 in loan repayments and failed to timely remit loan repayments. The Secretary also alleges that the fiduciaries failed to collect $264,750.36 in prevailing wage contributions. The complaint seeks an order requiring that Amy Demmy restore all losses to the plan with interest, removing her as a fiduciary, enjoining her from being a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to administer the plan. Cleveland Office

<u>Acosta v. DP Technology</u> (E.D. Va.)

On March 22, 2017, the Secretary filed a complaint against Darla Pena Lopez and DP Technology Services, Inc. alleging that they failed to remit employee contributions and loan repayments to the company's 401(k) Plan; failed to remit employee contributions to its Group Health Plan; and failed to remit mandatory employer prevailing wage contributions to its Contractors Plan. On July 26, 2017, the Secretary filed a motion for default judgment after the defendants failed to answer the complaint. On November 9, 2017, the magistrate judge recommended against entering a judgment that would provide complete relief to the plan on the theory that Fed. R. Civ. P. 54(c) prohibits entry of a monetary award in a default judgment if the complaint fails to allege a specific loss amount. On November 21, 2017, the Secretary filed objections to the report and recommendation arguing, among other things, that failure to provide complete relief would deny the participants and beneficiaries a full remedy – a result that the language and interpretation of ERISA never intended. The Secretary also argued that the complaint was sufficiently detailed to put defendants on notice of both the type and amount of loss that would result from defendants' default and, therefore, Rule 54(c) was satisfied. On December 21, 2017, the district court entered an order granting the Secretary's motion for default judgment, concluding that the Secretary was entitled to the complete relief sought, which amounts to $86,213.29, including $10,903.05 for the 401(k) Plan, $31,953.47 for the Health Plan, and $43,356.77 for the Contractors Plan. Philadelphia and Arlington Offices

<u>Secretary of Labor v. Fletcher-Thompson, Inc. and John C. Oliveto</u> (D. Conn.)

On November 27, 2017, the Secretary filed a complaint against Fletcher-Thompson, Inc. and John Oliveto (plan trustee and one of the company principals). The complaint alleges that the defendants failed to remit $259,172.25 in deferred employee contributions and loan repayments to the Fletcher-Thompson Savings Plan for the period February 27, 2015 to the present. The complaint also alleges that the company failed to remit $22,423.06 representing post-judgment interest on deferred employee contributions and loan repayments to the plan in accordance with the <u>Perez v. Fletcher-Thompson, Inc. and Michael S. Marcinek</u> modified consent judgment entered by the court on January 29, 2016. Boston Office

<u>Acosta v. General Projection Systems, Inc.</u> (M.D. Fla.)

On May 12, 2017, the Secretary filed a complaint against General Projection Systems, Inc., Cheryl Wayson, and Drake Wayson, alleging that they withheld employee contributions and failed to remit required contributions to the company's 401(k) Plan and the Group Health Plan. As a result of the fiduciaries' failure to remit the health insurance premiums, participants incurred unpaid medical claims totaling approximately $10,217. The complaint asks the court to: (1) permanently enjoin the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee or representative having control over the assets of any employee benefit plan subject to ERISA; (2) enjoin the defendants from engaging in any further action in violation of Title I of ERISA; (3) appoint a successor fiduciary at the defendants' expense to administer the plans; and (4) order the defendants to restore all losses to the plans, including payment of unpaid health insurance claims. Atlanta Office

<u>Acosta v. Gillette Construction Service Corp.</u> (S.D. Fla.)

On March 13, 2017, the Secretary filed a complaint against Gillette Construction Service Corp. and the company's sole owner and president, Michael Gillette, alleging that they withheld employee contributions and failed to remit required contributions to the company's 401(k) Plan. On September 22, 2017, the court entered a consent judgment. Gillette agreed to pay $35,605.87 to plan participants and agreed to accept a fiduciary bar for five years. If, after five years, he decides to serve as a fiduciary, he must undergo training and file a notice with the Department identifying the benefit plans for which he is acting as a fiduciary. Atlanta Office

Perez v. Hanco, Inc. (N.D. Ind.)

On September 19, 2014, the Secretary filed a complaint against Hanco, Inc. d/b/a Classico Seating, Harry T. Richardson Jr., and the Hanco, Inc. 401(k), Health, and Dental Plans, alleging that the fiduciaries failed to remit $5,242.08 in employee contributions to the 401(k) Plan from October 14, 2011 through February 17, 2012, failed to remit $22,863.09 in employee insurance premium contributions to the Health Plan from August 5, 2011 through September 30, 2011, and failed to remit $2,282.60 in employee insurance premium contributions to the Dental Plan from February 4, 2011, through May 20, 2011. Richardson filed an answer on February 6, 2015. Hanco did not file an answer. The Secretary filed a motion for default judgment with respect to Hanco on July 22, 2015. The court granted the motion on October 15, 2015. On June 28, 2016, the court set a Rule 16 preliminary pretrial conference for July 11, 2016. The defendant did not attend the preliminary pretrial conference. On August 10, 2016, the court ordered the defendant to pay $671.07 in costs to the Secretary for failure to appear. On August 23, 2017, the court ordered the defendants to provide funds for the full payment of the Secretary's financial demand. On December 8, 2017, defendants reported to the court that checks have been issued to all but three individuals and that the remaining participants will be paid within the next 60 days. Chicago Office

Perez v. Hobbs, Upchurch and Associates, P.A. (M.D.N.C.)

On September 28, 2015, the Secretary filed a complaint against Hobbs Upchurch and Associates P.A. and Frederick M. Hobbs, alleging that between April 2012 and September 2012, they failed to remit $22,475 in employee contributions to the company's 401(k) Plan and that between April 2013 and October 2013, the defendants failed to remit $2,659 in participant loan repayments to the 401(k) Plan. On April 12, 2017, the court entered a consent judgment and order against defendants, requiring restitution of $42,927.41 to the 401(k) Plan (including unremitted employee contributions, lost earnings, and unremitted loan repayments) and $13,449.31 to the Group Health Plan. The law firm and Hobbs are both enjoined from violating Title I of ERISA in the future, Hobbs is enjoined from serving as a fiduciary to an ERISA-covered plan, and an independent fiduciary was appointed for the plans. Atlanta Office

Acosta v Holloway (D. Colo.)

On May 26, 2017, the Secretary filed a complaint against Mark Holloway, Meridian Medical Staffing, Inc., and the company's Group Health Plan, alleging that the fiduciaries failed to remit $23,733.18 in premium payments withheld from employee wages to the plan, leaving 58 employees without health and/or dental coverage for various periods within a four year timeframe. On September 12, 2017, the court signed the parties' consent judgement, ordering defendants to issue $23,733.18 in refunds to 47 participants. ($4,885.93 had been refunded to 11 participants prior to filing of the complaint), enjoining the defendants from violating ERISA, and requiring Holloway and any employee to whom he delegates fiduciary responsibilities to attend a minimum of eight hours of fiduciary training. Dallas Office

Perez v. Kann (D. Md.)

On July 26, 2016, the Secretary filed a complaint against Donald Kann and his company, Kann & Associates, Inc. t/a Kann Partners. From July 28, 2010 through July 1, 2012, defendants failed to timely remit $56,065.27 in employee contributions to the company's 401(k) Plan, resulting in lost opportunity costs on the delinquent and untimely remitted employee contributions. The defendants waived service and filed an answer on January 25, 2017. On August 15, 2017, the court entered a consent judgment that required defendants to restore $12,963.71 to the 401(k) Plan and to pay a civil penalty of $1,296. Philadelphia Office

Solis v. Kineticsware, Inc. (W.D. Wash.); Solis v. Sampson (In re Sampson) (Bankr. W.D. Wash.)

The Secretary's district court complaint, filed on November 15, 2010 against Kineticsware, Inc., Jeffrey Sampson and Richard Barnett, alleged that they failed to collect and remit to the company's 401(k) Plan $222,316 in employer contributions for plan years 2007-2008. The Secretary had filed an adversary complaint on October 26, 2009 in Sampson's Chapter 7 bankruptcy case, seeking a determination that his debt to the plan is non-dischargeable. On January 9, 2012, the court entered a consent judgment, finding that Sampson and Barnett are jointly and severally liable for $200,610 in losses due non-fiduciary participants, permanently enjoining them from future fiduciary service to any ERISA-covered plan, and requiring them to pay for the costs of an independent fiduciary to administer the plan. On February 4, 2014, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was nearly one year delinquent under the terms of his payment plan. On June 13, 2014, the court ordered Sampson to pay at least $750 per month toward the judgment, ordered him to consider a stock pledge, and reminded Sampson that penalties could be imposed on him if he fails to make the required payments. During 2017, the court continued to hold regular status conferences to ensure defendants are repaying the 401(k) Plan pursuant to previous court orders. See also Solis v. Kineticsware, Inc.; Solis v. Sampson (In re Sampson), Section L. Contempt and Subpoena Enforcement. Seattle Office

Perez v. Kwasny (E.D. Pa. and 3d Cir.)

On July 16, 2014, the Secretary filed a complaint alleging that, from 2007 through 2009, Richard J. Kwasny and the law firm of Kwasny & Reilly, P.C. failed to ensure that discretionary employee contributions to the firm's 401(k) Profit Sharing Plan were remitted and remitted on a timely basis. The defendants filed an answer to the complaint on October 29, 2014. On November 7, 2014, the Secretary filed a motion to strike the company's answers, which the court granted on November 19, 2014. On December 1, 2014, the clerk of the court entered default against the company. Following Kwasny's failure to appear at a July 7, 2015 deposition, the Secretary filed a motion for sanctions that was held under advisement. On July 20, 2016, the court granted the Secretary's motion to deem admitted the plaintiff's request for admissions. On September 8, 2015, Kwasny was ordered to attend his deposition. On August 12, 2015, the Secretary filed a motion for summary judgment against Kwasny and a motion for default judgment against Kwasny & Reilly. Kwasny filed a response and cross-motion for summary judgment on September 23, 2015. The court granted the Secretary's motions on February 9, 2016 and awarded $40,416.30 in damages. Kwasny appealed the court's finding of liability to the Third Circuit Court of Appeals. The appellant raised statute of limitations and res judicata issues on appeal, arguing that the Secretary had actual knowledge more than three years before the lawsuit and that a judgment against him in a state court action offsets the damages in this case. The individual defendant appealed on April 7, 2016. The appellant filed his opening brief on July 11, 2016, and the Secretary's response brief was filed on August 10, 2016. No oral argument was scheduled; the case was submitted on the briefs on November 7, 2016. On

April 5, 2017, the Third Circuit issued a favorable decision, affirming the judgment below and rejecting Kwasny's statute of limitations and res judicata arguments. The Third Circuit remanded to the district court for further proceedings on whether the state court action should offset damages in this case. On remand, Kwasny filed a memorandum in support of an offset. The Secretary filed an opposition on November 16, 2017, arguing that an offset is not warranted because Kwasny cannot prove that he had paid any part of the state court judgment. Kwasny filed a reply on December 1, 2017. The Court ordered on December 11, 2017 that Kwasny can only offset the Secretary's judgment if he can provide proof of payment on the state court judgment. Philadelphia Office and, on appeal, Plan Benefits Security Division

Perez v. Lewis (N.D. Ill. and Bankr. N.D. Ill.)

On March 31, 2016, the Secretary filed a complaint against Michael Lewis, trustee of the Acme Orthotics and Prosthetic Laboratories, Inc. Profit Sharing 401(k) Plan and Trust, and Monica Fox, the company's executive director, alleging that they failed to remit $39,391.17 in employee salary deferral contributions and loan repayment contributions to the plan from July 2010 through April 2012. The complaint also alleges that Lewis misappropriated $66,431.99 in plan assets from April 2012 through March 2015. On November 15, 2016, the parties agreed on the principal terms of a consent order and judgment, including the amount of losses owed, the method of restoration of losses, and injunctive relief. On March 31, 2016, the Secretary also filed a complaint in the bankruptcy court, alleging that the debts Lewis owes to the plan are non-dischargeable. On August 8, 2016, the bankruptcy court entered a consent order and judgment, finding that the $115,167.99 debt Lewis owes to the plan is non-dischargeable. Lewis will repay all losses pursuant to his Chapter 13 plan, which the bankruptcy court previously approved. On December 19, 2017, the bankruptcy court entered an amended stipulated judgment regarding the non-dischargeability of Lewis' debt to the plan, increasing the amount owed to $128,535.75 as a result of additional documents received by a former participant. On December 21, 2017, the bankruptcy court also entered a stipulated order directing the Chapter 13 trustee to directly restore losses to former plan participants. The consent order and judgment is due in the district court by January 4, 2018. Chicago Office

Acosta v Michelson (W.D. Tex.)

On July 11, 2015, the Secretary filed a complaint against Michelson Energy Co., its owner Mitchell Michelson, and two other company officials, Robert Fannin and Barry DeWitt, alleging that beginning in July 2009, Michelson, Fannin and DeWitt failed to remit and to timely remit contributions and loan payments to the company's 401(k) and Profit Sharing Plan. Losses are estimated at $126,000 and affect 26 employees. The complaint seeks restitution and an order barring the defendants from serving in any capacity to any other ERISA-covered plan. On July 27, 2016, the Secretary obtained a partial consent judgment with Michaelson, DeWitt and the company, establishing the alleged violations, liquidating $126,839.76 in plan losses and $19,633.63 in lost opportunity costs, and ordering the parties to commence restitution and to undertake other actions commensurate with their fiduciary duties. On August 16, 2016, the Secretary filed a motion for default judgment against the remaining defendant, Fannin. On February 1, 2017, the court entered default judgment against Fannin, imposing a fiduciary bar and ordering offset of his account in the amount of $44,841. Dallas Office

Acosta v. Millikin (D. Colo.)

On June 19, 2017, the Secretary obtained a consent judgment and order resolving a complaint, filed on January 6, 2017, against Central Security Communications Inc. and Robert Millikin. The complaint alleged that the company and Millikin, who is the company's CEO and a fiduciary of its 401(k) and Health Plans, failed to remit employee contributions to the plans timely or at all and failed to bring an action to collect delinquent outstanding loan repayments owed to the 401(k) Plan. The consent judgment provides full restitution to the plans, consisting of $25,336 in employee contributions and lost opportunity costs that were not remitted to the 401(k) Plan, designation of the delinquent outstanding loan payments as distributions, and payment to participants of $10,415 for employee contributions that were not deposited into the Health Plan. The agreement also provides for termination of the 401(k) Plan and bars Millikin from serving as a fiduciary. Denver Office

Acosta v. Nichols Food Service, Inc. (E.D.N.C.)

On January 18, 2017, the Secretary filed a complaint against Nichols Food Service, Inc. and James L. Nichols, alleging that from September to November 2013, they failed to forward $4,564 in employee contributions to the 401(k) Plan and commingled the funds with the company's general assets. Additionally, the defendants withheld premiums totaling approximately $86,962 from employees' compensation and failed to segregate the funds from the company's general assets and forward them to the Health Plan. As a result, participants incurred unpaid medical claims totaling $143,394. The company ceased operation in January 2014. The complaint asks the court to: (1) permanently enjoin the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee or representative having control over the assets of any employee benefit plan subject to ERISA; (2) enjoin the defendants from engaging in any further action in violation of Title I of ERISA; (3) appoint a successor fiduciary at the defendants' expense to administer the plans; and (4) order the defendants to restore all losses, including interest and lost opportunity costs, to the 401(k) Plan and restore health plan participants' contributions that were withheld. The Secretary received waivers of formal service on April 1, 2017. See also Acosta v. Nichols Food Service, Inc., Section K. Orphan Plans. Atlanta Office

Acosta v. Parham (Bankr. E.D. Va. and E.D. Va.)

On June 16, 2017, the Secretary filed an adversarial complaint against Stephen Parham to declare that funds owed to the Dominion Paving and Sealing, Inc. ESOP and 401(k) Plan be deemed non-dischargeable in Parham's Chapter 7 bankruptcy proceeding because Parham engaged in defalcation while serving as a fiduciary to the plans. Specifically, the Secretary alleged that Parham failed to remit and timely remit employee contributions totaling $88,859.84 to the 401(k) Plan. Further, the Secretary alleged that seven withdrawals from the ESOP totaling $85,107.06 were used to pay company expenses that were unrelated to the ESOP. On September 13, 2017, the bankruptcy court entered a consent order declaring that the debts owed to the ESOP and to the 401(k) Plan were non-dischargeable. On August 30, 2017, the Secretary filed a civil action against Parham and Dominion Paving seeking a judgment against both for the amounts owed to the 401(k) Plan and to the ESOP based on the same alleged facts. Defendants filed an answer to the complaint on December 22, 2017. Arlington Office

Acosta v. Royal Tractor (D. Kan.)

On April 3, 2017, the Secretary filed a complaint against Thomas J. Hardwick, alleging that Hardwick, as trustee of Royal Tractor's 401(k) and Health Plans, failed to forward $463 in employee contributions to the 401(k) Plan at various times during 2009 through 2015, and during that time period, failed to timely forward $26,573.00 in employee contributions to the 401(k) Plan, causing $2,875.00 in lost earnings. The Secretary further alleged that Hardwick failed to forward $9,149.20 in employee contributions to the Health Plan during 2015. On October 28, 2017, the court approved and entered a consent judgment barring Hardwick's further violations of ERISA. Kansas City Office

Acosta v. Schrepfer (D. Colo.)

On August 6, 2015, the Secretary filed a complaint against M. Peter Schrepfer, Schrepfer Industries, Inc. 401(k), Schrepfer Industries, Inc. Health Plan, Trinidad Golf, LLC SIMPLE IRA Plan, and Trinidad Golf LLC Health Plan. The complaint alleges that Schrepfer and his companies failed to ensure that employee contributions were remitted to the plan sponsors' employee retirement and health benefits plans. On March 4, 2016, the Secretary obtained a consent judgment and order requiring Schrepfer to pay $21,500 in restitution to the participants of the two retirement plans and enjoining him from serving as a fiduciary unless and until he obtains no less than 12 hours of fiduciary education. Because Mr. Schrepfer failed to comply with the consent judgment, the Secretary filed a contempt petition on May 19, 2017. Subsequently, the Secretary obtained confirmation that that the fiduciary had satisfied all terms of the consent judgment. See also Acosta v. Schrepfer, Section L. Contempt and Subpoena Enforcement. Denver Office

Perez v. Seaboard Management, LLC (D. Md.)

On December 21, 2016, the Secretary filed a complaint against Seaboard Management, LLC, and Susan Porter and Larry Porter, owners and plan trustees, alleging that they caused the plan to make loans to their company and to another partnership under their control and that they failed to attempt to collect on these loans. On May 12, 2017, the court entered a consent judgment, ordering defendants to restore $175,309.54 to the plan, removed Susan Porter and Larry Porter as fiduciaries, and appointed an independent fiduciary to administer and terminate the plan. Philadelphia Office

Perez v. Sherrod (N.D. Ill.)

On April 29, 2016, the Secretary filed a complaint against Shirley Sherrod and Leroy Johnson, fiduciaries of the Shirley T. Sherrod, M.D., P.C. Target Pension Plan, alleging that, from September 2012 to the present, the fiduciaries failed to administer the plan, allocate distributions properly, and make distributions to the participants consistent with plan documents. On August 1, 2016, defendants filed their answer. On October 11, 2016, defendants filed a motion for a protective order, which they withdrew on November 7, 2016. On December 1, 2016, defendants filed a motion to amend their answer. On December 19, 2016, the Secretary opposed their motion to amend. On December 30, 2016, defendants filed their reply. On March 27, 2017, the court denied defendants' motion to amend their answer. On April 26, 2017, defendants' attorneys filed a motion to withdraw, which the court granted on May 2, 2017. On June 15, 2017, the court cancelled the scheduled status hearing and later retired as a judge. On August 28, 2017, the case was reassigned to a new judge. On December 5, 2017, defendants filed a motion seeking to limit the Secretary's rights to seek discovery for certain years. The court denied the motion on December 13, 2017. On December 15, 2017, defendants' second attorney filed a motion to withdraw. The court granted the motion to withdraw on December 21, 2017. Chicago Office

Acosta v. Sims (M.D. La.)

On February 21, 2014, the Secretary filed a complaint against Sims Insulation and Mechanical, Inc. and owner Richard Sims, alleging that they failed to remit $18,478 in employee premiums to the company's Health Plan from July 2, 2009 through April 8, 2011, and $23,230 in employee contributions to the company's SIMPLE IRA Plan from June 26, 2008 through October 14, 2011. On August 29, 2014, the Secretary filed a motion for default judgment. On January 20, 2015, the Secretary obtained a default judgment against Sims, ordering him to pay $26,921.16 in restitution to 11 SIMPLE IRA Plan participants and $21,358.24 in restitution to 20 Health Plan participants. On February 25, 2016, the Secretary filed a Rule 60 Motion for Relief. On July 24, 2016, the court granted the Secretary's motion and request for relief by amending the judgment to authorize offset of Sims' SIMPLE IRA account to restore plan losses. On September 8, 2017, the Secretary filed a Rule 60 motion to obtain the appointment of an independent fiduciary to administer the funds offset from fiduciary Rick Sims' SIMPLE IRA account and to arrange for distribution of the restitution due to the Health Plan participants. On September 14, 2017, the court granted the Secretary's motion and appointed the independent fiduciary. Dallas Office

Perez v. Smith (W.D. Pa. and Bankr. N.D. W. Va.)

On December 2, 2016, the Secretary filed a complaint against Matthew Smith and Wind Turbine Solutions, LLC, seeking approximately $45,000 in missing employee contributions to the company's Retirement Trust. Matthew Smith was the company's owner and the plan administrator and trustee. The complaint alleges that Smith failed to transfer approximately $45,000 in contributions over three years to cover operating costs for the company. On June 28, 2016, the bankruptcy court entered a consent order stating that the $45,000 in employee contributions that Smith misappropriated is a non-dischargeable debt. On May 7, 2017, the court entered a consent judgment in the civil action requiring Smith to restore $45,000 in missing employee contributions to the plan. Philadelphia Office

Perez v. Steven Keares, Inc. (E.D. Pa.)

On September 22, 2016, the Secretary filed a complaint against Steven Keares, Inc. and its president, Harry Keares, alleging that they failed to remit $33,411 in employee contributions and $9,311 in employee loan repayments to the company's 401(k) Retirement Plan from April 27, 2012 through December 26, 2014. The lost earnings attributable to these plan assets through June 7, 2016, are $4,128. The defendants also failed to pay $111,403.29 in prevailing wage contributions to the plan from December 28, 2011 through April 18, 2014. The lost earnings on those contributions are $7,766. The total restitution sought in this case is in excess of $166,021.71 as additional lost earnings accrue. On April 3, 2017, the court entered a consent judgment ordering defendants to restore $179,680.23 to the plan and ordering the replacement of Harry Keares with Steven Keares as fiduciary to the plan. Philadelphia Office

Perez v. Szajkovics (N.D. Ill.)

On January 17, 2017, the Secretary filed a complaint against Passages Hospice, LLC and Sandor Szajkovics, fiduciaries to the company's Dental and Employee Benefits Plans, asserting that they failed to remit employee salary reduction contributions, totaling more than $60,000, to the plans. The unremitted salary contributions were retained in the company's general corporate account and used to pay corporate expenses. The complaint seeks to have the $60,000, and related lost opportunity costs, restored to the plans and to enjoin Szajkovics from serving as a fiduciary or service provider to any ERISA-covered plan. As the company recently filed for bankruptcy, the Secretary filed a proof of claim in the bankruptcy. On September 22, 2017, Szajkovics filed his answer. On December 15, 2017, the Secretary filed a motion for default judgment against Passages Hospice. On December 29, 2017, the court granted the Secretary's motion and entered judgment against Passages Hospice. Chicago Office

Acosta v. Talbert (N.D. Ill. and Bankr. N.D. Ill.)

On July 27, 2017, the Secretary filed an adversary complaint against Frank Eric Talbert requesting the bankruptcy court to find the debt he owes the Proteus Group 401(k) Retirement Plan non-dischargeable. The complaint alleges that from January 4, 2012 through November 18, 2016, Talbert, as sole trustee of the plan, failed to remit $59,075.19 in employee salary deferral contributions and loan repayment contributions to the plan and also failed to timely remit $156,030.06 in employee salary deferral contributions and loan repayment contributions to the plan. On December 22, 2017, the Secretary filed a complaint in the district court against Talbert and the company based on the same allegations. The Secretary seeks the restoration of all losses, including lost opportunity costs, and an injunction permanently enjoining Talbert and Proteus from acting as fiduciaries or service providers to ERISA-covered plans. Chicago Office

Acosta v. Vehicle Control Technologies, Inc. (E.D. Va.)

On March 3, 2017, the Secretary filed a complaint against Donald Humphreys and Vehicle Control Technologies, Inc. for failing to remit and timely remit employee contributions to the plan. The complaint alleges that from January 2012 through at least December 2013, the company and plan sponsor and the company's owner, who was the plan fiduciary, untimely remitted contributions without interest. Additionally, the complaint asserts that from January 2014 until at least July 2015, the failed to forward withheld employee contributions. On July 6, 2017, the court entered a consent judgment providing for restitution of $44,450 plus interest of $26,752.55 for a total recovery of $71,202.55. The consent judgement also required the defendants to pay a civil penalty of $14,240.51. Philadelphia Office

Perez v. Weinhagen (D. Minn.)

On September 27, 2016, the Secretary filed a complaint against Michael E. Weinhagen and Weinhagen Tire Co., Inc. alleging that, between February 1, 2010, and May 27, 2015, they failed to remit $29,058.14 in employee contributions to the company's 401(k) Plan. On November 4, 2016, the defendant fiduciaries restored $37,754.00 to the plan, representing unremitted salary deferral contributions and lost opportunity costs for the period of February 1, 2010, through May 27, 2015. On April 11, 2017, the court entered a consent order and judgment finding the defendants violated ERISA, enjoining the defendants from violating ERISA in the future, and ordering the defendants to retain a plan co-administrator, file all delinquent Form 5500 annual reports, and maintain copies of all plan documents. Chicago Office

Acosta v. Wood (E.D. Mich.)

On June 18, 2017, the Secretary filed a complaint against Florentina Wood and Caring Nurses of Michigan, as fiduciaries of the Caring Nurses of Michigan Profit Sharing 401(k) Plan. The complaint alleges that the fiduciaries failed to remit approximately $39,000 in employee contributions to the plan. On October 18, 2017, the court entered a consent order and judgment requiring restoration of unremitted employee contributions and lost opportunity costs, permanently enjoining Wood from acting as a service provider or fiduciary to any ERISA-covered plan, and appointing an independent fiduciary to administer the plan. Chicago Office

2. Insurance Rebates

None

3. Miscellaneous

Secretary v. Allen (W.D. Ky.)

On December 27, 2017, the Secretary filed a complaint against Anthony C. Allen, Mark N. Cain, Brian A. Lutes, James M. Staron, Linda A. Wilson, and Norman E. Zelesky. Defendants are members of the Retirement Savings Plan Advisory Committee, the named fiduciary for four plans sponsored by Sypris Solutions, Inc. The complaint alleges that defendants failed to follow the plans' governing documents regarding use of forfeiture funds. The governing documents required the employer to use forfeiture funds to pay plan expenses prior to using such funds to reduce employer/matching contributions. From 2012 until 2016, defendants caused the four plans to pay plan expenses from plan assets and used the forfeiture funds to reduce employer/matching contributions. As a result of this practice, the employer benefited by reducing the amount of money it contributed to the funds at the expense of plan participants whose account balances were reduced by paying expenses from plan assets instead of forfeitures. The complaint seeks losses to the plans as a result of this practice, plus lost opportunity costs. Chicago Office

Secretary v. Baum (E.D. Mich.)

On November 28, 2017, the Secretary filed a complaint against David M. Baum and David M. Baum, P.C., fiduciaries of the David M. Baum Profit-Sharing Plan. The complaint alleges that the fiduciaries failed to issue distributions to the plan participants, transferred plan assets to the fiduciaries and parties in interest, and failed to conduct annual valuations and maintain proper records. The complaint seeks an order removing the defendants as fiduciaries to the plan, appointing an independent fiduciary to terminate the plan and distribute the plan's assets to the participants and beneficiaries, and restoring to the plan the more than $30,000 in losses, including lost opportunity costs. Chicago Office

Perez v. City National Corporation (C.D. Cal. and 9th Cir.)

On April 24, 2015, the Secretary filed a complaint against the fiduciaries of the City National Corporation Profit Sharing Plan, alleging that from January 1, 2011 through June 1, 2012, the plan lost more than $4 million when fiduciaries engaged in self-dealing and conflicted transactions involving plan assets and caused the plan to pay excessive fees to City National Bank and its affiliates. Rather than outsource plan services to avoid potential conflicts of interest, or reimburse themselves for only direct expenses, City National and other fiduciaries established compensation rates for the plan on par with those charged to the Bank's retail clients. The compensation rate issues were compounded when Bank employees were not required to track the amount of time they spent working on plan issues. On February 26, 2016, the Secretary filed a motion for partial summary judgment, seeking a finding of liability, which was granted on April 5, 2016. The court found that City National had engaged in years of rampant self-dealing by choosing themselves to provide in-house services to their own plan in exchange for millions of dollars of unchecked, admittedly high compensation. Notably, City National never refunded any money to the plan even though their own calculations acknowledge that the plan had overpaid for City National's services. Because City National lacked contemporaneous records showing the compensation it had received from the plan, the court ordered City National to perform an accounting, with the assistance of an independent fiduciary, of all of the compensation they had received from the plan from 2006 through 2012, plus lost-opportunity costs, to be returned to the plan. On August 15, 2016, City National filed the accounting where the independent fiduciary concluded that City National had received nearly $8.2 million in compensation (plus lost- opportunity costs using the plan rate of return) or alternatively, $6.06 million in compensation (plus lost opportunity costs using the lower IRC rate of return). The Secretary and City National then filed cross motions for partial summary judgment on the issue of losses. The Secretary argued that City National was liable for all of the compensation they had received from the plan for their service provider work using the higher rate of return, less limited offsets that the Department did not oppose during its investigation into the plan, for a total amount of $7.4 million. City National's motion argued that the plan was entitled to no damages because the plan had suffered no losses, or in the alternative, only $1.1 million, claiming that City National was entitled to various credits, including their employees' alleged work on the plan, for which City National had kept no contemporaneous records. On February 8, 2017, the district court granted the Secretary's motion for summary judgment on losses. The district court rejected City National's argument that the plan was entitled to no damages and its argument related to various credits that would offset the damages. Thus, relying on the accounting, the district court agreed with the Secretary's damages amount of $8,185,596.13. The district court then deducted from that total amount the offsets ($818,214) that the Secretary did not oppose. The district court awarded damages of $7,367,382.13 (i.e., $8,185,596.13 minus $818,214). The defendants filed a notice of appeal on March 28, 2017 and filed their opening brief on November 7, 2017. Los Angeles Office and, on appeal, Plan Benefits Security Division

Acosta v. Dynasplint Systems, Inc. and Dynasplint 401(k) Plan (D. Md.)

On April 11, 2017, the Secretary filed a complaint against Dynasplint Systems, Inc. and the company's 401(k) Plan asserting that the corporation failed to vest plan participants in their respective accounts when such participants were laid off and the plan experienced a partial termination. The employer contributions that should have been vested with the terminated employees instead went into a forfeiture account, which was used to pay employer contributions and plan expenses. On April 21, 2017, the court entered a consent judgment that provided for the restoration of $108,724.82, including $97,810.55 in improperly forfeited employer contributions and $10,914.27 in interest. Philadelphia Office

Perez v. Eye Centers of Tennessee LLC (M.D. Tenn.)

On December 31, 2014, the Secretary filed a complaint against Eye Centers of Tennessee, Raymond K. Mays, and Larry E. Patterson, alleging that the defendants improperly transferred over 90% of the assets of the company's 401(k) Profit Sharing Plan to real estate projects and used many of these projects for their own financial and personal benefit. The Secretary is seeking approximately $1.1 million in restitution, representing over $800,000 in transferred plan assets to parties in interest, transferred plan assets to defendants, and unremitted employee and employer contributions. In addition, the Secretary is seeking a permanent injunction against defendants from violating the provisions of Title I of ERISA and acting as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. The Department participated in a settlement conference with defendants on February 5, 2016. On February 18, 2016, Mays entered into a plea agreement in which he pled guilty to three counts of false statements to federal investigator, Amy Brown, and his representations on the plan's Form 5500s. As part of the plea agreement, Mays agreed to restore $800,000 to the plan on or before May 9, 2016. The Secretary filed a motion for partial summary judgment on April 29, 2016 seeking restitution of all monies to the plan with the exception of the $312,805.48 in unpaid rent due from The Pit Barbell Club. The rent due is a disputed fact between the parties' expert witnesses. The defendants responded to the Secretary's motion with approximately 1200 mostly irrelevant documents that did not demonstrate proper plan expenses. The Secretary filed a motion to exclude these documents because they were irrelevant and were not produced to the Secretary in accordance with the Federal Rules of Civil Procedure. On May 11, 2016, the defendants made a payment of $788,250.00 to the plan. On November 10, 2016, in a wholly favorable order, the court granted the Secretary's motion for summary judgment on liability, finding that the defendants violated multiple provisions of ERISA. The court also denied the defendants' renewed motion to stay proceedings. Trial on remedies was held on August 8-11, 2017. The Secretary sought: (1) reversal of prohibited transactions and restitution of losses of $1,193,692.54 to the plan; (2) a permanent injunction against defendants from violating the provisions of Title I of ERISA and acting as a fiduciary, trustee, agent, or representative in any capacity to any employee benefit plan; and (3) appointment of an independent fiduciary at the defendants' expense. At the close of evidence, the Secretary moved for a judgment on partial findings as to injunctive relief. The court requested that the Secretary file a written motion and present the Secretary's proposed independent fiduciary as a witness at a hearing on August 11, 2017. As a result of the hearing, the court entered a permanent injunction against defendants and appointed the independent fiduciary. Defendants agreed to pay the independent fiduciary fees. The Secretary participated in a mandatory settlement conference with defendants on September 20, 2017. The parties did not reach settlement. The parties filed proposed findings of fact and conclusions of law on December 11, 2017. The parties are awaiting a decision from the court. Atlanta Office

Perez v. Leiter (C.D. Ill.)

On April 19, 2016, the Secretary filed a complaint against Thomas E. Leiter and the Leiter Group Attorneys and Counselors Professional Corporation, fiduciaries of the Leiter Group Pension Plan, for making improper loans of $182,000 in plan assets to three entities in which Leiter had a significant stake, and also investing $225,000 of plan assets in a condominium development in which Leiter owned a 50% interest. The Secretary filed a motion for partial summary judgment on October 27, 2017. The motion is still pending. Chicago Office

Acosta v. Macy's, Inc. (S.D. Ohio)

On August 16, 2017, the Secretary filed a complaint alleging that Macy's Inc., Anthem, and Cigna failed to properly pay out-of-network claims for the Macy's, Inc. Welfare Benefits Plan and alleging that Macy's administered a discriminatory wellness program. The first violations concern Macy's, Anthem and Cigna's failure to provide benefits in accordance with the health plan documents, which stated that from the beginning of July 2009, through the end of June 2012, the plan would pay for out-of-network benefits based on the Usual and Customary Rate ("UCR") while the plan fiduciaries actually paid for these benefits on a formula tied to the Medicare Allowable Rate. These two methods, UCR and the Medicare Allowable Rate, use significantly different methodologies to determine rates. Based on the evidence, the Secretary alleges that plan participants paid more for out-of-network benefits received because the fiduciaries used the Medicare Allowable Rate instead of UCR. The Secretary alleges that Macy's, Anthem, and Cigna failed to follow the plan documents regarding out-of-network claims reimbursement. The second set of violations stems from Macy's tobacco surcharge wellness program, in which it charged tobacco users a monthly surcharge. The Secretary alleges that Macy's violated ERISA's Part 7 non-discrimination provisions when it failed to provide a lawful reasonable alternative to the surcharge and required invalid affidavits from those who attempted to utilize alternative means of compliance from July 1, 2011, through June 30, 2013. The Secretary alleges further violations of Part 7 non-discrimination provisions from July 1, 2013 through the present, based on deficiencies in the documents used by Macy's to administer its tobacco surcharge wellness program. The Secretary's complaint seeks the appointment of an independent fiduciary to readjudicate all out-of-network claims that were processed by Cigna from July 1, 2009 through June 30, 2012, and processed by Anthem from July 1, 2011 through June 30, 2012, in order to restore losses to the affected participants, as well as restoration of all tobacco surcharges collected from July 1, 2011 through the present. Chicago Office

Acosta v. Metropolitan Building Services (D.D.C.)

On July 28, 2017, the Secretary filed a complaint against Metropolitan Building Services, Inc.(MBS), Teresa Febres, Richard Thompson, and Marilyn Ward, seeking the disgorgement and return of $375,000 to the MBS Plan with a pro rata distribution to the affected employee participants. Febres and Thompson are co-owners of P&R Enterprises, which adopted an employee welfare plan under a collective bargaining agreement. Febres also owns an unrelated company, MBS, which adopted its own employee welfare benefit plan funded by employer contributions mandated under the Service Contract Act in connection with MBS's contract with the Federal Reserve. Marilyn Ward served as the trustee for both the P&R Plan and the MBS Plan. The complaint alleges that in 2012, Febres and Thompson attempted to find a way to fund sufficiently the P&R Plan to meet its benefit obligations without increasing P&R Enterprises' contributions. At that time, because MBS's contract with the Federal Reserve had ended, MBS remained idle without any employees and the MBS Plan retained approximately $375,000 in surplus assets that had not been distributed to participants. Febres and Thompson decided that Febres would transfer $375,000 of the MBS Plan's surplus to the P&R Plan to reduce the contributions required by P&R Enterprises. With the approval of Febres, in August 2012 Ward transferred the MBS plan's remaining assets to P&R Enterprises. On November 16, 2017, defendants filed an answer to the complaint. Philadelphia Office

<u>Sierra Pacific Health Benefits Plan</u> (unfiled)

Throughout 2017, Sierra Pacific Industries and its self-funded Health Benefits Plan made and submitted verification of payments of more than $1.3 million in claims of plan participants and beneficiaries. The payment and verification process was completed by Fall 2017. The payments were the result of compliance efforts following up on a settlement reached in September 2016 relating to the Affordable Care Act (ACA), the Department's claims regulation, and other health benefits issues. The plan agreed to pay claims for preventive services consistent with ACA requirements and claims that had been left on hold for a long time. The plan agreed to comply with the timelines for deciding claims as provided in the Department's claims regulation and to revise plan documents provided to participants to make them more readily understood by employees and applied more uniformly. Sierra Pacific also agreed to forego, for the 2017 plan year, any increases to participants' premiums, annual out-of-pocket limits, annual deductibles and coinsurance percentages in effect for the 2016 plan year. Plan Benefits Security Division

<u>Acosta v. Specialty Hospital of Washington, LLC</u> (D.D.C.)

On August 18, 2017, the Secretary filed a complaint against Specialty Hospital of Washington, among others, in connection with unpaid health claims. Specialty sponsored the Specialty Hospital Washington Medical, Dental, Vision and Prescription Drug Plan to provide health and welfare benefits to its employees. The complaint alleged that Specialty failed to inform plan participants of its ongoing failure to fund the claims accounts, while continuing to deduct employee contributions, thereby causing the participants to believe that their coverage was active and ongoing during periods in which Specialty knew that claims' processing was suspended. Specialty ultimately filed a Chapter 11 bankruptcy and was sold to a group of investors. On August 24, 2017, the court entered a consent order and judgment that provided for a recovery of $1,134,000 to the plan for distribution by an independent fiduciary to plan participants and for payment by Specialty of civil penalty of $116,000. Philadelphia Office

<u>Acosta v. Tate</u> (S.D. W. Va.)

On October 20, 2017, the Secretary filed a complaint against Donald Tate and Fas Chek Supermarkets, alleging that Tate was a functional fiduciary of the company's Employee Medical Benefit Plan, who exercised discretionary authority and control over plan assets when he took over $36,000 in plan assets for non-plan expenses. The complaint further alleges that as plan administrator, Fas Chek took no steps to stop Tate and benefited from some of the funds Tate misappropriated. As a result of Tate and Fas Chek's actions, the plan was unable to pay $29,921.60 in claims to fifteen participants. The complaint seeks the appointment of an independent fiduciary to pay the outstanding medical claims and injunction against defendants to prevent them from serving as fiduciaries to any other ERISA-covered plan. Philadelphia Office

Solis v. Tomco Auto Parts, Inc. (C.D. Cal.); Solis v. Schoenfeld (In re Schoenfeld) (Bankr. C.D. Cal.); Perez v. Schoenfeld (9th Cir.)

On January 13, 2012, the Secretary filed a complaint against Tomco Auto Parts, Inc. and Richard Alan Schoenfeld, and on January 17, 2012, the Secretary filed an adversary complaint in Schoenfeld's Chapter 13 bankruptcy. The complaints allege that, between October and November 2004, Schoenfeld, as trustee of the company's ESOP, authorized improper withdrawals of $197,000 from the ESOP, $47,000 of which was never repaid. On January 27, 2012, the Secretary filed a motion to withdraw the bankruptcy reference and to remove the action to district court. On April 25, 2012, over Schoenfeld's objection, the court removed the matter to district court. On September 17, 2012, Schoenfeld filed a motion for partial summary judgment, arguing, among other things, that he was not liable for any losses because a settlement agreement between the defunct company and a successor addressed the liability and, as a matter of law, defalcation cannot be found. On September 26, 2012, the Secretary opposed the motion, and on October 29, 2012, the court denied Schoenfeld's motion. On October 26, 2012, the Secretary filed a motion for summary judgment on all claims, and on January 31, 2012, the court granted the Secretary's motion, finding that Schoenfeld breached his fiduciary duties and committed defalcation, rendering the debt non-dischargeable. The court also imposed injunctive relief, including requiring Schoenfeld to pay all costs of an independent fiduciary to terminate the plan and distribute its assets. On February 11, 2013, Schoenfeld appealed this matter to the Ninth Circuit. Schoenfeld only appealed the court's conclusion that the judgment was non-dischargeable debt because it was a defalcation from a trust. On March 23, 2015, the Ninth Circuit remanded the case to the district court based on an intervening Supreme Court decision in Bullock (abrogating Ninth Circuit precedent and requiring certain findings in connection with the fiduciary's state of mind to find defalcation). On August 12, 2015, the district court resumed the litigation of the two cases after remand by ordering a status conference and the submission of a joint status report. On remand, funds recovered from the corporation were deemed sufficient to cover the plan's monetary loss, so Schoenfeld was no longer liable for his monetary judgment. The Secretary argued below that injunctive relief was not similarly affected by the Ninth Circuit's decision or the monetary recovery. On November 6, 2015, the district court re-affirmed the injunctive relief as "law of the case." On December 3, 2015, Schoenfeld once again appealed to the Ninth Circuit. Schoenfeld filed his brief on June 15, 2016. The Secretary filed a response brief with record excerpts on July 15, 2016. On appeal, the Secretary argued that Schoenfeld failed to appeal the prior decision on injunctive relief, and, therefore, the court below correctly rejected Schoenfeld's belated attempts to now set aside the injunction. On February 7, 2017, the Ninth Circuit issued a favorable decision, rejecting Schoenfeld's argument that the resolution of the monetary portion of the original judgment mooted the judgment's injunctive relief and affirming the injunctive relief ordered by the district court. Los Angeles Office and, on appeal, Plan Benefits Security Division

C. Financing the Union

Perez v. Silva (D. Md. and Bankr. D. Md.)

On November 16, 2015, the Secretary filed a complaint against Ricardo Silva, Charles Ezrine, Maryland Association of Correctional and Security Employees ("MACSE"), AmeriGuard

Security Services, Inc., and State Employee Benefits, Inc. ("SEBI") in connection with conduct relating to the MACSE Health & Welfare and Retirement Plans, which were funded by AmeriGuard contributions. The complaint alleged that Silva, MACSE, and AmeriGuard were fiduciaries for both plans, and Ezrine and SEBI were Health Plan fiduciaries. The complaint also alleged that between August 2010 and October 2013, Silva and MACSE mishandled and misappropriated Health & Welfare Plan and Retirement Plan assets, Ezrine and SEBI mishandled and misappropriated Health & Welfare Plan assets, and AmeriGuard took no steps to stop these actions. The complaint seeks restoration of plan assets, plus lost opportunity costs, and the appointment of an independent fiduciary to distribute the assets and terminate the plans. The complaint also seeks to permanently bar MACSE, Silva, Ezrine, and SEBI from serving as fiduciaries to any ERISA-covered plan. In their January 19, 2016 answer to the Secretary's complaint, AmeriGuard Security Services included a demand for a jury trial. On February 9, 2016, the Secretary filed a motion to strike this demand. The court granted the Secretary's motion on May 9, 2016. Because the Ricardo Silva and the MACSE February 9, 2016 answer was filed by Silva, not by an attorney, the judge struck the answer on Mary 9, 2016. The Secretary filed for entry of default against MACSE on May 13, 2016. On September 9, 2016, AmeriGuard filed a motion to amend its answer, seeking to add cross-claims of contribution and indemnification against the other defendants. The Secretary filed an opposition to this motion on September 27, 2016. On February 23, 2017, the court granted AmeriGuard's motion to amend. On December 2, 2016, the Secretary filed a motion for protective order seeking to quash in part two notices of deposition served by AmeriGuard, Ezrine and SEBI seeking to conduct Rule 30(b)(6) depositions of a representative of the Department. On February 17, 2017, the court granted the Secretary's motion for a protective order precluding the 30(b)(6) deposition of a Department representative. On May 26, 2017, the Secretary filed a motion for summary judgment against Silva and AmeriGuard and a motion for default judgment against MACSE. These motions remain pending. On June 2, 2017, the court entered a consent judgment against Ezrine and SEBI which provides for $40,000 to be restored to the health plan and permanently enjoins Ezrine from serving as an ERISA fiduciary. On August 4, 2017, Silva filed for Chapter 13 bankruptcy protection. The Secretary notified the bankruptcy court of the Department's regulatory action and its exemption from the automatic stay provision of the Bankruptcy Code. On November 13, 2017, the Secretary filed an adversary complaint seeking to have Silva's debt to the plan declared non-dischargeable. Philadelphia Office

<u>Acosta v. United Transportation Union</u> (N.D. Ohio)

On May 1, 2017, the Secretary filed a complaint against the United Transportation Union (UTU); its successor, the International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART); and five trustees of the UTU Group Voluntary Short Term Disability Plan. The Secretary alleges that the defendants caused SMART and other parties in interest to retain more than $7,000,000 in "administrative expenses" from employee withholdings intended as participant contributions to the plan. The complaint seeks injunctive relief and an order requiring the defendants to restore all losses to the plan. Cleveland Office

D. Prudence of Investments

Note: For other cases involving imprudent investments, please see J. Financial Institution and Service Provider Cases.

Perez v. Bridgeport Health Care Center, Inc. and Chaim Stern (D. Conn.)

On September 8, 2016, the Secretary filed a complaint against Bridgeport Health Care Center, Inc. ("BHCC") and Chaim Stern, fiduciaries of the company's Retirement Plan. The fiduciaries transferred an undetermined amount of plan assets both directly and indirectly to BHCC, Stern, and Em Kol Chai, a related entity. Between January 2011 and September 2011, the fiduciaries transferred approximately $2.6 million to Em Kol Chai without any contract or agreement related to the transfers. In October 2011, Em Kol Chai executed a Promissory Note for a $3.8 million loan from the plan without any collateral and at an interest rate of 3.25%. The promissory note also provided for a two-year extension, which Stern granted as trustee of the plan without any consideration, such as collateral or a higher interest rate. Between 2011 and 2013, the fiduciaries transferred over $3.6 million directly to Em Kol Chai. The fiduciaries filed a motion to dismiss the Secretary's complaint on December 7, 2016. On September 26, 2017, the court denied the motion to dismiss in its entirety. On March 23, 2017, the Secretary filed a motion for a preliminary injunction to remove Chaim Stern as fiduciary of the plan and appoint an independent fiduciary. The preliminary injunction motion is pending. Boston Office

Perez v. Byrnes (N.D.N.Y.)

On January 26, 2015, the Secretary filed a complaint against Daniel Byrnes and Fort Orange Capital Management alleging that Byrnes invested approximately 96% of the assets of the company's Profit Sharing Plan Trust in a penny stock with a limited public market. Prior to investing the plan assets in the company, Byrnes and his family had personally owned shares of the company. As of September 2014, Byrnes was the company's president and interim chief financial officer. The Secretary seeks both monetary and injunctive relief, including the removal of Byrnes as plan trustee and an order permanently barring him from serving as a fiduciary or service provider to any ERISA-covered plan. The Secretary engaged a valuation expert to determine the loss to the plan. The Secretary filed a summary judgment motion on June 30, 2016. The individual defendant filed his response on September 7, 2016, and the Secretary replied on October 6, 2016. On July 28, 2017, the court appointed a replacement independent fiduciary to assume control of the plan. On August 10, 2017, the court issued a judgment against Byrnes for $310,000.00 in restitution. New York Office

Acosta v. Cohen (D. Md.)

On February 24, 2017, the Secretary filed a complaint against Barry J. Cohen and the Barry J. Cohen, MD, PC Profit Sharing Plan, alleging that Cohen purchased a difficult to value stock that was held without a valuation for years, failed to diversify assets, causing the plan to extend a loan to a company in which Cohen has an interest, and failed to seek repayment of the loan until after being contacted by the Department of Labor. The complaint alleges that over 97% of plan assets were being held in non-liquid form which resulted in a significant negative effect on diversity and liquidity such that the plan was unable to make a distribution to a participant. On April 7, 2017, the court entered a consent judgment, requiring Cohen to restore a total of $100,000 to the plan representing $87,768 in plan assets and $12,232 in interest. The order also removed Cohen as a fiduciary to the plan and enjoins him from serving as a fiduciary to any ERISA-covered plan in the future. Philadelphia Office

Perez v. Ditch Witch Equipment of Tennessee Inc. (E.D. Tenn.)

On April 29, 2014, the Secretary filed a complaint against Aubrey Needham and Ditch Witch Equipment of Tennessee, Inc., alleging that in 2005, Needham entered the company's Profit-Sharing Plan into a margin agreement account which allowed him to make plan investments on margin. Needham began purchasing stock warrants as plan investments, and as a result of purchases on margin, the plan's margin account had a negative balance of more than $500,000 by the end of 2005. To satisfy the margin calls, Needham liquidated other plan investments in various mutual funds. In late 2006, Needham had liquidated all of the plan's mutual fund investments and all plan assets were invested in stock warrants of a publicly traded company, Star Maritime Acquisition Corp. In April 2007, Needham liquidated the SMAC stock warrants and began purchasing stock warrants of another publicly-traded company, Health Care Acquisition Co., which became PharmAthene Inc. In August 2007, 100 percent of plan assets were invested in PharmAthene stock warrants, and plan assets remained solely invested in PharmAthene stock warrants and stock through April 2009. As a result of the plan's investments in PharmAthene, the plan suffered net losses totaling at least $359,770.91. The complaint charges Needham with failing to give appropriate consideration to whether the investments or investment course of action was reasonably designed to further the purposes of the plan and failing to take into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action. He also allegedly failed to appropriately consider the diversification of the plan's investment portfolio, the liquidity and return of the portfolio relative to the plan's anticipated cash flow requirements, and the projected return of the portfolio relative to the plan's funding objectives. The Secretary engaged an expert witness and filed a motion for summary judgment on December 20, 2016. On February 15, 2017, the court issued an order finding that Needham breached his fiduciary duty of prudence and caused losses to the plan. On July 7, 2017, the court issued a judgment ordering Needham to restore $195,084 to the plan, permanently barring him from serving as a fiduciary for any ERISA-covered plan, and requiring him to allow any participant interest he may have in any existing or future assets of the plan to be applied as an offset against the amounts that are allegedly due the plan. An independent fiduciary was appointed to oversee the plan, and the defendants are required to pay reasonable expenses and fees for the independent fiduciary's services. Atlanta Office

Acosta v Goebbel (D.N.M.)

On November 23, 2016, the Secretary filed a complaint against Martin Goebbel and Daniel Helton, co-trustees of the Southern Boulevard Dental Corporation, P.A. Profit Sharing Plan and Trust and of the company's Defined Benefit Plan, for failing to prudently invest and monitor the plans' assets. Goebbel transferred the plans' assets to John Thomas Financial ("JTF") without either himself or Helton undertaking any due diligence to research or investigate JTF prior to transferring the assets. Additionally, neither trustee monitored the plans' assets once they were transferred. Following extensive negotiations, the parties entered into an agreement wherein the defendants each admitted to the violations, admitted that total losses to both plans amounted to $517,936.68, agreed to restitution of the total amount, and agreed to a fiduciary bar. On May 18, 2017, the court signed and entered a consent judgment and order containing the parties' agreement. Dallas Office

Perez v. Severstal Wheeling, Inc. Retirement Committee (W.D. Pa.)

On October 31, 2014, the Secretary filed a complaint alleging that from November 3, 2008 through May 19, 2009, the assets of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling Inc. were imprudently invested by the plans' fiduciaries, including the Severstal Wheeling, Inc. Retirement Committee – specifically committee members Michael DiClemente and Dennis Halpin – and WPN Corp. and its owner Ronald LaBow, who had been hired as the plans' investment manager. The suit also alleges that the Retirement Committee and its members failed to properly oversee the plans and monitor the actions taken by WPN and LaBow. The suit seeks to order the defendants to restore to the plans all losses and lost earnings, amounting to in excess of $7 million, and to remove the Retirement Committee as fiduciaries and appoint an independent fiduciary with authority to manage the plans. The Secretary filed motions for additional time to serve LaBow and WPN on February 25, 2015 and April 24, 2015 based on LaBow's attempts to evade service. Service was eventually effected on June 24, 2015. In March 2015, several defendants filed motions to dismiss the complaint in part. The Secretary replied to the motions and amended the complaint on March 27, 2015. The case was stayed on April 10, 2015 pending the decision of a Southern District of New York court in a related case in which the Retirement Committee had sued LaBow and WPN. The court in the related case entered a judgment in favor of the Retirement Committee in excess of $15,000,000 on August 10, 2015. LaBow and WPN have appealed that judgment. Following an August 18, 2015 status conference, the court continued the stay in the Secretary's case and scheduled a settlement conference with a magistrate judge. On September 6, 2016, the Secretary agreed to a settlement with the current members of the retirement committee covering May 1, 2009 through the present. The settlement was not filed in court. The Second Circuit Court of Appeals upheld the Southern District of New York judgment on August 30, 2016. The Secretary moved that the case be referred back to the District Court because no further settlement progress was likely with the prior Retirement Committee, DiClemente, and Halpin. The District Court held a scheduling conference on September 20, 2016. On October 14, 2016, the Secretary opposed the release to the prior Committee of the settlement agreement with the current Committee. The court ordered the settlement agreement be released to the prior Committee but not shared with anyone else on November 9, 2016. The prior members of the Retirement Committee, DiClemente, and Halpin, filed a motion to dismiss on October 31, 2016, to which the Secretary responded on December 15, 2016. Oral argument on the Retirement Committee's motion to dismiss was held on February 7, 2017 and the Secretary filed a supplemental brief on March 17, 2017. The court issued its ruling on the Retirement Committee's motion to dismiss on June 7, 2017, rejecting the Retirement Committee's position that the Secretary's failure to monitor claim should be dismissed. The court found that the backdated investment management agreement which was signed on December 5, 2008, was effective on November 1, 2008, and dismissed the Secretary's failure to invest claim against the Retirement Committee for November 2008. The court gave the Secretary leave to amend the complaint to allege that the Retirement Committee failed to monitor LaBow, and LaBow failed to invest the plans' assets in November 2008. The court dismissed the co-fiduciary liability claim which was based on the same facts as the failure to monitor claim. The Secretary filed the amended complaint on June 28, 2017. There is a private action against some of the same defendants (LaBow and WPN). Philadelphia Office

E. Preemption

None

F. Participants' Rights and Remedies

Ariana M. v. Humana (5th Cir.) (en banc)

This case concerns the Fifth Circuit's long-standing interpretation of the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court permitted courts to defer to a plan administrator's decision in a benefits case if the plan document grants the administrator the discretion to do so. Without such a grant of discretion, the court reviews the decision de novo. In Pierre v. Connecticut General, 932 F.2d 1552 (5th Cir. 1991), the Fifth Circuit interpreted Firestone in a way contrary to many other circuits. Under Pierre, even if the plan document does not grant discretion, a court must defer to the administrator's factual findings under an abuse of discretion standard. In this case, a panel of three judges in the Fifth Circuit urged the court to revisit Pierre and align the Circuit with the other Circuit courts. The plaintiff filed a petition for en banc rehearing, and the Fifth Circuit granted the en banc rehearing petition on July 10, 2017, and ordered supplemental briefs from the parties to be filed on August 8, 2017. The Secretary filed an amicus brief on August 15, 2017, urging the Fifth Circuit to abrogate Pierre, to align with the other circuits in reviewing plan decisions, including fact-finding, under a de novo standard when the plan does not confer discretion on the plan administrator. Oral argument, in which the Secretary participated, was held on September 19, 2017. Plan Benefits Security Division

Fletcher v. Convergex (2d Cir.)

This case concerns a purported class action on behalf of a number of ERISA defined benefit plans that claim that they were double charged by a company that provided them with securities brokerage and transition management services, funneling trade orders to an offshore subsidiary in Bermuda and diverting small amounts from their many clients, which included many ERISA plans. Because the amounts involved for each plan were small, the named plan representative was only double billed for $1500. The district court held that the loss of $1500 by a large ERISA defined benefit pension plan did not significantly increase the risk of default, even though the plan was significantly underfunded, and held that the plaintiff participants lacked Article III standing to bring the suit. The plaintiffs appealed, and the Secretary filed a brief on June 27, 2016, arguing that under Second Circuit and Supreme Court case law, a fiduciary breach is sufficient as an injury-in-fact, and the participants can also represent the plan for its financial injury, even if the injury is small. Oral argument, in which the Secretary participated, was held on December 12, 2016. On February 10, 2017, the Second Circuit issued a favorable opinion, concluding that the alleged violations and losses were sufficient to confer Article III standing on the plaintiff-participants. Plan Benefits Security Division

Hitchcock v. Cumberland University (6th Cir.)

This case concerns Cumberland University employees who alleged that the University failed to provide a promised employer match for their pension contributions and then retroactively amended the plan to eliminate the promised match. The employees contend that the plan amendment violated ERISA's anti-cutback protections. The district court dismissed the claim, concluding that administrative exhaustion was required for the anti-cutback claims and that these were just claims for benefits. The plaintiffs appealed. In support of the plaintiffs, the Secretary filed an amicus curiae brief on September 2, 2016. The Secretary argued that administrative exhaustion is not required for anti-cutback claims, because these claims are statutory claims that concern the employer's promised funding for the plan. The Secretary also argued that the anti-cutback claims are not disguised benefit claims, because they alleged a fiduciary breach in administrating the plan pursuant to an illegal amendment. Oral argument, in which the Secretary participated, was held on January 25, 2017. On March 14, 2017, the Sixth Circuit issued a favorable opinion, concluding that the anti-cutback and fiduciary claims are statutory claims, not benefit claims. Accordingly, the Sixth Circuit reversed the dismissal, holding that the plaintiffs need not administratively exhaust their claims. Plan Benefits Security Division

Osberg v. Foot Locker (2d Cir.)

This class action challenging a company's conversion of its defined benefit plan to a cash balance plan is on appeal for a second time to the Second Circuit. In the prior appeal from a grant of summary judgment to Foot Locker, the Second Circuit reversed in part, based on its conclusion that the reformation remedy that the class sought did not require a showing of actual harm. On remand, the district court certified a class, held a bench trial and found in favor of the class, reforming the plan and ordering Foot Locker to pay benefits under the plan as reformed. The court concluded that the company had provided plan participants with false and misleading descriptions of the plan's wear-away provision in SPDs and elsewhere. ("Wear-away" provisions apply to the conversion of benefits from an old to a new pension plan. If benefits in an old plan exceed the benefits in a new plan, the participant will not accrue new benefits until the level of benefits under the new plan catches up with or "wears away" the accrued benefits under the old plan.) The court also found that the statute of limitations had not run for any of the class members based on the "fraud or concealment" exception to ERISA's statute of limitations. Foot Locker appealed, arguing, among other things, that ERISA's three-year statute of limitations turns on constructive notice and that, because there is no basis for concluding that every class member shared the same mistaken understanding of the wear-away provision, the court erred in ordering reformation for an entire class. Foot Locker filed its brief on February 16, 2016, the plaintiffs filed their response brief on May 17, 2016, and Secretary filed a supporting amicus brief on May 24, 2016. The Secretary's brief contends that the district court correctly applied the statute of limitations provision, that plaintiffs need not show detrimental reliance to establish fiduciary misrepresentation, and that a class could be certified without showing individualized mistake. Oral argument, in which the Secretary participated, was held on January 25, 2017. On July 6, 2017, the Second Circuit issued a favorable opinion, and affirmed the district court’s decision on the three separate issues briefed by the Secretary related to: (1) establishing a misrepresentation claim under ERISA, (2) obtaining a remedy for such a claim on a class-wide basis, and (3) the elements needed to establish the “fraud or concealment” exception to ERISA’s six-year time limit. Plan Benefits Security Division

Pearce v. Chrysler (6th Cir.)

This case concerns the remedy of plan reformation for fiduciary misrepresentations. In a previous appeal to the Sixth Circuit, the court held in Pearce v. Chrysler Group, L.L.C. Pension Plan (Pearce I), 615 F. App'x 342, 348 (6th Cir. 2015), that the plaintiff pled a "material conflict" between the plan's summary plan description and the governing plan document. The plan's summary plan description misled the participant into believing that he was eligible for a supplement to his pension benefits by omitting a disqualifying condition found only in the plan document. Based on this misleading summary plan description, the participant rejected an early retirement buy-out, expecting that he was eligible for a supplement. He was subsequently terminated and was deemed disqualified for the supplement. The Sixth Circuit remanded for further proceedings, holding that the participant plausibly stated a claim for equitable relief under ERISA. On remand, the district court granted the defendants' motion for summary judgment, concluding that the plaintiff could not satisfy the requirements for any equitable remedy under section 502(a)(3). The district court denied the equitable relief of plan reformation, because the participant could not establish "intent to deceive." The participant appealed, and filed an opening brief on July 21, 2017. The Secretary filed an amicus brief on July 28, 2017, arguing that under the law of trusts, the equitable relief of plan reformation in cases of misrepresentation does not require the beneficiary to establish the fiduciary's intent to deceive. Chrysler filed a response brief on August 25, 2017 and the participant filed a reply brief on September 8, 2017. Plan Benefits Security Division

Solnin v. Sun Life (2d Cir.)

This case concerns a long-running dispute related to a long-term disability benefits claim. Solnin was denied long-term disability benefits by her insurer, Sun Life, and appealed this denial in federal court. On March 23, 2007, the district court issued an order concluding that Sun Life's denial of Solnin's claim was arbitrary and capricious because Sun Life had considered only Solnin's medical limitations and not whether she was vocationally qualified to obtain any employment. The court then remanded the matter to Sun Life, instructing it to consider both Solnin's physical capability and her vocational qualifications. The court did not specify any timeline within which the review must be completed. On remand, Sun Life requested more information from Solnin, and Solnin provided more information. However, Sun Life was not satisfied and refused to render a decision. On July 10, 2008, Solnin filed suit in the district court, 475 days after the district court's order and 184 days after Solnin requested that Sun Life issue a decision. Back in the district court, the Sun Life contended that Solnin's claim should be dismissed for a failure to exhaust administrative procedures, but Solnin argued that Sun Life did not act in a timely fashion consistent with the claims regulations, 29 C.F.R. § 2560.503–1(h), so her claim should be "deemed denied" as a matter of law. The district court agreed with Solnin and granted her benefits. The issue presented on appeal was whether the time limits of the claims regulation apply on remands for purposes of the deemed denied provisions. Sun Life filed its opening brief on March 3, 2016, and the plaintiff's response brief was filed on June 2, 2016**.** The Secretary filed a supporting brief on June 11, 2016, arguing that a remanded claim should generally be treated as a claim on appeal under the claims regulations, and the time limits in the claims regulation for deciding appeals of claims denials should apply, generally running from the date of the remand order. Oral argument, in which the Secretary participated, was held on December 12, 2016. On January 12, 2017, the Second Circuit issued a favorable decision, affirming the district court’s holding that applied the timing requirements of the Secretary's claims regulations to cases on remand to the plan administrator. Plan Benefits Security Division

Thole v. U.S. Bank (8th Cir.)

This case concerns constitutional standing for plan participants who seek to represent their underfunded defined benefit pension plans. The plaintiffs sued the fiduciaries for failing to diversify their plan and for improperly taking fees for their services. They allege that their violations contributed to the plan's underfunding. After surviving a motion to dismiss, the plan sponsor contributed to the plan and erased the deficit in funding. The district court in Minnesota issued an order dismissing the case based on mootness, concluding that the decision by the defendants to fully fund their plan eliminated any injury. The plaintiffs appealed. The defendants’ response brief argued an alternative ground for affirmance based on the plaintiffs' lack of constitutional standing when the lawsuit was filed and when the plan was underfunded. In response to this argument, the Secretary submitted a motion to file an amicus curiae brief out-of-time on October 19, 2016 and attached the Secretary's proposed brief. The Secretary argued that plan participants sustained constitutional injury when the fiduciary acts contributed to their plan's underfunding and the plan's inability to deliver promised benefits. The defendants filed an opposition to the motion, and the Court deferred its decision to accept the brief to the merits panel that will hear the case. On October 12, 2017, the Eighth Circuit issued a decision that relied on its prior precedent to hold that plaintiffs in overfunded defined-benefit pension plans have no right to sue under ERISA sections 502(a)(2) and (a)(3). By relying on this basis for its decision, the Court did not directly opine on the constitutional issue addressed in the Secretary’s amicus brief. Plan Benefits Security Division

Van Loo v. Church's (6th Cir.)

This case concerns the remedies available to participants for fiduciary misrepresentations. A district court in Michigan held that Church's Chicken, the plan sponsor and administrator for an ERISA-covered life insurance plan, breached its fiduciary duty of loyalty by accepting premiums from a plan participant without mailing to her an insurability form requiring proof of good health. After the participant died, the insurer denied her beneficiary's claim based on the failure to complete and submit the form. Based on its conclusion that Church's was a fiduciary and breached its duties, the court entered judgment against Church's in the amount of the elected supplemental coverage. The appellant's brief was filed on Sept. 13, 2016, the plaintiff-appellee's brief was filed on November 23, 2016, and the Secretary's brief was filed on November 30, 2016. The appellant Church's Chicken argued that the remedy was improper because the plaintiff failed to establish detrimental reliance. The Secretary disagreed and argued that the district court's monetary judgment against Church's Chicken was proper because detrimental reliance is not required for surcharge remedies against fiduciaries, and in any event, detrimental reliance was satisfied because lost opportunity costs and non-economic harm can justify the remedy. Oral argument, in which the Secretary participated, was held on March 15, 2017. On July 18, 2017, the Sixth Circuit issued a favorable decision, affirming the district court's decision and its monetary judgment against Church's Chicken because detrimental reliance was satisfied in this case. Plan Benefits Security Division

G. Section 510

Acosta v. FCE Benefits Administrators, Inc. (N.D. Cal.)

On September 20, 2017, the Secretary filed a complaint against FCE Benefits Administrators, Inc. for unlawfully retaliating against an employee and two former employees in connection with the Department's ongoing ERISA lawsuit in Chimes District of Columbia, Inc. *et al.* in the District of Maryland. FCE is the third party administrator of the employee health and welfare plan at issue in that litigation and is also a named defendant in the lawsuit. The complaint alleges that approximately one month after the Secretary filed the Chimes lawsuit, FCE fired a longtime employee because it believed that she provided information to the Department. In addition, the complaint alleges that FCE sued that employee in Texas state court, alleging that she violated the confidentiality and non-compete clauses of her employment agreement. In the Texas litigation, FCE issued subpoenas to two former employees that required them to produce their computers and cell phones for imaging and testify at depositions. Both of those former employees are named witnesses in the Chimes litigation. The complaint further alleges that at the depositions of the fired employee and one of the former employees, FCE questioned the employee witnesses extensively about whether they spoke with the Department and other law enforcement agencies. See Perez v. Chimes District of Columbia, Inc., Section J. Financial Institution and Service Provider Cases. Philadelphia Office

Perez v. Scott Brain (C.D. Cal. and 9th Cir.)

On May 21, 2014, the Secretary filed a retaliation complaint under section 510 of ERISA, alleging that the trustees and administrator of several Southern California Cement Masons Union pension and welfare funds terminated a fund employee, Cheryle Robbins, because she cooperated with a Department investigator who was investigating Scott Brain, president of the local and one of the funds' trustees and also because she participated in a complaint to the union's international leadership, alleging that Brain was engaging in several schemes resulting in underpayment to the funds and which, if true, would violate ERISA. On June 30, 2014, the Secretary amended the complaint to name Melissa Cook and her law firm, Melissa W. Cook & Associates, as defendants. Cook was counsel to the trust funds and was also Brain's romantic partner from at least May 2013 through at least March 2014, although she never disclosed this conflict to the other trustees. The complaint alleges that Cook stepped outside her role as counsel to effect the removal of Robbins in an effort to protect Brain and that the Cook defendants knowingly participated in ERISA violations. On August 26, 2014, the Cook defendants filed a motion to dismiss. On January 30, 2015, the court denied the motion, adopting the Secretary's position that: (1) there is no statute of limitations applicable to claims brought by the Secretary under ERISA section 510; (2) the Secretary's demand for back pay is not futile; (3) informal, internal complaints are protected under ERISA section 510; (4) the decision to outsource the work of the whistleblower's department was an adverse action; (5) the attorney to the trust funds may be held liable for knowingly participating in the trustees' violations of ERISA; (6) ERISA section 510 applies to "any person," including an attorney to the trust funds; and (7) California law does not immunize an attorney from liability under ERISA sections 404 and 510. The court also permitted the Secretary to file a second amended complaint, which varies from the first in three ways. First, relief is sought from the individual trustees who voted to outsource Robbins' department. Second, it added one additional trustee who participated in such vote. Third, relief is sought from certain defendants for the terminations of Louise Bansmer and Cory Rice (mother and son), who allegedly were terminated by the trust funds' administrator in violation of section 510 for their participation in making internal ERISA-protected complaints and refusing requests by Brain to change contribution rates and because she continued to speak to Robbins while Robbins was on administrative leave. On August 25, 2015, the court entered a partial consent judgment resolving the case against all defendants except two trustees, including Brain, and Cook and her firm. It provides for $630,000 in back pay and other damages to the three whistleblowers as well as critical injunctive relief, requiring the trustee defendants to make a statement that Robbins's termination was unlawful and calling for Brain's resignation as trustee. On August 6, 2015, the court ruled that the Secretary's communications with the whistleblowers are protected by the common interest doctrine. This order was the result of the Secretary's emergency motion for protective order filed after the Secretary's attorneys were forced to suspend the deposition of a whistleblower because defense counsel refused to stop asking questions about the whistleblower's communications with the Department. On December 14, 2015, the Secretary presented oral argument against defendants' motions for summary judgment. The two remaining trustee defendants sought summary judgment primarily on grounds that they could not be liable for actions taken by votes of the trust funds' full board of trustees or third-party administrator. The Secretary argued that material evidence disputes these asserted facts, showing the trustee defendants' participation in certain votes and influence on other trustees and the funds' administrator in connection with all of the relevant retaliatory votes and actions. The Secretary further contended that Cook conspired with one of the remaining trustee defendants to retaliate, arguing that the co-conspirator exception to hearsay, FRE 801(d)(2)(E), allows the court to impute to her trustee co-conspirator the funds' attorney's statements planning retaliation against the whistleblowers. On January 8, 2016, the court denied Cook's motion and denied Brain and Briceno's motions in part. The court granted summary judgment to Brain and Briceno with regard to their liability under section 510 for the third-party administrator's failure to rehire Robbins after her department was dissolved. The Secretary moved for reconsideration of the court's ruling with regard to Brain. As discussed below, the Secretary's motion was granted following trial. Trial took place on May 17-24, 2016, after which the court issued an order on July 25, 2016, finding that Brain and Cook violated section 510 by retaliating against Robbins for her participation in a DOL investigation and in an internal complaint about Brain and retaliating against Rice for his participation in the internal complaint about Brain The decision established that section 510 violations warrant fiduciary and service provider bars; that such violations constitute breaches of fiduciary duties; that section 510 protects complaints to internal personnel; that the "cat's paw" theory of liability applies and can reach individual defendants; and that attorneys are not immune from liability under ERISA's anti-retaliation provision. In finding Brain liable for retaliation against Robbins, the court granted the Secretary's motion for reconsideration of the court's grant of summary judgment to Brain. In September of 2016, Brain filed a motion to stay the injunction pending appeal. The court denied his motion, but granted a stay of 30 days to permit Brain to seek a stay from the Ninth Circuit. On October 4, 2016, Brain filed a motion for reconsideration of his motion for stay, complaining that the court's judgment was harming his reputation and hurting his chances of reelection as Business Manager of his union. The Ninth Circuit denied that motion as well. On October 14, 2016, the Secretary obtained a final order and permanent injunction memorializing the relief that the Secretary won in July. The injunction removed Brain as trustee to the funds and barred him from serving in any fiduciary capacity, including but not limited to serving as a trustee, to the plans. Brain was also required to give notice of the injunction to all fund participants and beneficiaries and prior to accepting any position as fiduciary to any other ERISA-covered plans. The order also enjoined Cook and her law firm from providing services to the funds, required them to disgorge all of the fees received in connection with the retaliation, and required them to provide notice of the injunction to all owners, officers, directors, affiliates, subsidiaries, employees, and agents of the firm. On October 14, 2016, and October 17, 2016, Brain and Cook filed separate notices of appeal from the district court's decision. On October 17, 2016, Brain filed a motion for stay in the Ninth Circuit. On October 26, 2016, the Secretary filed a response arguing against the stay. The Ninth Circuit denied the stay request on November 8, 2016. Brain filed his opening brief on March 29, 2017 and Cook filed her opening brief on March 30, 2017. The Secretary filed a response brief on May 30, 2017. Brain filed a reply brief on July 10, 2017 and Cook filed a reply brief on July 11, 2017. Los Angeles Office and, on appeal, Plan Benefits Security Division

Trujillo v. Landmark Media (4th Cir.)

This case concerns a pro se claim under ERISA section 510 alleging retaliation for reporting ERISA violations during a plan audit. The plaintiff alleges that he instigated and participated in an internal audit and alerted the plan to problems with its procedures on vesting. The plaintiff was subsequently fired. The district court dismissed the plaintiff's claims on a motion to dismiss, concluding that the Fourth Circuit does not read section 510 to protect internal complaints. On March 10, 2016, the plaintiff appealed the district court's dismissal. The Secretary filed an amicus brief on May 6, 2016, supporting the plaintiff and arguing that any complaints about violations during internal plan audits are protected by section 510. Oral argument, in which the Secretary participated, was held on March 21, 2017. On May 11, 2017, the Fourth Circuit issued a favorable decision. While the Fourth Circuit did not resolve the issue raised by the Secretary's amicus brief, the Court reversed the district court's dismissal, described the issue raised by the Secretary as "novel," and permitted the pro se plaintiff to litigate his ERISA section 510 claim in order to develop a factual record. Plan Benefits Security Division

H. Participant Loans

Note: This section covers loans made in violation of ERISA. For cases involving failure to forward participant loan repayments to plans, see section B.1.Collection of Plan Contributions and Loan Repayments.

None

I. MEWAs

Acosta v. AEU Benefits, LLC (N.D. Ill.)

On November 2, 2017, the Secretary filed a complaint and motion for temporary restraining order ("TRO") against AEU Benefits, LLC, AEU Holdings, LLC (together "AEU"), and Black Wolf Consulting, Inc. The *ex parte* motion and complaint alleged that participants in a multiple employer welfare arrangement ("MEWA") are experiencing irreparable harm as a result of over $26 million in unpaid medical claims dating back to 2016, AEU and Black Wolf caused these losses as a result of the MEWA's excessive fees, and plan assets are being unlawfully held in offshore Bermuda accounts. The court issued the TRO on November 3, 2017, temporarily removing AEU and Black Wolf from their positions as fiduciaries and service providers to the ERISA-covered plans participating in the MEWA, freezing bank accounts holding plan assets, and appointing an independent fiduciary to manage the MEWA and participating plans. On November 15, 2017, the court issued an order under the All Writs Act, staying and enjoining all state and federal court actions against the MEWA and participating plans, all actions against participants and beneficiaries for unpaid benefit claims incurred while participating in the MEWA, and prohibiting adverse credit reports against participants and beneficiaries for nonpayment of monies from health claims incurred while participating in the MEWA. On December 13, 2017, the court entered a preliminary injunction. In addition to the relief set forth in the TRO, the preliminary injunction permits the appointed independent fiduciary to use the monies in all but one of the frozen bank accounts to pay claims and reasonable and necessary plan expenses, and requires AEU and Black Wolf to pay the independent fiduciary's fees. On December 21, 2017, the court granted the independent fiduciary's motion to terminate the MEWA and participating plans effective January 31, 2018, except as to plans associated with aggregator Focus Health Solutions, which will be the subject of further briefing. In addition, on November 6, 2017, the Secretary issued a cease and desist order to stop all sub-brokers and aggregators to the MEWA from marketing the MEWA and accepting new applications for enrollment, in order to limit additional harm to prospective employers and participants. Of the 53 subjects of the Cease and Desist Order, five requested hearings before the Office of Administrative Law Judges. Chicago Office

<u>Perez v. Distribution by Datagen Inc. f/k/a Depawix Health Resources Inc.</u> (N.D. Ga.)

On February 14, 2014, the Secretary filed a complaint against Distribution by Datagen, Inc. f/k/a Depawix Health Resources, Inc., and several companies and individuals involved in the imprudent marketing and operation of a multiple employer welfare arrangement. Other defendants include Smart Services, Inc. f/k/a Peck and Peck, Inc., based in Atlanta, Georgia, BeneSmart, Inc., based in Stone Mountain, Georgia, and Gallagher Health Studies, Inc., Inspired by Coconut, Inc., and Green Gables Artisan's Cooperative, Inc., based in Jacksonville, Florida. Individual fiduciary defendants include Michael Purr, Ann Marie Purr, Grant Lockhart, Marlin Brett Dixon, Cheryl L. Clinton, and Christopher Peck. The complaint alleges that defendants offered part-time "employment" with Gallagher Health Studies, consisting primarily of participating in an annual health assessment and communicating with a patient advocate regarding the participant's health care, for prospective participants in Datagen's self-insured health plan. The defendants also offered an additional part-time "employment" arrangement with Inspired by Coconut and Green Gables Artisan's Cooperative for participants who incurred more than $1,500 in medical expenses in a four-week period; those participants typically paid premiums of several hundred dollars per month for coverage. The additional part-time "employment" arrangement purportedly required participants to produce hand-crafted items; however, participants could pay additional sums to have the work outsourced. After deducting premiums from participants' accounts over several months, defendants failed to remit funds to the third-party administrator (TPA) and to insurance companies, resulting in about $250,000 in unpaid medical claims. The complaint further alleges that defendants misled participants by affirmatively promoting the Datagen Plan as sound and viable, while aware that TPA services and insurance coverage were being terminated for non-payment and health plan claims were unfunded. In August 2015, the Department obtained consent orders with Clinton, Dixon, Purr, and Lockhart permanently enjoining them from violating ERISA, requiring them to complete 24 hours of fiduciary education prior to assuming any fiduciary obligations imposed by ERISA, and securing their cooperation with the Secretary's prosecution of the lawsuit. On December 1, 2015, the Secretary filed a motion for summary judgment against Purr and Peck, and Peck filed a response on January 3, 2016. Purr also filed a summary judgment motion and the Department filed its response to that motion on December 21, 2015. Oral arguments on the cross-motions were held on March 16, 2016. The court granted the Secretary's motion for summary judgment on liability, denied defendants' cross motions, and rejected defendants' statute of limitations defense. The court found that both Purr and Peck breached their fiduciary duties by (1) causing participants' medical claims to go unpaid, (2) failing to properly remit funds to the third party administrator for processing, and (3) misleading participants regarding the financial stability of plan accounts. The court ordered additional briefing on losses and permanent injunctive relief, as well as the names of three possible independent fiduciaries. The court determined that "[w]hile the plaintiff has shown losses to the Datagen Plan, Plaintiff has not identified which losses were caused by the defendants' breaches." The court held that this matter must proceed to a jury trial on the issue of damages and ordered the Secretary to (1) discuss, with authority, which party has the burden of proof at trial to prove that defendants' breaches caused the losses identified by plaintiff (and perhaps by the independent fiduciary); (2) submit a proposal for the appointment of an independent fiduciary and detail how this special master is to be compensated; (3) provide authority allowing such an appointment and submit the names and addresses of three persons who could serve as independent fiduciary; and (4) provide authority for the imposition of a permanent injunction against an ERISA fiduciary along with a proposed permanent injunction. On May 13, 2016, the Secretary briefed all of these issues. On July 1, 2016, the court entered an order stating, "Due to the litigious nature of this suit, and because the defendants seem more interested in disputing the court's ruling on summary judgment than proposing a feasible path to final resolution, the court finds it necessary to espouse a rigid plan moving this case forward." The court will appoint a successor fiduciary, choosing from one of the three individuals the Department recommended and will then proceed with a bench trial (realizing that a jury trial as previously ordered is not appropriate under ERISA) on losses. The court removed the defendants as fiduciaries and appointed an independent fiduciary. At the Secretary's and Peck's suggestion, the court ordered mediation and assigned the case to a federal magistrate judge for settlement purposes. Mediation was successful, and the remaining fiduciaries agreed to contribute a total of $76,000 towards payment of previously unpaid health claims of which the Secretary was aware. The claims will be processed and paid by a successor fiduciary, at the defendants' expense. Under the terms of the consent judgment, entered by the court on May 27, 2017, the defendants are also permanently barred from serving as fiduciaries to an ERISA-covered plan in the future or from engaging in any behavior that would constitute a violation of Title I of ERISA. Atlanta Office

<u>Perez v. Doyle</u> (D.N.J. and 3d Cir.)

On April 28, 2005, the Secretary filed a complaint involving the Professional Industrial & Trade Workers Union (PITWU) Health and Welfare Fund, a MEWA. The Secretary alleged that James Doyle, who marketed the plan's health benefits, diverted employer contributions paid to the plan's trust for non-plan purposes, including for his own commission and fees, and that Cynthia Holloway, as a trustee, failed to institute any proper administration of funds despite clear indications of diversion. The fund collapsed with more than $7 million of unpaid health claims. Following a bench trial in 2009, one defendant, Mark Maccariella, a co-trustee, entered into a consent order in which he agreed to be enjoined from serving as a fiduciary or service provider for any ERISA-covered plan and to restore more than $195,000 to the plan. On June 30, 2010, the district court granted judgment in favor of Doyle and Holloway, finding that the Secretary failed to conclusively establish that the plan was underfunded or that the marketing fees were unreasonable. The Secretary filed an appeal on August 27, 2010, with an opening brief filed on December 13, 2010 and a reply on March 4, 2011. The Secretary argued that the district court erred in holding that Holloway, as trustee, did not breach her duties when the evidence showed that she failed to prudently manage the trust fund and did nothing to prevent the diversion of its assets, and that there was substantial evidence, which the district court failed to address, that Doyle was a fiduciary in that he controlled plan assets and that the fees he forwarded from plan assets were unreasonable. The Third Circuit heard oral argument on April 27, 2011. The Secretary received a favorable decision on March 27, 2011, vacating the decision and remanding for further proceedings. On January 8, 2015, the district court issued a post-remand decision against the defendants, holding Holloway and Doyle liable for diverting over $4.6 million and $3.8 million of plan assets, respectively, in the form of bogus union dues and unnecessary sales commissions. The defendants appealed once more to the Third Circuit. The Secretary filed a response on September 3, 2015 arguing that the paid employer contributions were plan assets, that Doyle is a functional fiduciary based on his control and discretion over the billing and receipt of the paid employer contributions, and that Holloway and Doyle had both breached multiple fiduciary duties in failing to protect these plan assets from diversion. Oral argument, in which the Secretary participated, was held on January 21, 2016. On August 18, 2016, the Third Circuit issued a mostly favorable decision upholding the functional fiduciary status of the appealing defendants. The Third Circuit rejected Doyle's arguments and affirmed in full the lower court's judgment against Doyle. The court also rejected Holloway's arguments that the contributions were not plan assets, but remanded to have the district court make findings as to when Holloway’s liability for plan losses arose. The Third Circuit found that Holloway could not simply be held liable for losses starting on the date of her installation as a fiduciary; liability could only attach when sufficient "red flags" (the Third Circuit’s phrase) put her on notice. The district court judge issued an "Order on Mandate" re-entering the case on the district court docket on November 3, 2016. The district court assigned the case to a Magistrate Judge for settlement discussions. New York Office and, on appeal, Plan Benefits Security Division

<u>Secretary v. Koresko</u> (E.D. Pa. and 3d Cir.)

This is a fiduciary breach case involving the diversion of assets from a MEWA death benefit arrangement. While the case was ongoing in the district court, Koresko and other defendants filed multiple appeals, a motion to stay and a mandamus action. Ultimately, the Secretary was successful in getting all of the appeals dismissed as interlocutory, except the appeal from the order prohibiting the defendants from acting as plan fiduciaries or service providers and appointing an independent fiduciary. Eventually, after numerous extensions, Koresko filed his opening brief on May 28, 2014, and the Secretary filed a response brief on June 27, 2014, arguing that the court of appeals should uphold the district court's order. On March 6, 2015, the appeal was submitted to a panel without oral argument. Meanwhile, the district court held a three-day bench trial in June 2014. By decisions issued in February and March 2015, the district court made the injunctions permanent and held Koresko liable for $38 million in plan losses. On April 24, 2015, the district court granted the Secretary's and U.S. Trustee's motion to dismiss six pending Koresko-related bankruptcy petitions with prejudice, finding that the bankruptcy process had been used as a means to impede the Department of Labor's prosecution against the Koresko defendants rather than to benefit the beneficiaries. On July 21, 2015, the district court issued an order appointing a forensic accountant responsible for conducting, at the defendants' expense, an equitable accounting of the assets of the trusts at issue, with a sub-accounting of each plan's interest in the trust. On August 4, 2015, the district court issued an order appointing a new independent fiduciary and ordering Koresko to pay for the associated costs at the end of the appointment. Koresko appealed the merits decision, and filed a brief on September 23, 2015, to which the Secretary responded on November 9, 2015. Koresko also appealed the August 4 order appointing an independent fiduciary, and the court ordered the appeals consolidated and asked for additional briefing on the issues relating to the order. The parties submitted letter briefing on these issues. On April 5, 2016, the Third Circuit affirmed in full the judgment against Koresko without holding oral argument. In subsequent proceedings, the Court ordered Koresko to turn over property and assets to the Trust pursuant to the judgment. Koresko did not comply, and the Court jailed Koresko for contempt. Koresko challenged the order of contempt but was denied relief. On October 15, 2016, Koresko appealed that denial. At the same time, the Secretary proceeded with collection efforts, and, on April 21, 2016, the Secretary's representative recorded the final judgment in this case for restitution of losses and disgorgement of profits in the State of Oklahoma, based on information that Koresko held funds in escrow in Oklahoma that could be used towards satisfying Koresko's liability. On September 23, 2016, the district court issued a writ of continuing garnishment. On October 17, 2016, the Secretary identified $50,000 held in an escrow account in which Koresko has a substantial, non-exempt interest subject to the garnishment order. On November 10, 2016, Koresko filed a motion to quash the writ of garnishment, which the court denied on December 5, 2016. On January 13, 2017, Koresko filed another notice of appeal with respect to a garnishment order. On February 8, 2017, Koresko filed a motion to stay proceedings along with other miscellaneous relief. The Secretary filed a response on February 21, 2017. The Third Circuit, on March 15, 2017, denied Koresko's motion for miscellaneous relief. The Third Circuit then consolidated the two appeals. On June 19, 2017, Koresko filed a letter motion for release pending appeal and a stay of briefing. The Department filed a response on August 3, 2017, and the Court denied the motion on August 18, 2017. Koresko's opening brief was filed on August 18, 2017, and the Secretary filed a response brief on October 18, 2017. Koresko filed an Emergency Motion for Immediate Release and Vacatur of Orders on November 15, 2017. The Secretary filed a response on November 20, 2017. The Third Circuit denied the motion as moot on November 27, 2017. On December 5, 2017, Koresko filed a new motion, again, urging the Court to release him and the Secretary filed a similar response. On December 19, 2017, the motion was denied. On December 15, 2017, the district court held a hearing with Koresko, asking him to sign a power of attorney, which might have released him from contempt of court. Koresko refused to sign. Philadelphia Office and, on appeal, Plan Benefits Security Division

Acosta v. National Allied Workers Union Local 831 Insurance Trust Fund (N.D. Ill.)

On June 7, 2017, the Secretary filed a complaint against National Allied Workers Union Local 831 Insurance Trust Fund and trustees Robert Fiascone, Tonina Cozzo, Patrick Adams, and Vivienne Bailey in connection with the fund, which is a MEWA. Specifically, the complaint alleges that from 2009 through at least 2015, the trustees paid unreasonable fees, including stop-loss premium commissions, to Aegis Administrative Services, Inc. and Noble Consulting Group. The complaint seeks approximately $3.7 million in losses and injunctive relief, including the removal of the trustees, the appointment of an independent fiduciary to administer the fund, internal controls designed to ensure the proper selection and to monitor the fund's service providers, and enhanced reporting requirements. On November 29, 2017, the parties participated in a settlement conference before a magistrate judge. On December 11, 2017, the parties agreed to a settlement in principle. The parties will file a consent order and judgment in the near future. Chicago Office

J. Financial Institution and Service Provider Cases

Perez v. Belanger (E.D. Pa.)

On August 15, 2016, the Secretary filed a complaint against A. Kenneth Belanger, Jo-Ann Belanger, and Belanger and Company alleging that, in their capacity as professional retirement plan administrators, they violated ERISA with respect to many of the plans they served. The defendants' improper actions include transferring some plan assets to the company's accounts without the knowledge and authorization of the clients, failing to transfer employee contributions and loan repayments to some plan accounts in a timely fashion, and charging some of the plans fees without informing their clients or reporting said fees on the Form 5500. The Secretary seeks restoration of approximately $67,600 plus lost opportunity costs to the plans and an injunction barring the defendants from serving as fiduciaries or service providers to ERISA-covered plans. On November 7, 2016, the defendants filed a partial motion to dismiss, to which the Secretary filed an opposition on December 12, 2016. On May 10, 2017, the court denied the partial motion to dismiss. On December 28, 2017, the court entered a consent judgment against the Belangers and the company, ordering defendants to restore $73,820.01 to four ERISA-covered plans and to pay a civil penalty of $14,764. Philadelphia Office

Perez v. Chimes District of Columbia, Inc. (D. Md.)

On October 30, 2015, the Secretary filed a complaint against Chimes District of Columbia, Inc., FCE Benefits Administrators, Inc. ("FCE"), Benefits Consulting Group ("BCG"), and other related defendants alleging that the Chimes D.C. Health & Welfare Plan paid millions of dollars in excessive fees for plan services and that FCE and BCG, the plan's service providers, caused the plan to engage in a number of transactions for their benefit or knowingly participated in such transactions. Among other things, the complaint alleges that Chimes DC officers Albert Bussone and Martin Lampner solicited FCE and BCG to make donations to the Chimes Foundation, the fundraising entity of Chimes International and its other subsidiaries (including Chimes DC). In 2009 and thereafter, FCE and BCG jointly pledged at least $330,000 to the Chimes Foundation and did so in connection with their continued retention as plan service providers. Between 2009 and 2014, FCE paid at least $400,000, and BCG paid at least $282,500, to the Chimes Foundation in connection with their engagement as plan service providers. The complaint also alleges that the Chimes defendants failed to diligently seek alternative service providers for the plan, that FCE improperly used its authority over the plan to cause other service providers to make payments to FCE, and that the claims administration and other services FCE provided to the plan were inadequate. In 2016, the court denied motions to dismiss filed by all of the defendants. On November 17, 2017, the Secretary filed a motion for sanctions against Chimes District of Columbia for its failure to present a properly prepared witness at a deposition noticed by the Secretary under Fed. R. Civ. P. 30(b)(6). The night before the deposition, counsel for Chimes filed a motion for a protective order alleging that the deposition notice, which had been served 60 days before, was overly broad. The deposition commenced as noticed. At the deposition, Chimes designated a single witness, Joseph Gannon, to respond to all the topic areas designated in the deposition notice. Gannon began working for Chimes International only five months before and at the deposition was unable to answer even the most basic of questions such as the name of the current plan trustee. On November 28, 2017, the court entered an order denying the Chimes' motion for a protective order as moot. Following a December 5, 2017 conference call with the court, Chimes agreed to produce a witness (or multiple witnesses) that it asserts will render the Secretary's motion for sanctions moot. See Acosta v. FCE Benefits Administrators, Inc., Section G. Section 510. Philadelphia Office

Acosta v. DeWalt (E.D. Wash.)

On February 24, 2017, the Secretary filed a complaint concerning the administration of the Associated Employers Health and Welfare Trust, which held the assets of ERISA-covered plans that funded and paid for benefits through the Trust. The defendants are the trustees, a service provider, and the parent of the service provider. The complaint alleges that the trustees caused the trust to retain and pay ever-increasing administrative fee rates to a service provider, Associated Industries Management Services, Inc. ("AIMS"), for which two of the trustees served as officers and employees. The complaint also alleges that the trustees repeatedly paid and increased AIMS's fee rates without researching other firms' fee rates, seeking competing bids, seeking a consultant's evaluation of the reasonableness of the increased fees for AIMS's services, or making any efforts to determine if AIMS's services could have been provided by another firm for less. The complaint further alleges that AIMS's parent company failed to monitor the actions of the trustees and that AIMS was a knowing participant in the fiduciary breaches. As a result, the Trust allegedly paid AIMS millions of dollars of additional fees, largely taken from financial reserves held by the Trust, without disclosing to the employers or employees that AIMS's fees had been increased or that money to pay for the increased fees was being taken out of the Trust's reserve funds. The Secretary seeks to recover losses from the fiduciaries resulting from the improper payments to AIMS and disgorgement from AIMS. On July 31, 2017, the court denied in their entirety two motions to dismiss, rejecting the defendants' arguments that: (1) the court lacked subject matter jurisdiction because the Secretary failed to adequately plead that the funds used to pay fees to the service provider were "plan assets" under ERISA; (2) the Secretary failed to adequately plead that the defendants were fiduciaries; (3) the Secretary failed to adequately plead that one fiduciary breached its duty to monitor its co-fiduciaries; and (4) part of the claims were barred by the six-year statute of limitations. On August 8, 2017, the defendants filed their answer. On September 18, 2017, the Secretary filed a motion to strike five of the defendants' affirmative defenses. On October 11, 2017, the court granted the Secretary's motion, striking two of the affirmative defenses (laches and good faith) with prejudice, and allowing the defendants the opportunity to amend three others (waiver, statutory and regulatory exemptions) with additional detail. The defendants filed an amended answer on November 14, 2017. A court-scheduled mediation was set for January 2018. Plan Benefits Security Division

In re First Farmers Financial Litigation (N.D. Ill.)

This is a private action against parties involved in fraudulent loans that injured many investors, including ERISA plans. The loans were purportedly originated from 2012 to 2014 by First Farmers Financial, LLC ("FFF"), a USDA-approved "non-traditional" lender, and were represented to be mostly guaranteed by the USDA. In fact, the loans were a sham. Pennant purchased interests in the fraudulent loans, sold them to investors, and recommended them for an investment vehicle in which ERISA plans invested. FFF's principal was arrested and pled guilty to criminal fraud charges. A receiver was appointed to recover assets for the benefit of injured investors, including ERISA plans. In the private action, Pennant's counsel sought $1.8 million of attorney fees from the amounts recovered in the action. The appointed receiver and the Secretary objected to the fee application, arguing that Pennant's counsel is limited to the retainer agreement it has with Pennant, which agreement requires Pennant to pay its counsel's fees. On December 15, 2015, the court denied the fee application in part, allowing Pennant's counsel to be paid some fees from the receiver's estate for work it completed as special counsel at the receiver's direction. On July 27, 2016, the Secretary filed a proof of claim against the FFF estate on behalf of ERISA plans that invested in investment products impaired by the fraudulent loans. The Secretary also asserted a claim of contingent liability if FFF knowingly participated in any fiduciary breaches that may have been committed by Pennant Management, Inc., Salem Trust Company, or GreatBanc Trust Company, three affiliated companies that served as investment advisor and trustee to the investment products and as trustee to the ERISA plans. On December 13, 2016, the receiver filed an objection, arguing that the Secretary's proof of claim was duplicative of the investment products' claims, that the ERISA plans that invested in the investment products are not direct claimants of the FFF estate, and that the investment products are the direct claimants that would receive any distributions. As of November 30, 2017, the receiver had collected approximately $79.9 million. On February 22, 2017, the court entered an order reflecting an agreement between the receiver, the Secretary, Pennant, Salem and GreatBanc. The order provided that any amounts distributed from the receivership estate to the investment products and subsequently distributed to the ERISA plans will reduce, on a dollar-for-dollar basis, the amount of the Secretary's claim; that Pennant, Salem or GreatBanc will provide the Secretary with proof of any distributions made by the investment products to the ERISA plans; and that the receiver's objection was withdrawn. See also Pennant Management, Inc., Salem Trust Company and GreatBanc Trust Company, Section J. Financial Institution and Service Provider Cases. Chicago Office and Plan Benefits Security Division

Solis v. Hutcheson (D. Idaho and 9th Cir.)

On May 15, 2012, the Secretary filed a complaint along with a motion for a temporary restraining order and a preliminary injunction, seeking removal of Matthew D. Hutcheson and his firm, Hutcheson Walker Advisors LLC, and the appointment of an independent fiduciary to take control of plan assets currently under the control of an entity called the Retirement Security Plan & Trust (RSPT). On May 16, 2012, the court entered the temporary restraining order. On June 13, 2012, the court issued a preliminary injunction, granting the Secretary's request to continue the appointment of the independent fiduciary over RSPT and the removal of Hutcheson through the pendency of the litigation. Hutcheson was criminally convicted on April 15, 2013. The Ninth Circuit affirmed his conviction on May 15, 2015 and denied rehearing on July 9, 2015. On March 29, 2016, the Secretary dismissed the suit as to two now-defunct corporate defendants, Hutcheson Walker Advisors LLC and Green Valley Holdings LLC. On March 29, 2016, the Secretary filed a motion for summary judgment and permanent injunction against Hutcheson, seeking to have him removed from his role at RSPT and permanently barring him from acting as a fiduciary for any ERISA-covered plan. Hutcheson filed his opposition to the summary judgment motion on June 29, 2016. On July 11, 2016, Hutcheson filed a motion for declaratory judgment, seeking, among other things, to have the Secretary's claims against him declared to be invalid; the Secretary filed a response on August 4, 2016. On July 22, 2016, Hutcheson filed a motion requesting an evidentiary hearing on whether he violated ERISA; the Secretary filed an opposition on August 15, 2016. On December 16, 2016, the court denied Hutcheson's motion for declaratory relief, granted the Secretary's summary judgment motion, and entered a final judgment against Hutcheson in favor of the Secretary. The independent fiduciary continues to pursue claims on behalf of the plan and has made monthly activity and expense reports to the Secretary and the district court. On January 20, 2017, defendant Hutcheson filed a notice of appeal of the summary judgment decision. On appeal, Hutcheson's opening brief was filed on July 21, 2017. Hutcheson also filed a motion for judicial notice for documents that are not part of the record. The Secretary filed a response objecting to the judicial notice on July 31, 2017. The Secretary's answering brief on the merits was filed on August 17, 2017. Hutcheson filed a reply brief on September 8, 2017. Plan Benefits Security Division

Pennant Management, Inc., Salem Trust Company and GreatBanc Trust Company (unfiled)

The Secretary entered into a settlement agreement, effective December 14, 2017, with Pennant Management, Inc., GreatBanc Trust Company, Salem Trust Company and U.S. Fiduciary Services, Inc., providing for payment of more than $7 million to ERISA plans that suffered losses as a result of investments in fictitious loans created by First Farmers Financial, LLC ("FFF"). The proceeds of the settlement and anticipated future payments from a receivership estate are expected to compensate the ERISA plans for approximately $16 million of losses. FFF created fictitious loans and forged documents stating that the loans were largely guaranteed by the United States Department of Agriculture. Salem was the trustee and Pennant was the investment advisor for an investment product which invested the money of 42 retirement plans into repurchase agreements collateralized by fictitious FFF loans. GreatBanc was the trustee of the retirement plans that invested in the compromised investment product. The Secretary conducted investigations of GreatBanc, Pennant and Salem for potential ERISA violations in connection with the investment of the ERISA plans' funds in investment products exposed to the fictitious FFF loans. Pennant, Salem and GreatBanc are affiliated companies and subsidiaries of U.S. Fiduciary Services, Inc. See also In re First Farmers Financial Litigation, Section J. Financial Institution and Service Provider Cases. Chicago Office, Atlanta Office and Plan Benefits Security Division

Peterson v. UnitedHealthCare (8th Cir.)

This case concerns defendant-insurer UnitedHealthcare's efforts to recoup overpayments made on healthcare claims. UnitedHealthcare offsets an overpayment made to one healthcare provider with a payment owed to the same provider from a different plan. UnitedHealthcare uses that payment from the second plan to reimburse the first plan for its overpayment. UnitedHealthcare is the claims administrator and fiduciary to numerous ERISA plans that have overlapping healthcare providers. In this case, a group of providers sued UnitedHealthcare as a class in the district court, alleging that this recoupment practice violates the plan documents and ERISA. On summary judgment as to liability, the district court ruled in the providers' favor, concluding that the offsetting practice was not permitted by the plan documents and violated the plan documents. The district court concluded that the practice creates an impermissible conflict of interest as UnitedHealthcare decides which plans to offset, and some offsets favored UnitedHealthcare's own account. The district court agreed with the providers that such practices also hurt plan participants because the withheld payments used as offsets may cause the providers to bill the participants for the withheld payments. The district court sua sponte certified the issue for interlocutory appeal, and the Eighth Circuit granted the interlocutory appeal on April 6, 2017. Defendant-appellant UnitedHealthcare filed its opening brief on June 27, 2017. The plaintiffs' brief was filed on September 6, 2017. The Secretary filed an amicus brief on September 7, 2017, arguing that the practice violates ERISA's fiduciary duty of loyalty and implements prohibited transactions. The Secretary agreed with the district court that the practice creates an impermissible conflict of interest whereby United Healthcare benefits itself through the offsets and hurts participants by putting them at financial risk for paying costs covered by their plans. UnitedHealthcare filed a reply brief on October 13, 2017. Plan Benefits Security Division

Perez v. Ramsay (W.D.N.Y.)

On December 29, 2014, the Secretary filed a complaint against Roger Ramsay, an investment advisor to ERISA Plans, and Compensation Planning Corp. of Rochester, Inc., a third party administrator. The complaint alleges that from at least 2006 through 2011, defendants received undisclosed and unauthorized compensation, failed to offset fees received against fees the plans would otherwise have had to pay, and Ramsay failed to advise plans to move assets to a lower fee fund class with the same investment portfolio. On May 3, 2017, the court approved a consent judgment that provides for $31,500 in restitution to affected plans and an enhanced compliance injunction. New York Office

Perez v. Wedbush Securities, Inc. (C.D. Cal.)

On March 30, 2017, the Secretary filed a complaint against Wedbush Securities, Inc., Edward Wedbush and Gary Wedbush, alleging that the defendants, who were all plan fiduciaries, caused or permitted the assets of two retirement plans to be used to pay brokerage fees and commissions to the company and management fees and performance fees to two party in interest hedge funds. It also alleges that the fiduciaries failed to honor participant distribution requests for investments in Wedbush stock. Defendants filed a motion to dismiss based on statute of limitations grounds that the court denied on August 15, 2017. At the August 21, 2017 scheduling conference, the court set a trial date of January 16, 2018. Defendants filed their answer on August 31, 2017. On December 4, 2017, the court granted a two week continuance of the trial date until February 6, 2018, to allow the parties to negotiate a settlement. Plan Benefits Security Division

K. Orphan Plans

Acosta v Advanced Urology of New Mexico S/H 401(k) Plan (D.N.M.)

On February 21, 2017, the Secretary filed a complaint seeking the appointment of an independent fiduciary to terminate the plan and direct the distribution of plan assets to the eligible participants. After the Secretary filed a motion for default judgment on May 26, 2017, the court entered an order granting the motion and ordered the appointment of an independent fiduciary to administer the plan. Dallas Office

Perez v. Astro Communications 401(k) Plan (S.D.N.Y.)

On March 24, 2016, the Secretary filed a complaint to secure distribution of about $13,800 due three plan participants. The Secretary applied for the clerk's entry of default on July 26, 2016 and received the entry on August 25, 2016. The Secretary applied to the court for an order appointing an independent fiduciary on September 1, 2016. On June 27, 2017, the magistrate judge filed a report and recommendation proposing that the judge grant the requested relief. On September 5, 2017, the judge approved the report and recommendation and appointed the independent fiduciary for the plan. New York Office

Perez v. Atilano Cordero Badillo and the Empresas A. Cordero Badillo Retirement Plan (D.P.R.)

On May 7, 2015 the Secretary filed this case involving an abandoned plan with over $128,000 in assets. In addition to an independent fiduciary, the Secretary's complaint seeks payment of the independent fiduciary's costs by the previous trustee, whom the Secretary alleges abandoned the plan for a prolonged period of time to the detriment of participants. On July 7, 2015, the defendants filed a motion seeking an extension of 30 days to file an answer and a stay of this action in favor the plan sponsor's pending Chapter 7 corporate bankruptcy liquidation case. On July 16, 2015, the Secretary filed an opposition to these applications in view of (1) the prolonged efforts by the Secretary to get voluntary plan asset distribution (2) the police powers exception to bankruptcy stays and (3) clear statutory and case authority exempting plans and plan assets from the debtor's estate. The defendants filed a response on August 7, 2015, alleging abuse of process and automatic stay violations. The Secretary filed a reply, with leave of the court, on August 14, 2015. That same day, the court denied the defendants' applications for dismissal, stay, and sanctions, and ordered an answer to be filed on August 17, 2015. The defendants filed a motion to dismiss for lack of subject matter jurisdiction; the Secretary filed the opposition on August 21, 2015. On March 1, 2016, the court issued a decision and order denying the defendants' motion to dismiss and indicating its expectation that the Secretary will file a motion for summary judgment. That same day, the defendant filed an interlocutory appeal to the First Circuit. Because this is not a final, appealable order, the First Circuit issued an order to the defendants to show cause as to why the court has appellate jurisdiction over this interlocutory appeal. The defendants filed a brief in response. On December 19, 2016, the First Circuit dismissed the appeal for lack of appellate jurisdiction and ordered a remand to the district court. The Secretary then filed a motion for summary judgment with the district court on April 4, 2017. On May 26, 2017, the district court granted the Secretary's motion for summary judgment, appointing an independent fiduciary and making the individual liable for the independent fiduciary's costs. Defendants filed a motion to reconsider, the Secretary filed an opposition, and the court summarily denied it. Defendants appealed to the First Circuit on June 14, 2017. On November

7, 2017, the Secretary participated in a mediation conference conducted by the First Circuit's mediation program. New York Office and, on appeal, Plan Benefits Security Division

Perez v. Authorized Factory Service, Inc. (W.D. Pa.)

On December 9, 2016, the Secretary filed a complaint alleging that Authorized Factory Service, Inc. failed to operate and administer its 401(k) plan and failed to appoint anyone to assume that responsibility. Since the company ceased operations in 2002, participants have not been able to obtain distribution of their retirement assets. On May 23, 2017, the court entered a consent judgment which removed the defendant as the plan administrator and appointed an independent fiduciary to terminate the plan and distribute the assets. Philadelphia Office

Acosta v. Cambridge Management Companies, LLC (E.D. Pa.)

On July 7, 2017, the Secretary filed a complaint against Cambridge Management Companies, LLC, administrator of the Cambridge Retirement Communities 401(K) Plan. The Secretary alleges that Cambridge failed to take responsibility for the operation and administration of the plan and its assets, which totaled $181,168.98, and by failing to appoint anyone to assume that responsibility following the owner's death in 2012. Since the company's cessation of business, which occurred prior to the owner's death in February 2012, plan participants have not been able to obtain distributions of their retirement plan assets, which violates the terms of the plan. On August 1, 2017, the court granted the Secretary's motion to permit service by publication. On November 21, 2017, after service was effectuated by publication, the clerk of the court entered a default. Philadelphia Office

Acosta v. Cambridge Technologies Group, Inc. (E.D. Va.)

On October 31, 2017, the Secretary filed a complaint against Andrew Carrington (company CEO and plan fiduciary) and Cambridge Technologies Group, Inc., (plan administrator and plan sponsor), alleging that Carrington and the company (defunct since approximately 2004) failed to monitor the on-going operations of the plan, resulting in participants being unable to access the assets in their plan accounts. The complaint seeks removal of Carrington and the company as fiduciaries and the appointment of an independent fiduciary to administer the plan to effectuate its termination and the distribution of plan assets to the participants and beneficiaries. As of August 23, 2016, the plan assets were $535,790.60 and twenty-four participants were awaiting distributions. Philadelphia Office

Acosta v. Central Sweeping Services, Inc. (M.D. Fla.)

On March 1, 2016, the Secretary filed a complaint against Central Sweeping Services, Inc., and Douglas Swatkowski, the fiduciaries of the company's Inc. 401(k) Plan, alleging that they untimely remitted employee contributions and loan repayments. The complaint also alleged that the plan was abandoned after the company ceased operations. After successfully showing the court that defendants were served but failed to answer, the Secretary filed a motion for default judgment. On August 15, 2017, the court issued an order, adopting in part and rejecting in part the magistrate judge's report and recommendations. The court appointed an independent fiduciary, approved the independent fiduciary's fee proposal, permanently enjoined the defendants from serving as fiduciaries or service providers to any ERISA-covered plan, and ordered a setoff of $3,824.34 against Swatkowski's individual balance. The court, while ordering a fiduciary bar, declined to enter an obey-the-law injunction, citing unfavorable precedent on this issue. On August 16, 2017, the court entered a final judgment. See also Acosta v. Central Sweeping Services, Inc., Section B.1. Collection of Plan Contributions. Atlanta Office

Acosta v. C M S H Electrical (E.D. Cal.)

On October 26, 2017, the Secretary filed a complaint against C M S H Electrical seeking to appoint an independent fiduciary to receive assets owing to the profit sharing plan and to terminate the plan. The owner and officer of C M S H was previously convicted under state law for embezzling all the plan's assets and is barred from serving as a fiduciary. The plan was bonded by Travelers' Insurance. The Department submitted a proof of claim on June 17, 2017 and requested that the bond proceeds be issued to the plan, restoring $272,003.00 for the five participants. Travelers' Insurance indicated that it will pay the bond proceeds to the plan. On December 20, 2017, the Secretary filed a motion for default judgment requesting that the court appoint an independent fiduciary to administer the plan, distribute its assets and terminate the plan and to award fees and expenses of $2,450.00 from the assets of the plan to the independent fiduciary. The hearing on the motion for default judgment is scheduled for January 24, 2018. San Francisco Office

Acosta v. DeLaGarza (E.D. Mich.)

On August 26, 2016, the Secretary filed a complaint against Christina Samone DeLaGarza and Mariah Industries, Inc. for failing to administer the company's 401(k) Plan since September 2012 when Mariah ceased operations. On May 25, 2017, the court entered a consent order and judgment requiring fiduciaries to terminate the plan and distribute the plan's assets. As of the date of the judgment, the defendants were working towards issuing the one remaining plan participant his $738.99 distribution. The judgment also permanently enjoined the defendants from serving as fiduciaries or service providers with respect to any ERISA-covered plan. Chicago Office

Acosta v. Direct Wireless Inc. (M.D. Fla.)

On February 22, 2016, the Secretary filed a complaint against Brian Bangle and Brenda Soto, alleging that the defendants failed to administer the Direct Wireless, Inc. 401(k) Plan, failed to ensure distributions were made to terminated participants, and abandoned the plan after Direct Wireless Inc. ceased operations on or about June 16, 2011. As a result, the plan participants were unable to receive information about their funds and were unable to gain access to their funds. As of May 10, 2015, thirteen participants remained in the plan with an aggregate balance of $66,235.74. The complaint asked the court to permanently enjoin the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any employee benefit plan subject to ERISA; enjoin the defendants from engaging in any further action in violation of Title I of ERISA; and appoint an independent fiduciary at the defendants' expense to arrange for the termination of the plan and the distribution of its assets. After successfully showing the court that the defendants were served but failed to answer, the Secretary filed a motion for default judgment. On June 19, 2017, the court granted the motion for default judgment and appointed an independent fiduciary. Atlanta Office

Perez v. Homestead Physicians Inc. (S.D. Fla.)

On September 16, 2016, the Secretary filed a complaint seeking the appointment of an independent fiduciary to the Homestead Physicians P.A. 401(k) Plan to replace the company and Lorn Leitman, who owned Homestead and served as the plan trustee. On September 14, 2010, Homestead dissolved administratively and ceased operations later that month. At that time, Leitman began facilitating distributions to terminated participants but failed to ensure that terminated participants received all plan distributions. As of December 31, 2012, one participant remained in the plan with an account balance of more than $91,000. In an unrelated civil case brought by the Secretary, the court order filed on October 9, 2013 permanently barred Leitman from serving as a fiduciary to any employee benefits plan. On April 6, 2017, the court granted the Secretary's motion for default judgment, removed Leitman from serving as a fiduciary to the plan, and appointed an independent, successor fiduciary. In the same order, the court denied Leitman's motion to set aside the default. Atlanta Office

Perez v. Interactive Marketing Group 401(k) Plan (D.N.J.)

On April 11, 2016, the Secretary filed a complaint to secure distribution of about $753,000 to 11 participants. After serving the plan and not receiving an answer, the Secretary requested and obtained entry of default from the clerk of the court on August 12, 2016. On September 8, 2016, the Secretary submitted an application for the appointment of an independent fiduciary. On February 10, 2017, the court ordered the appointment of an independent fiduciary. New York Office

Acosta v. International Longshoremen's Association Local 2038, AFL-CIO (N.D. Ind.)

On August 7, 2017, the Secretary filed a complaint against the International Longshoremen's Association Local 2038, AFL-CIO, fiduciary of the International Longshoremen's Association Local 2038 Pension Fund. The complaint alleges that the defendant failed to administer the plan, as a result of which participants have been unable to obtain distributions from their vested account balances. The action seeks to have an independent fiduciary appointed to administer the fund, distribute the remaining fund assets to eligible participants, and terminate the fund. Chicago Office

Perez v. Lechler (S.D. Ohio)

On January 19, 2017, the Secretary filed a complaint against Michael A. Lechler and Exterior Systems, Inc., alleging that the defendants misappropriated plan forfeitures and failed to administer the plan. On March 31, 2017, the court entered a consent judgment, appointing an independent fiduciary to terminate the plan, requiring the defendants to restore $5,035 to the plan, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. Cleveland Office

Perez v. Lily Pond Nursing Home Savings Plan (E.D.N.Y.)

On March 24, 2016, the Secretary filed a complaint to secure distribution of about $129,000 to seven participants. After the plan was served but did not answer, the Secretary requested clerk's entry of default, which was received on July 27, 2016. On August 10, 2016, the Secretary applied to the court for the appointment of an independent fiduciary. On February 1, 2017, the magistrate judge filed a report and recommendation in favor of granting the Secretary's request for relief. On February 28, 2017, the district judge issued an order approving the report and recommendation and appointing an independent fiduciary. New York Office

Perez v. Mueller (D. Minn.)

On April 26, 2016, the Secretary filed a complaint against Lori Jo Mueller for failing to administer the Edelweiss 401(k) Plan since 2012. The company ceased operations in September 2012 after it was discovered Mueller embezzled money from the company for personal use. Mueller plead guilty to defrauding her employer in February 2013 and in June 2013, was sentenced to 51 months in prison for one count of wire fraud and one count of health care fraud. On January 6, 2017, the court entered a consent order and judgment which removed Mueller as a fiduciary to the plan and permanently enjoined her from serving as a fiduciary or service provider to any ERISA-covered plan. The consent order and judgment also appointed an independent fiduciary to administer the plan, distribute $12,276 of the plan's remaining assets to four eligible participants, and terminate the plan. Chicago Office

Acosta v. Nichols Food Service, Inc. (E.D.N.C.)

On January 18, 2017, the Secretary filed a complaint against Nichols Food Service, Inc. and James L. Nichols, alleging that from September to November 2013, the defendants failed to forward $4,564 in employee contributions to the 401(k) Plan and commingled the funds with the company's general assets. Additionally, the defendants withheld premiums totaling approximately $86,962 from employees' compensation and failed to segregate the funds from the company's general assets and forward them to the Health Plan. As a result, participants incurred unpaid medical claims totaling $143,394. The company ceased operation in January 2014. The complaint asks the court to: (1) permanently enjoin the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee or representative having control over the assets of any employee benefit plan subject to ERISA; (2) enjoin the defendants from engaging in any further action in violation of Title I of ERISA; (3) appoint a successor fiduciary at the defendants' expense to administer the plans; and (4) order the defendants to restore all losses, including interest and lost opportunity costs, to the 401(k) Plan and restore health plan participants' contributions that were withheld. The Secretary received waivers of formal service on April 1, 2017. See also Acosta v. Nichols Food Service, Inc., Section B.1. Collection of Plan Contributions. Atlanta Office

Perez v. Rossetter (D. Minn.)

On January 5, 2017, the Secretary simultaneously filed a complaint and consent judgment against Charles Rossetter, plan administrator of the Receivables Management Solutions, Inc. 401(k) Savings Plan, alleging that he failed to terminate the plan and issue distributions. The plan became abandoned on April 16, 2014, when the company was administratively dissolved through a receivership. The total distributions owed to the nine participants were approximately $24,292.43. The consent judgment entered on January 11, 2017, required Rossetter to issue distributions to eligible participants in accordance with plan documents and terminate the plan no later than March 15, 2017. Chicago Office

Acosta v. Rotondo (E.D. Mich.)

On June 21, 2017, the Secretary filed a complaint against Dino Rotondo and Apex Administrative Services, LLC, fiduciaries of the People Plus Multiple Employer 401(k) Savings

Plan, alleging that they failed to administer the plan after Apex ceased operations in March 2013. On June 26, 2017, the court entered a consent order and judgment requiring the fiduciaries to terminate the plan and distribute the plan's assets. The judgment also permanently enjoined the defendants from serving as fiduciaries or service providers with respect to any ERISA-covered plan. Chicago Office

Acosta v. Rudraraju (E.D. Va.)

On September 28, 2017, the Secretary filed a complaint alleging that Rudraraju and Softalia, Inc. failed to monitor the on-going operations of the Softalia, Inc. 401k Plan, resulting in participants being unable to access the assets in their plan accounts. The Secretary seeks removal of Rudraraju and the company from their positons as plan trustee and administrator, respectively, and the appointment of an independent fiduciary to administer the plan in order to effectuate its termination and the distribution of plan assets to the participants and beneficiaries. Philadelphia Office

Perez v. The Scanlan Agency (E.D. Pa.)

On November 28, 2016, the Secretary filed a complaint seeking the appointment of an independent fiduciary to complete the termination and distribution of the Scanlan Agency, Inc. 401(k) plan. Plan trustees resigned in October 2011 after the company ceased operations in the first quarter of 2011. The company failed to complete the termination of the plan and distribute its assets. The plan has approximately seven participants and over $100,000 in assets. On January 26, 2017, the court approved a consent judgment removing the defendant from its position as a fiduciary with respect to the plan and appointing an independent fiduciary to distribute plan assets and to terminate the plan. Philadelphia Office

Hugler v. Urban Hotels, Inc. dba LAX Urban Plaza Hotel (C.D. Cal.)

On December 15, 2016, the Secretary filed a complaint against Urban Hotels, Inc. dba LAX Urban Plaza Hotel for failing to terminate the company's Urban Plaza Hotel 401(k) Plan and Trust and issue distributions. As of January 13, 2016, the abandoned plan had $57,414.15 in plan assets and fourteen participants. On March 14, 2017, the Secretary filed a motion for default judgment. On April 17, 2017, the court granted the Secretary's motion for default judgment, removing the company, Hidebumi Minagawa, and Hailu Solomon as fiduciaries to the plan, permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to administer the plan, distribute its assets, and terminate the plan. The judgment also ordered the independent fiduciary's fees and expenses, which totaled $2,525, to be deducted from the assets of the plan. San Francisco Office

Acosta v. Wuest & DiFara Profit Sharing Plan (N.D.N.Y.)

On May 27, 2017, the Secretary filed a complaint to secure distribution of $13,554.53 to eight participants. Following service of the complaint, the Secretary negotiated a consent order for the appointment of an independent fiduciary, which consent order was filed with the court on August 29, 2017. Subsequently, the fiduciary distributed the money to the eight participants, and on October 12, 2017, the Secretary voluntarily dismissed the case. New York Office

Hugler v. Zagara (N.D. Ohio)

On February 6, 2017, the Secretary filed a complaint against Charles Zagara, alleging that he failed to remit participant contributions to the Tax Warrior Inc. 401(k) Plan and also failed to administer the plan. On July 27, 2017, the court entered a consent judgment requiring Zagara to restore $7,139 to the plan over a twelve-month period and then authorize distributions from the plan. Zagara is then permanently enjoined from serving as a fiduciary to any ERISA-covered plan. Cleveland Office

L. Contempt and Subpoena Enforcement

Acosta v. Anstett (D.N.D.)

On March 1, 2016, the court entered a consent judgment and order settling allegations in the Secretary's complaint, filed on July 15, 2015, that the Mathison Company, Marilyn Anstett, and Paul Anstett, who are the company's president and vice president and plan trustees, failed to remit and to timely remit employee contributions and loan repayments to the company's 401(k) Plan and failed to properly administer its ESOP. The consent judgment confirmed the complaint allegations and, among other things, ordered the defendants to pay $14,066.34 to 401(k) plan participants, to terminate the 401(k) plan, and freeze and to take steps to properly administer the ESOP. The court also ordered them to complete ten hours of fiduciary training. Since the filing of the consent judgment the fiduciaries only have partially fulfilled their 401(k) Plan monetary obligations under the consent judgment ($8,066 in employee contributions is still outstanding to participants) and only partially fulfilled their ESOP monetary obligations under the consent judgment. Accordingly, on November 16, 2017, the Secretary filed a contempt petition to enforce the provisions of the consent judgment. The court has not yet taken action on the contempt petition. See also Acosta v. Anstett, Section B.1. Collection of Plan Contributions and Loan Repayments. Denver Office

Acosta v. Ashton Group LLC (LinkUs Holdings, Inc. ESOP) (N.D. Ill.)

On March 15, 2017, the Secretary filed a petition to enforce an administrative subpoena against Ashton Group LLC, which was the appraiser responsible for valuing the corporate shares for the LinkUs Holdings, Inc. ESOP's purchase of the company's outstanding common stock shares on April 30, 2013. Ashton provided a valuation report that purportedly identified adequate consideration for the 1,769,499 shares. The ESOP fiduciaries purchased the employer securities for $34 million or $19.34 per share. On July 10, 2017, after Ashton provided all responsive documents to the subpoena, the Secretary withdrew the petition to enforce. Chicago Office

Secretary v. Ashton Group LLC (Allied Exhaust Systems, Inc. ESOP) (N.D. Ill.)

On March 15, 2017, the Secretary filed a petition to enforce an administrative subpoena against Ashton Group LLC, which was the appraiser responsible for valuing the corporate shares for the Allied Exhaust Systems, Inc. ESOP's purchase of the outstanding common stock shares on February 11, 2014. Ashton provided a valuation report that purportedly identified adequate consideration for the 267,500 shares. The ESOP fiduciaries purchased the employer securities for $7.2M. On June 30, 2017, after Ashton provided all responsive documents to the subpoena, the Secretary withdrew the petition to enforce. Chicago Office

Acosta v. Aycock (N.D. Ga.)

On June 30, 2015, the court entered a consent judgment between Joel E. Aycock and the Secretary, ordering Aycock to make restitution payments totaling $49,033.88 directly to JEA Architects SIMPLE IRA Plan's participants over a period of two years. Aycock made payments totaling $4,631.50 through August 2015, but failed to make further payments. The Secretary filed a motion for contempt against Aycock on October 12, 2016. The court set a motion hearing for February 5, 2017. On February 3, 2017, Aycock filed a notice of filing of bankruptcy. Subsequently, the Secretary sought recovery of the losses through the bankruptcy proceeding. The bankruptcy matter is still pending. Atlanta Office

Perez v. Business Administrators Consultants, Inc. (S.D. Ohio)

On November 16, 2016, the Secretary filed a petition to compel Business Administrators Consultants, Inc. to respond to a subpoena duces tecum issued by the Department on May 19, 2016. The court scheduled a January 17, 2017 hearing on the petition to enforce this subpoena. After the order was issued, the respondent produced the subpoenaed documents, and the Secretary withdrew the subpoena. Cleveland Office

Acosta v. Chainani (S.D. Tex.)

On April 20, 2015, the Secretary filed an amended complaint against AARC Environmental, Inc. (AARC) and Kishore Chainani, AARC's sole owner. The original complaint, filed on December 26, 2014, alleged that they failed to forward employee contributions and loan repayments to the company's 401(k) Plan since December 29, 2007, resulting in more than $78,000 in losses. The amended complaint alleges that they failed to remit all employee and employer premiums to the company's Group Health Plan and allowed coverage to lapse multiple times since 2011, as a result of which they owe participants more than $40,000 in employee premiums and an additional unknown amount for unpaid medical claims. On September 20, 2016, the court entered a default judgment against defendants, granting full relief and awarding more than $86,000 in losses for the 401(k) Plan and more than $40,000 in losses for the Health Plan to 49 participants and beneficiaries. Defendants are also required to hire an independent fiduciary at their own expense and are barred from acting as fiduciaries in the future once the independent fiduciary is in place. Because defendants failed to comply with the default judgment, the Secretary on June 28, 2017, filed a motion to adjudge defendants in contempt. On September 7, 2017, the court issued an order finding defendants in civil contempt and ordered defendants to make immediate restitution of $86,085.43 to the 401(k) plan and immediate restitution of $39,601.47 to the health plan participants. Defendants hired legal counsel and entered into negotiations with the Secretary to purge themselves of contempt. On December 22, 2017, the Secretary filed a request for stay of contempt pending defendants' payment of the outstanding debt owed to both plans pursuant to an agreed repayment plan. See also Acosta v. Chainani, Section B.1. Collection of Plan Contributions and Loan Repayments. Dallas Office

Acosta v. Gibbs (N.D. Ill.)

On July 25, 2017, the Secretary filed a petition to enforce an administrative subpoena against Dr. Thomas R. Gibbs, DDS, PC. Respondent sponsored the Dr. Thomas R. Gibbs, DDS, PC Defined Benefit Pension Plan. The Department issued the subpoena on October 26, 2016 during the investigation of the plan, which holds $2.8 million in assets. Despite several attempts to obtain compliance, respondent had not complied with the subpoena. On August 23, 2017, after receiving all documents responsive to the subpoena, the Secretary withdrew the petition to enforce. Chicago Office

Solis v. Kineticsware, Inc. (W.D. Wash.); Solis v. Sampson (In re Sampson) (Bankr. W.D. Wash.)

The Secretary's district court complaint, filed on November 15, 2010 against Kineticsware, Inc., Jeffrey Sampson and Richard Barnett, alleged that they failed to collect and remit to the company's 401(k) Plan $222,316 in employer contributions for plan years 2007-2008. The Secretary had filed an adversary complaint on October 26, 2009 in Sampson's Chapter 7 bankruptcy case, seeking a determination that his debt to the plan is non-dischargeable. On January 9, 2012, the court entered a consent judgment, finding that Sampson and Barnett are jointly and severally liable for $200,610 in losses due non-fiduciary participants, permanently enjoining them from future fiduciary service to any ERISA-covered plan, and requiring them to pay for the costs of an independent fiduciary to administer the plan. On February 4, 2014, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was nearly one year delinquent under the terms of his payment plan. On June 13, 2014, the court ordered Sampson to pay at least $750 per month toward the judgment, ordered him to consider a stock pledge, and reminded Sampson that penalties could be imposed on him if he fails to make the required payments. During 2017, the court continued to hold regular status conferences to ensure defendants are repaying the 401(k) Plan pursuant to previous court orders. See also Solis v. Kineticsware, Inc., Solis v. Sampson (In re Sampson), B.1.Collection of Plan Contributions and Loan Repayments. Seattle Office

Perez v. Lamprecht (M.D. Fla)

On June 1, 2016, the court entered a consent judgment in which Hendrik Lamphrecht, fiduciary of The Children's Place, Inc. Welfare Benefit Plan, agreed to pay $20,000 in restitution by August 31, 2016 and to be enjoined from serving as a fiduciary or service provider to any ERISA-covered plan in the future. On January 11, 2017, the Secretary filed a petition for adjudication in civil contempt as to Lamprecht. The petition sought a finding that defendant Lamprecht failed to comply with the consent judgment and order that was entered by the court on June 1, 2016. The Secretary later requested that the petition be withdrawn without prejudice, because Lamprecht began to pay restitution in compliance with a payment plan schedule he submitted to the court. On August 7, 2017, the court ordered that the petition be withdrawn without prejudice and canceled the hearing. Atlanta Office

Perez v. Mayerhauser Realty Inc. (S.D.N.Y.)

On November 16, 2017, the Secretary filed a subpoena enforcement action against Mayerhauser Realty Co., seeking production of certain documents relating to the company's 401(k) Plan & Trust. On December 20, 2017, the court granted the Secretary's petition and ordered Mayerhauser Realty to produce the documents. New York Office

Perez v. N&B Lundy Corp. d/b/a Pitter Patter Day School (M.D. Pa.)

On October 12, 2016, the Secretary filed a petition to enforce an administrative subpoena against N&B Lundy Corp. d/b/a/ Pitter Patter Day School that was issued as part of an investigation of the Pitter Patter Day School Health Plan. On October 13, 2016, the court issued an order to show cause requiring N&B Lundy Corp. to appear at a hearing to show cause as to why it should not be required to produce all of the documents requested. The company failed to appear at the hearing which was held on November 18, 2016, after which the court granted the Secretary's motion and ordered that all subpoenaed documents be produced. After the company failed to produce the subpoenaed documents, the Secretary filed a motion for adjudication of civil contempt which was granted on May 3, 2017. The court found that N&B Corp and its president and owner, Bobbi Jo Lundy were guilty of civil contempt of court and ordered them to produce all responsive documents, entered a coercive fine of $250 per day for each day that they fail to comply with the order, and ordered respondents to reimburse the Secretary for the costs and attorney's fees incurred in preparing and filing the motion. On September 25, 2017, the court granted the Secretary's request that the statute of limitations be equitably tolled until such time that respondents comply with the court's order of contempt. Philadelphia Office

<u>Acosta v. Schrepfer</u> (D. Colo.)

On August 6, 2015, the Secretary filed a complaint against M. Peter Schrepfer, Schrepfer Industries, Inc. 401(k), Schrepfer Industries, Inc. Health Plan, Trinidad Golf, LLC SIMPLE IRA Plan, and Trinidad Golf LLC Health Plan. The complaint alleges that Schrepfer and his companies failed to ensure that employee contributions were remitted to the plan sponsors' employee retirement and health benefits plans. On March 4, 2016, the Secretary obtained a consent judgment and order requiring Schrepfer to pay $21,500 in restitution to the participants of the two retirement plans and enjoining him from serving as a fiduciary unless and until he obtains no less than 12 hours of fiduciary education. Because Mr. Schrepfer failed to comply with the consent judgment, the Secretary filed a contempt petition on May 19, 2017. Subsequently, the Secretary obtained confirmation that that the fiduciary had satisfied all terms of the consent judgment. See also <u>Acosta v. Schrepfer</u>, Section B.1. Collection of Plan Contributions and Loan Repayments. Denver Office

M. Bankruptcy

Note: This section includes cases focusing on bankruptcy issues; where an adversarial complaint to determine the non-dischargeability of debt is incidental to a district court complaint, please see the appropriate case discussion.

<u>Perez v. Harris</u> (8th Cir. BAP and 8th Cir.)

This case, before the Eighth Circuit's Bankruptcy Appellate Panel (BAP), concerns the Secretary's collection of a judgment against a breaching fiduciary in bankruptcy. In 2012, the Chicago Office filed a complaint against Harris, who, as CEO, misused his employees' contributions to their health plan for corporate expenses. In 2015, the Chicago Office won in the district court after a bench trial, obtaining a judgment that Harris had violated his fiduciary duties and was liable for $67,839.60. Harris did not appeal the judgment but filed for bankruptcy in an attempt to discharge the judgment debt. In bankruptcy court, the Kansas City Office filed an adversary action asserting that the debt is not dischargeable. The bankruptcy court agreed with the Secretary and concluded that the debt was not dischargeable. The defendant then appealed to the Eighth Circuit's BAP. In his appeal, the defendant argued that he was not a fiduciary for purposes of the bankruptcy code and did not have the requisite intent for defalcation. Harris filed his brief on August 31, 2016. The Secretary filed a response brief on September 30, 2016. Oral argument, in which the Secretary participated, was held on December 8, 2016. On January 6, 2017, the BAP issued a favorable opinion agreeing with the Secretary's position. On February 2, 2017, Harris appealed the BAP decision to the Eighth Circuit. Harris filed his opening brief on March 20, 2017. The Secretary's response brief was filed on April 20, 2017, urging the Court to adopt the BAP and the district court's reasoning. Chicago Office, Kansas City Office and, on appeal, Plan Benefits Security Division

Acosta v. Phelps (Bankr. D. Md.)

On March 3, 2017, the Secretary filed an adversarial action arguing that the bankruptcy court should not discharge amounts owed by Phelps to the Phelps and Phelps Consulting 401(k) plan related to missing employee contributions and missing loan repayments. On December 18, 2017, the court entered a consent order finding that the $23,861.05 owed by Phelps to the plan was non-dischargeable. Arlington Office

N. Miscellaneous

Acosta v. Azer (D. Md.)

On April 7, 2017, the Secretary filed a complaint against Rida N. Azer, president of the Metropolitan Washington Orthopaedic Associates, Chartered 1975 & Allied Specialties and fiduciary of the Metropolitan Washington Orthopaedic Associates, Chartered 1975 Employees Pension Plan and against plan fiduciary Donald Nobel. The Secretary alleges that Azer repeatedly over-reported the plan’s assets and under-reported the plan’s liabilities in the plan’s Form 5500s and that Noble and Azer authorized the use of plan assets as collateral for a loan that did not exclusively benefit the plan. The Secretary seeks the appointment of an independent fiduciary and a permanent bar preventing the defendants from serving as fiduciaries to any ERISA-covered plan in the future. The defendants filed answers to the complaint on July 21, 2017. Philadelphia Office

In re George W. Mathias (7th Cir.)

This case concerns an insurer's use of a forum selection clause in the plan documents to overrule the plaintiff's choice of forum. The participant-plaintiff filed a suit against his insurer-defendant because the defendant attempted to charge the plaintiff for the insurers' own admitted failure to bill the correct amount of disability insurance premiums. Because the disabled plaintiff could not pay the charge, the insurer terminated his insurance. The plaintiff filed suit in the Eastern District of Pennsylvania near where he had worked and where he currently lives. The plan's forum selection clause, however, required all suits to be brought in the Central District of Illinois. The district court in Pennsylvania transferred the case to Illinois. In Illinois, the plaintiff moved to retransfer the case back to Pennsylvania. The district court in Illinois denied the motion to retransfer. The plaintiff then filed his petition for a writ of mandamus with the Seventh Circuit on October 28, 2016. On November 3, 2016, the Seventh Circuit invited the Secretary to file an amicus curiae brief on the venue issue. The Secretary filed an amicus curiae brief on December 8, 2016, arguing that forum selection clauses are contrary to ERISA's text and purposes. On August 10, 2017, the Seventh Circuit, in a split decision, issued an unfavorable decision, upholding a forum-selection clause in an ERISA plan document that required the plan participant to bring his benefit claim in a district court away from his home and place of employment, even though ERISA provides plaintiffs the right to sue in the forum they chose. The dissenting judge agreed with the Secretary that the statutory text of ERISA, read in context and in light of the purposes of the statute, gives plan participants certain procedural protections, including a right to select from among the venues enumerated in the statute. Plan Benefits Security Division

<u>United States of America v. Kevin Brown</u> (D. Mass.)

The Secretary, in conjunction with the U.S. Attorney's Office, opposed Kevin Brown's petition for exemption from ERISA section 411, which imposes employment disqualifications on individuals convicted of certain crimes, including health care fraud and conspiracy to commit health care fraud, to which Brown plead guilty in October 2014. During Brown's tenure as vice president of operations at Health Management Advisors, LLC ("HMA"), he directed the submission of forged health insurance applications on behalf of unknowing plan participants, as a means of shifting costs from HMA's stop-loss insurance policy to state-run insurance plans. Brown was released from prison in May of 2016. He remains under supervised release and, pursuant to section 411, is disqualified for a period of 13 years from the date of his convictions, from serving or being permitted to serve any ERISA plan as an administrator, fiduciary, officer, trustee, custodian, counsel, agent, employee, or representative, and from serving as a consultant or advisor to an employee benefit plan. Brown petitioned the court for relief from this restriction, arguing that the ban should be lifted because his particular crimes did not warrant disqualification, that he would be merely serving as a "consultant to a consultant" on ERISA plans, and that he had been rehabilitated since conviction. The Secretary objected and asserted that the time since his conviction was insufficient for rehabilitation, his characterization of his crimes was evidence of his lack of rehabilitation, and his proposed employment clearly fell within the disqualification in section 411. On February 1, 2017, the Secretary, in conjunction with the U.S. Attorney's Office, opposed Brown's request for a hearing on his petition for exemption from ERISA section 411. On February 9, 2017, Brown withdrew his petition. The court allowed the withdrawal of Brown's petition on February 15, 2017. Boston Office

<u>Acosta v. Stapleton</u> (S.D. Ohio)

On September 20, 2017, the Secretary filed a complaint against the Board of Trustees of the Plumbers and Steamfitters Local No. 577 Annuity Plan and 11 trustees of the plan. The complaint alleges that the defendants caused the plan to pay service provider fees for plan accounts of inactive participants, which should have been distributed prior to the fees being incurred. The complaint seeks injunctive relief and an order requiring the defendants to restore all losses to the plan. Cleveland Office

<u>Sun Life v. Sierra Jackson</u> (6th Cir.)

This case concerns the standard for qualifying domestic relations orders, such as divorce decrees, to serve as the operative designation of beneficiaries of ERISA plan benefits. An ERISA plan administrator typically provides ERISA plan benefits to the beneficiary designated in accordance with plan documents. A plan administrator must override that designation and provide those benefits in accordance with state domestic relations orders only if the state orders "clearly specify" certain information listed in ERISA, such as the beneficiary's mailing address. This

case concerns life insurance benefits, and whether Sun Life correctly paid those benefits to the designated beneficiary, a brother of the plan participant, and not to the deceased's only daughter. The daughter argued that her parents' divorce decree was a qualified domestic relations order that dictated her as the rightful beneficiary. Sun Life made two arguments on appeal: (1) under a strict interpretation of the statutory requirements, the divorce decree failed to satisfy those requirements; and (2) the divorce decree had its own enforcement and monitoring requirements, and the daughter failed to abide by them, so the decree is ineffective. The district court rejected these arguments. Sun Life appealed the decision, and filed its opening brief on May 2, 2017. The daughter-beneficiary filed her brief on July 5, 2017. The Secretary filed an amicus brief on July 12, 2017. The Secretary urged the Sixth Circuit to reject a strict test for the statutory requirements with flexibility for plan administrators to infer information from the text of the order. The Secretary also argued that the divorce decree's own idiosyncratic requirements do not affect or trump the qualification of the order under federal law. Oral argument, in which the Secretary participated, was held on November 28, 2017. On December 13, 2017, the Sixth Circuit issued a favorable opinion, rejecting Sun Life's strict standard, and agreed with a contextual approach toward qualifying domestic relations orders. The Sixth Circuit also rejected any argument that alleged non-compliance with the order affects the daughter's ERISA rights.
Plan Benefits Security Division