ERISA Litigation Update

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Tom is Of Counsel with The Wagner Law Group, a law firm specializing in ERISA & Employee Benefits. His expertise encompasses all aspects of employee benefits programs, including the design, implementation and compliance of retirement plans, health and welfare plans, and executive and incentive compensation arrangements. He also has a robust practice assisting covered service providers in meeting their ERISA compliance needs.

Earlier in his career, Tom worked for the law firm of Schlichter, Bogard & Denton including on such landmark cases as Tibble v. Edison, which was decided by the U.S. Supreme Court last year. Tom is also Editor-in-Chief of the Fiduciary Matters Blog, a blog visited over 160,000 times since its first publication in March 2013. He also teaches ERISA Fiduciary Law as an Adjunct Professor at the Washington University in St. Louis School of Law, his alma mater. Tom is also a co-author on the forthcoming Second Edition of ERISA: Principles of Employee Benefits Law, a one of a kind treatise discussing the policies behind our national employee benefits scheme.

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About Thomas E. Clark Jr.

- Former Schlichter, Bogard, & Denton Plaintiffs' Attorney
- Current Of Counsel with The Wagner Law Group
  - Based in St. Louis
- Adjunct Law Professor
- Editor-in-Chief Fiduciary Matters Blog / ERISA Litigation Index
  - http://www.fiduciarymattersblog.com

The Swinging Pendulum

- *Hecker v. Deere & Co.* – 7th Cir.
  - High watermark – Stephen Rosenberg
- *Braden v. Walmart* – 8th Cir.

Tibble v. Edison International

- *District Court*
  - Judge granted Motion for Summary Judgment on most issues on grounds that the 6 year statute of limitations forbid the claims
    - Active v. Passive
    - Separate Account v. Mutual Fund
    - Most of the expensive share class mutual funds in the Plan
  - At trial, provides victory to Plaintiffs – imprudent to include (after 2001) three mutual funds with an available cheaper share class. Three funds added before 2001 did not have material change in circumstances (court created doctrine, not in ERISA)
- 9th Circuit – Affirms District Court
- Supreme Court
  - Plaintiff file cert petition and get support of the Solicitor General/DOL

Tibble v. Edison International

- Supreme Court
  - Issues – Does the 6 year statute of limitations eliminate any need for a fiduciary to reevaluate a selected investment option unless a material change in circumstance has occurred?
  - Ruling – No
    - Selection and monitoring of an investment option are two different fiduciary actions
    - A claim over selection may be time barred, but a claim over failure to monitor is viable in theory
  - Open Issue – What then is the duty to monitor?
    - Sent back to the 9th Circuit to decide
    - 9th Circuit Ruled – April 13, 2016 that Plaintiffs waived Duty to Monitor Case

Tibble v. Edison International

- Now What? KEY TAKEAWAYS
  - Don't wait for the 9th Circuit to declare what the duty to monitor is.
  - Process, Process, Process (and more Process)
  - Prediction – Duty to Monitor will be less onerous than duty to select, but will still include looking at:
    - Performance
    - Fees
    - Revenue Sharing
    - Management Team
    - Style Drift

Tatum v. RJR Pension Committee

- Background
  - RJR and Nabisco decided to separate business groups to insulate from the tobacco lawsuits
  - The RJR plan was left with two single securities, RJR stock and Nabisco stock
  - A group met to discuss the divestiture of the Nabisco stock for about an hour, discussing only RJR's own liability
  - After announcement, plan participant wrote RJR asking to reconsider, because stock was artificially depressed and would regain after time. RJR declined to reconsider.
  - Lawsuit brought. Determined that fiduciaries failed to put participants best interests first

Tatum v. RJR Pension Committee

- *4th Circuit* - Majority –
  - Failure of procedural prudence – no real process
  - Causation is shifted to defendant
  - Test of substantive prudence is "would have" rather than "could have"
- 4th Circuit - Dissent
  - No violation of procedural prudence
  - Proving causation stays with the plaintiff
  - Could have standard is appropriate
- Supreme Court
  - Rejected Cert Petition

Tatum v. RJR Pension Committee

- Key Takeaways:
  - Real decision was about fiduciaries not getting a free pass when they failed to perform procedural prudence. Courts struggle with how to handle that.
- So…
  - Always have a process
  - Always have participant's best interests in mind
  - Always document both

Old Active Cases

- Tussey v. ABB – Back in Front of the 8th Circuit
- Grabek v. Northrop Grumman – Going to Trial
- In re Fidelity Float Litigation – Pending in 1st Circuit

Settlements

- Gordon v. Mass Mutual - ???
- Spano v. Boeing - $57 million
- Kruger v. Novant Health - $32 million
- Abbott v. Lockheed Martin - $62 million

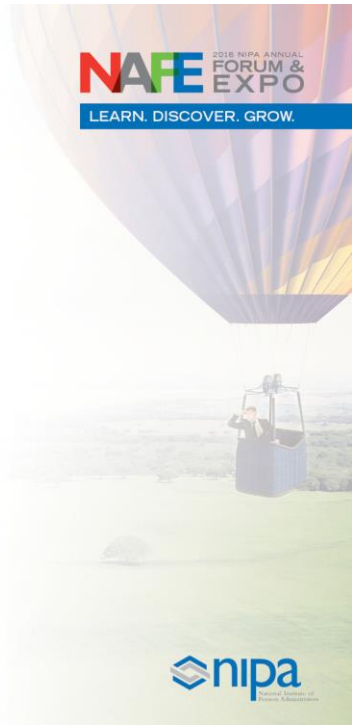
Church Plan Cases

- Kaplan v. Saint Peter's – 3rd Circuit Rules in Favor of Plan Participants
- Stapleton v. Advocate Health Care Network – 7th Circuit Rules in Favor of Plan Participants
- Settlements where parties agree that plan is not subject to ERISA
  - E.g. Overall v. Ascension

New Cases

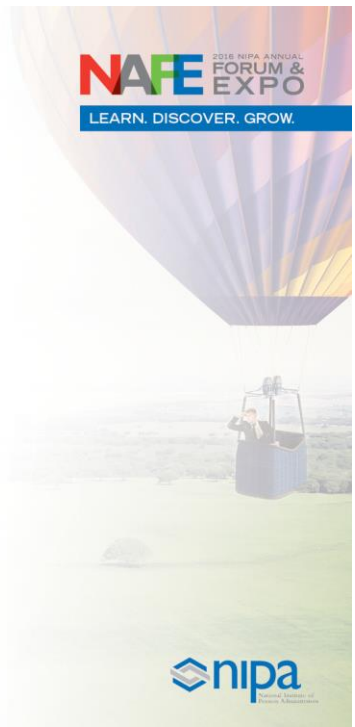
Plan Sponsor as Service Provider

- Bowers v. BB&T Corp.
- Urakhchin v. Allianz
- Brotherston v. Putnam
- Cooper v. DST
- Kilpatrick v. Great-West
- Moreno v. Deutsche Bank
- Pledger v. Reliance Trust



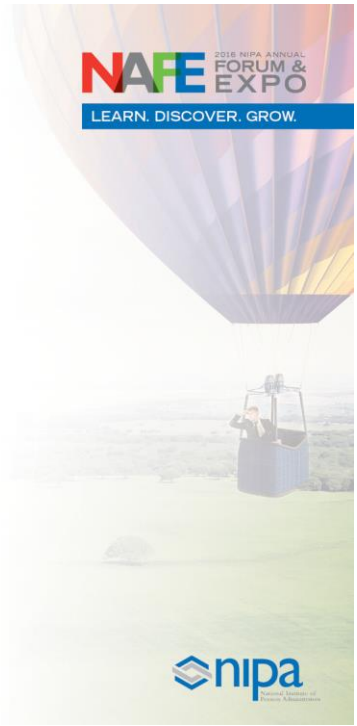
Process Cases

- Bell v. Anthem
- Troudt v. Oracle
- White v. Chevron
- Ramos v. Banner Health
- Sulyma v. Intel



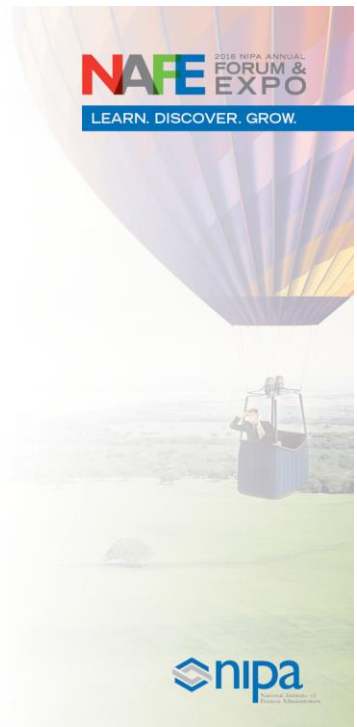
Stable Value Cases

- Bishop-Bristol v. MassMutual
- Ellis v. Fidelity
- Lau v. MetLife
- Wood v. Prudential
- Whitman v. New York Life



Recordkeeper Controls Rev. Share

- Rosen v. Prudential
- Krikorian v. Great-West



Party in Interest Cases

Harris Trust & Savings Bank v. Salomon Smith Barney – S.Ct.

- Non-Fiduciary participating in 406(a) prohibited transaction can be found liable under ERISA 502(a)(3)
- Section 502(l), implicitly allows section 502(a)(3) suits against a non-fiduciary "who knowing[ly] participat[es] in a fiduciary's violation," regardless of whether the underlying substantive provision mentions non-fiduciaries.
- Anyone can be a defendant, so long as the person or entity was a fiduciary or knowingly participated in a fiduciary's breach of a substantive provision of ERISA.

Skin Pathology v. Morgan Stanley – S.D. NY

- No allegation that MS was a fiduciary
- Instead, MS was a party in interesting receiving excessive fees from plan assets
- Court granted motion to dismiss finding one paragraph in disclosure was enough to put the onus back on the plan fiduciary
- Key Takeaway: Your 408(b)(2) disclosures matter

Blue Moon Fiduciary v. Hutcheson – M.D. NC

- Fall out from embezzlement by Matt Hutcheson from the open MEPs he founded and administered
- New fiduciaries and the service providers at the time of wrong doing are the defendants in the case
- Major decision in denying Aspire's Motion to Dismiss
- Court found that based on Aspire's conduct in allowing Hutcheson to take money and falsely report to plan participants that money was in a bond fund, 502(a)(3) claim can be brought against Aspire as a party-in-interest even though they never received any of the stolen money


QUESTIONS?
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