

X. Labor

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A. INTRODUCTION

The Labor Committee's report reviews important decisions over the past year in federal employment, labor, and employee benefit laws. The report's employment and labor law sections review significant U.S. Supreme Court decisions involving class actions, religious exemptions to federal discrimination laws, and attorney fees, including the Court's landmark decision in *Wal-Mart Stores, Inc. v. Dukes*, which changed the class action certification landscape. These sections also discuss a number of important circuit court decisions under Title VII, the Family Medical Leave Act (FMLA), the Fair Labor Standards Act (FLSA), the Americans with Disabilities Act (ADA), and other federal laws as well as significant National Labor Relations Act (NLRA) developments. The Employee Retirement Income Security Act (ERISA) section of the report reviews the Supreme Court's decision in *Cigna Corp. v. Amara*, which has important implications for ERISA remedies. That section also addresses several important decisions in the continuing employer stock drop saga and the 401(k) plan fee area.

B. EMPLOYMENT LAW DEVELOPMENTS

1. Federal Rule of Civil Procedure 23

In *Wal-Mart Stores, Inc. v. Dukes*, the U.S. Supreme Court significantly limited plaintiffs' ability to certify employment class actions under Federal Rule of Civil Procedure 23.¹ Plaintiffs consisted of a proposed nationwide class of 1.5 million female Wal-Mart employees alleging gender discrimination in promotions and compensation under Title VII. The district court, a Ninth Circuit Court of Appeals panel, and a divided Ninth Circuit sitting en banc approved class certification. In reversing, the Supreme Court established stringent certification standards aimed at preventing overly broad class claims. It also explained that a district court must engage in a "rigorous analysis" before certifying a class and consider the merits of plaintiffs' claims where they overlap with issues related to certification.

In a five-four decision authored by Justice Scalia, the Court explained that a proposed class must satisfy the Rule's threshold requirements of numerosity, commonality, typicality, and adequate representation. Focusing on commonality, the Court held allegations that Wal-Mart had a "common" policy which gave local managers discretion to make employment decisions on subjective factors were inadequate. The Court acknowledged a single common question could

1. 131 S. Ct. 2541 (2011).

suffice, explaining that “commonality requires the plaintiff to demonstrate that the class members have suffered the same injury.”² The Court made clear, however, that commonality does not exist merely because putative class members allegedly suffered a violation of the same provision of law. Instead, a plaintiff must identify common questions that depend upon the same contention, and the determination of that contention’s “truth or falsity [must] resolve an issue that is central to the validity of each one of the claims in one stroke.”³

The Court then addressed the “wide gap” between an individual plaintiff’s discrimination claim and the existence of a company policy that would create a class of individuals suffering that same alleged injury.⁴ The Court noted that the gap could be bridged in two ways. First, the Court cited a uniform biased testing procedure that impacted all test takers in the same way. Second, the Court explained that the gap could be bridged by “significant proof” that an employer “operated under a general policy of discrimination.”⁵ The Court contrasted such a policy with “the bare existence of delegated discretion” described by plaintiffs.⁶ The policy of discretion missed the commonality mark because “demonstrating the invalidity of one manager’s use of discretion will do nothing to demonstrate the invalidity of another’s.”⁷

In addition, the Court unanimously ruled that claims for “individual monetary damages,” including back pay, could not be certified under Rule 23(b)(2) and instead must be certified, if at all, under the more stringent requirements of Rule 23(b)(3).⁸ The Court noted that Rule 23(b)(3), unlike Rule 23(b)(2), mandates notice to the class and an opportunity for class members to opt out, necessary safeguards to preserve the due process rights of class members whose individual monetary claims otherwise would be adjudicated. The Court specified that back pay, even if characterized as equitable relief, cannot be certified under Rule 23(b)(2).

2. Title VII

a. Fourth Circuit Extends Title VII’s Exemption for Religious Organizations Beyond Hiring and Firing

In *Kennedy v. St. Joseph’s Ministries, Inc.*, the Fourth Circuit held in a case of first impression that Title VII’s liability exemption for religious organizations is not limited to decisions over hiring and firing.⁹ Instead, the exemption covers all decisions related to employment and all aspects of the employment relationship. As such, a plaintiff may not bring a Title VII claim of discriminatory

2. *Id.* at 2551 (citing *Gen. Tel. Co. v. Falcon*, 457 U.S. 147, 157 (1982)).

3. *Id.*

4. *Id.* at 2553 (citing *Falcon*, 457 U.S. at 157–58).

5. *Id.* (citation omitted).

6. *Id.* at 2555–56.

7. *Id.* at 2541.

8. *Id.* at 2557–58.

9. 657 F.3d 189 (4th Cir. 2011).

discharge, harassment, or retaliation on the basis of religion against a religious organization.

Plaintiff, a member of the Church of Brethren, worked at a Catholic nursing facility. Plaintiff wore long dresses and skirts and covered her hair because of her religious beliefs. The facility informed plaintiff that her garb was inappropriate for work at a Catholic organization. She refused to change her attire and defendant terminated her shortly thereafter. She filed Title VII claims for harassment, retaliatory discharge, and discriminatory discharge on the basis of religion. The district court held her discharge claim was barred by the Title VII exemption for religious organizations,¹⁰ but that her harassment and retaliation claims were cognizable.

On appeal, the Fourth Circuit held that the religious organization exemption covers religious harassment and retaliation claims, as well as discharge. The court reasoned that all three claims are located in the same “subchapter” covered by the exemption and arise from the state of “being employed.”¹¹ The Fourth Circuit further explained that its decision follows Congress’s intent to free religious organizations from government intervention.

b. Fifth Circuit Affirms Application of Title VII Damages Cap on a Per Party Basis, Even Where the Party Had Multiple Title VII Claims

In *Black v. Pan American Laboratories, L.L.C.*, the Fifth Circuit held a Title VII damage cap applies on a per party, and not a per claim, basis.¹² In so holding, the court significantly decreased potential monetary awards for plaintiffs seeking relief for more than one alleged Title VII violation. The Fifth Circuit thus joined other circuits, including the Sixth, Seventh, Tenth, and D.C. Circuits, which previously applied the cap on a per party basis.¹³

Plaintiff Black was a sales representative for a pharmaceutical company. When she complained her sales quota was higher than a male coworker, a supervisor told her that it did not matter because she was “not the breadwinner anyway.”¹⁴ Black also complained informally about managers making sexually charged comments to her or in her presence. After her termination for missing meetings and complaining about her sales territory, she brought discriminatory discharge, job assignment, and retaliation claims against her employer.

The jury awarded Black \$200,000 in compensatory damages for each claim, \$150,000 in back pay for two claims, and \$2,400,000 in punitive damages. The district court reduced the total back pay award to \$150,000 and the total compensatory and punitive award to \$200,000. The Fifth Circuit affirmed, holding the caps apply to each party and not to each claim under the plain language of Title VII.

10. 42 U.S.C. § 2000e-1(a) (2006).

11. *Kennedy*, 657 F.3d at 193–94 (citing BLACK’S LAW DICTIONARY 604 (9th ed. 2009)).

12. 646 F.3d 254, 264 (5th Cir. 2011).

13. *Id.* at 264.

14. *Id.* at 257.

3. 42 U.S.C. § 1988

In *Fox v. Vice*, the Supreme Court held that where a plaintiff brings both frivolous and non-frivolous claims in certain civil rights lawsuits, a court may grant a defendant reasonable attorney fees for costs that would not have been incurred “but for” the frivolous claims.¹⁵ The Court’s ruling resolved a long-standing circuit court split “about whether and to what extent a court may award fees to a defendant under § 1988 when a plaintiff asserts both frivolous and non-frivolous claims.”¹⁶

Plaintiff Fox ran for chief of police against the incumbent, defendant Vice. After an alleged “assortment of dirty tricks” and “racial slurs,” Fox filed a complaint in Louisiana state court. Fox eventually conceded that his federal civil rights claims were not valid and proceeded only on his state claims.¹⁷

The Supreme Court had previously held that a district court may grant attorney fees if the plaintiff’s suit is frivolous. In *Fox*, Justice Kagan, writing for a unanimous Court, clarified that a district court may grant reasonable fees to the defendant where the plaintiff asserted both frivolous and non-frivolous claims. Such an award would be limited to “costs that the defendant would not have incurred but for the frivolous claims.”¹⁸ The Court emphasized that a “determination of fees ‘should not result in a second major litigation’” and that the goal of awarding fees is to “do rough justice, not to achieve auditing perfection.”¹⁹

4. Fair Labor Standards Act

a. Second Circuit Holds That Commute Time Is Not Compensable Where Plaintiff Performed Administrative Tasks at Home

In *Kuebel v. Black & Decker Inc.*, the Second Circuit affirmed the dismissal of plaintiff’s commute time claims.²⁰ The court held that the use of an electronic device to work from home on administrative tasks that could be completed at any time does not mark the start of a work day. The court’s ruling clarified and narrowed the definition of a workday under the FLSA.

Plaintiff Kuebel was a retail specialist for Black & Decker (B&D), responsible for merchandising and marketing at six B&D stores. He did not report to a central office and used his home as a base of operations. He completed thirty minutes to an hour of work from home per day, synching his B&D-issued personal data assistant, checking e-mail and voicemail, printing and reviewing sales reports, organizing product materials, making signs, taking online training courses, and loading and unloading his car.

The Second Circuit held plaintiff’s commute-time claims were not compensable under the FLSA. Under the Department of Labor’s “continuous workday

15. 131 S. Ct. 2205, 2211 (2011).

16. *Id.* at 2212–13.

17. *Id.*

18. *Id.* at 2211.

19. *Id.* at 2216 (citation omitted).

20. 643 F.3d 352, 360 (2d Cir. 2011).

rule,” the workday is defined as “the period between the commencement and completion on the same workday of an employee’s principal activity or activities.”²¹ An activity that is “‘integral and indispensable’ to a ‘principal activity’ is itself a ‘principal activity’ . . . and thus compensable under the FLSA.”²² The Second Circuit explained that even if work performed at home was integral and indispensable to his principal work activities, his ordinary commute is not compensable. The court followed long-standing regulations stating that normal travel time from home to work is not work time, emphasizing that Kuebel chose to complete his administrative tasks at home.²³

b. Fourth Circuit Holds That the FLSA’s Antiretaliation Provision Does Not Protect Job Applicants

In *Dellinger v. Science Applications International Corp.*, the Fourth Circuit affirmed the district court’s dismissal of an applicant’s retaliation claim under the FLSA, distinguishing between retaliation against an employee and an applicant.²⁴ Plaintiff sued her former employer for alleged violations of the FLSA’s minimum wage and overtime provisions. Shortly thereafter, defendant Science Applications International Corporation (SAIC) offered, and plaintiff accepted, a job position contingent on her passing a security clearance. After learning about her pending FLSA lawsuit, SAIC withdrew its offer. Plaintiff sued under FLSA’s antiretaliation provisions. The district court dismissed, finding the FLSA’s antiretaliation provision only protects employees, not prospective employees.

The Fourth Circuit affirmed, focusing on the text of the FLSA. Section 215(a)(3) “prohibits retaliation ‘against any employee’ because the employee sued the employer to enforce the Act’s substantive rights.”²⁵ Section 203(e)(1) defines an employee as “any individual employed by an employer.”²⁶ Based on the provision’s plain language, the court held that “a prospective employee cannot sue a prospective employer for retaliation.”²⁷

5. Americans with Disabilities Act

a. U.S. Supreme Court Holds First Amendment Bars Employment Discrimination Actions When Employer Is a Religious Group and Employee Is One of the Group’s Ministers

In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, the U.S. Supreme Court held the “ministerial exception” bars an employment discrimination suit on behalf of a minister challenging the church’s termination

21. *Id.* at 359 (quoting *IBP, Inc. v. Alvarez*, 546 U.S. 21, 29 (2005)).

22. *Id.* at 359 (quoting *Alvarez*, 546 U.S. at 37).

23. *Id.* (citing 29 C.F.R. § 785.35 (2011); 26 Fed. Reg. §§ 190, 194 (Jan. 11, 1961)).

24. 649 F.3d 226, 227 (4th Cir. 2011), *cert. denied*, 132 S. Ct. 1542 (2012).

25. *Id.* at 228–29.

26. *Id.* at 229.

27. *Id.* at 227.

decision.²⁸ The Court refused to adopt a formula for deciding when an employee qualifies as a minister. Instead, the Court reasoned that the exception applied to the employee in this case, given all the circumstances of her employment.

Plaintiff Perich, while employed as a teacher at Hosanna-Tabor, became a commissioned church minister. Thereafter, she became ill and was out on disability. When ready to return, the school informed her it had filled her position, would not let her return, and ultimately advised her that she was likely to be fired. In response, Perich indicated she had contacted an attorney and would assert her legal rights. The school board then decided to “rescind her call” because of “insubordination and disruptive behavior” and the damage done to her working relationship by “threatening to take legal action.”²⁹

The Equal Employment Opportunity Commission (EEOC) brought suit, alleging Hosanna-Tabor terminated Perich in retaliation for threatening legal action under the ADA. Hosanna-Tabor moved for summary judgment, invoking the ministerial exception under the ADA, which bars suits concerning the employment relationship between a religious institution and its ministers on First Amendment grounds. The district court granted summary judgment because Hosanna-Tabor treated Perich like a minister and held her out to the public as such. The Sixth Circuit vacated and remanded, noting that Perich did not qualify as a minister under the exception because her duties as a called teacher were identical to her duties as a lay teacher.

While the U.S. Supreme Court had not considered the issue until *Hosanna-Tabor*, the appellate courts had unanimously recognized the existence of a First Amendment ministerial exception, which precluded the application of employment discrimination laws to the employment relationship between a religious institution and its ministers. The Court held likewise and reasoned that the exception applied under the circumstances of the case.

The Court also resolved a circuit conflict over whether the ministerial exception is a jurisdictional bar or a defense on the merits.³⁰ The Court concluded the exception operates as an affirmative defense to an otherwise cognizable claim, not a jurisdictional bar. Courts still have the power to consider these ADA claims and decide whether the claim can proceed or is instead barred by the ministerial exception.

*b. Second Circuit Holds Employer Is Obligated
to Accommodate Commute Under ADA*

In *Nixon-Tinkleman v. New York City Department of Health and Mental Hygiene*,³¹ the Second Circuit disagreed with four other circuits in holding that in certain circumstances, employers may have an obligation to accommodate an employee’s commute to work. Plaintiff, who is hearing impaired, and suffers

28. 132 S. Ct. 694, 710 (2012).

29. *Id.* at 700.

30. *Id.* at 709.

31. 434 F. App’x 17 (2d Cir. 2011).

from cancer, heart problems, and asthma, brought suit against the New York City Department of Health and Mental Hygiene (DOHMH) and the City of New York alleging that they discriminated against her on account of her disabilities in violation of the ADA³² and §§ 501 and 504 of the Rehabilitation Act.³³ At issue were two proposed accommodations. First, plaintiff argued defendants should have provided her with a special telephone or other hearing device while she was stationed in Manhattan. Second, plaintiff, who was moved from Queens to Manhattan, requested that defendants accommodate her with respect to her commute to work.

The Second Circuit affirmed the district court's finding that plaintiff's first accommodation claim failed because plaintiff had not requested a special telephone during the period in question, and in every instance where defendants had been made aware of plaintiff's needs, they either had reimbursed plaintiff or furnished her with the requested device. The failure to spontaneously offer plaintiff a special telephone did not constitute discrimination.

With respect to plaintiff's second accommodation, the court held that "the district court erred because it concluded that an employer had no obligation to assist in an employee's commute."³⁴ Rather, the court reasoned that a commuting accommodation potentially was within the scope of her employer's ADA and Rehabilitation Act obligations. Citing its own precedent, the court stated that "there is nothing inherently unreasonable . . . in requiring an employer to furnish an otherwise qualified disabled employee with assistance related to her ability to get to work."³⁵

Because the reasonableness of a commuting accommodation is a fact question, the court remanded the case. Factors to consider on remand included, among others, whether defendants could have transferred plaintiff back to Queens or some other close location, allowed her to work from home, or provided a car or parking permit.

6. Family and Medical Leave Act

In *Pereda v. Brookdale Senior Living Communities, Inc.*,³⁶ the Eleventh Circuit held in a matter of first impression that employees requesting but not yet eligible for FMLA leave nonetheless are protected from interference with their FMLA rights prior to the occurrence of the triggering event. In addition, an employee's pre-eligibility request for maternity leave is considered "protected activity" under the FMLA as required for a retaliation claim.

Plaintiff worked at a senior living facility operated by the defendant. After plaintiff informed her employer she was pregnant and would be requesting

32. 42 U.S.C. §§ 12101 *et seq.*

33. 29 U.S.C. §§ 791 and 794.

34. *Nixon-Tinkleman*, 434 F. App'x, at 19 (citing *Lyons v. Legal Aid Soc'y*, 68 F.3d 1512, 1517 (2d Cir. 1995)).

35. *Id.* (citations omitted).

36. 666 F.3d 1269 (11th Cir. 2012).

FMLA leave with the birth of her child, her employer allegedly began harassing her, causing stress and pregnancy complications. She also alleged her employer denigrated her job performance and placed her on an improvement plan with unattainable goals. After providing notice that she needed to take physician-instructed time off for bed rest due to pregnancy complications, defendant terminated her employment. Plaintiff filed suit alleging claims for interference and retaliation under the FMLA.

The district court dismissed plaintiff's complaint, holding that (1) defendant could not have interfered with her FMLA rights because she was not entitled to FMLA leave at the time of her request; and (2) defendant could not have retaliated against her because she was not eligible for FMLA leave and thus could not have been engaged in protected activity. On appeal, the Eleventh Circuit reversed and remanded, holding that the FMLA protects a pre-eligibility request for post-eligibility maternity leave.

The Eleventh Circuit concluded the district court's ruling would violate the purposes of the FMLA. By allowing pre-eligibility interference, a loophole would be created that would allow an employer to terminate an employee before he or she could ever become eligible for FMLA leave. The court held that because the FMLA requires notice in advance of future leave, employees are protected from interference prior to the occurrence of a triggering event, such as the birth of a child. On the retaliation claim, the court reasoned a pre-eligibility request for post-eligibility leave is protected activity because the FMLA aims to support both employees in the process of exercising their FMLA rights and employers in planning for the absences of employees on FMLA leave. Thus, plaintiff had a cognizable retaliation claim based on the discussion of her maternity plans with her employer.

C. NATIONAL LABOR RELATIONS ACT DEVELOPMENTS

1. Small Bargaining Units Defined by the Union

The National Labor Relations Board (NLRB) in *Specialty Healthcare & Rehabilitation Center of Mobile* announced a new standard for determining whether a petitioned-for unit of employees is appropriate for collective bargaining.³⁷ The case nominally involved the issue of appropriate bargaining units in nonacute health care facilities, and, in particular, a unit of certified nursing assistants. The NLRB's decision, however, went beyond this narrow issue and articulated a new standard for determining whether unions in other industries may petition for an election among a small group of employees over an employer's objection that the union has inappropriately excluded other groups of employees from the prospective unit.

37. No. 15-RC-008773, 2011 WL 3916077, at *1 (NLRB Aug. 26, 2011).

For decades, in determining the appropriateness of such an exclusion, the Board has examined whether the excluded group is “sufficiently distinct” to warrant exclusion.³⁸ The NLRB’s new standard in *Specialty Healthcare* reverses that inquiry. Employers will now have the burden of proving that the excluded employees share an “overwhelming community of interest” with the employees included in the union’s petition.³⁹ While the NLRB noted that its holding was not intended to disturb existing industry-specific rules and standards other than that in the nonacute health care industry, the new standard is expected to facilitate union organizing in many industries. As dissenting board member Brian Hayes noted, the “overwhelming community of interest [test has] vast practical ramifications . . . [because it] obviously encourages unions to engage in incremental organizing in the smallest units possible.”⁴⁰

2. NLRB Applies the *Specialty Healthcare* “Overwhelming Community of Interest” Standard to Overturn a Regional Director’s Decision on the Appropriate Bargaining Unit

In *DTG Operations, Inc.*, the NLRB overturned a regional director’s finding that a bargaining unit of only rental service agents (RSAs) and lead rental service agents (LRSAs) at a rental car facility was inappropriate.⁴¹ The NLRB’s decision illustrates the difficulty of challenging a proposed bargaining unit under the “overwhelming community of interest” standard announced in *Specialty Healthcare*.

The regional director in *DTG Operations, Inc.* held the union’s petitioned-for unit of thirty-one RSAs and LRSAs at an airport rental car facility was not an appropriate unit for bargaining, reasoning instead that all 109 hourly employees onsite constituted the smallest appropriate unit, given the “overwhelming community of interest” among the RSAs, LRSAs, and the other employees. The regional director relied on evidence that the RSAs, LRSAs, and other hourly employees all had similar base wages, similar benefits, overlapping shift supervisors, and interaction during breaks and shifts.

The NLRB disagreed and remanded for an election on the union’s proposed bargaining unit, holding that the employer failed to demonstrate that the additional employees it sought to include shared an “overwhelming community of interest” with RSAs and LRSAs.⁴² The NLRB reinforced its explanation in *Specialty Healthcare* that, to meet this standard, there must be “‘no legitimate basis upon which to exclude certain employees from’ the larger unit because the traditional community-of-interest factors ‘overlap almost completely.’”⁴³

38. See, e.g., *NLRB v. Action Auto., Inc.*, 469 U.S. 490 (1985).

39. *Specialty Healthcare & Rehab. Ctr.*, 2011 WL 3916077, at *16.

40. *Id.* at *27 (Hayes, B., dissenting).

41. No. 27-RC-008629, 2011 WL 7052275, at *1 (NLRB Dec. 30, 2011).

42. *Id.*, at *4–8.

43. *Id.* at *5 (citation omitted).

3. New Union Representations Receive Protection from Challenge Following an Employer's Voluntary Recognition

In *Lamons Gasket Co.*,⁴⁴ the NLRB expressly overruled *Dana Corp.*,⁴⁵ which established a special process for employers or a rival union to challenge an employer's voluntary recognition of a union, typically through a card check procedure. Under the *Dana* process, the employer would post a notice in the workplace for forty-five days following voluntary recognition so that the employees would have an opportunity to petition the NLRB for a secret ballot election to test the union's majority status. The *Lamons Gasket* decision dispenses with this notice process and reimposes a "voluntary recognition bar" that blocks any challenge to the union's majority status for a "reasonable period of time" following the employer's voluntary recognition.⁴⁶

Under *Lamons Gasket*, the NLRB will not entertain any challenge to the recognized union's majority status for a minimum of six months and a maximum of one year after the parties' first bargaining session. During this period, no employer, employee, or union may petition the NLRB for a secret ballot election, and the employer may not withdraw recognition from the union. The specific length of this voluntary recognition bar will depend on a multifactor analysis set forth in *Lee Lumber & Building Material Corp.*,⁴⁷ which includes the following factors: (1) whether the parties are bargaining for an initial contract; (2) the complexity of the issues being negotiated and of the parties' bargaining processes; (3) the amount of time elapsed since bargaining commenced and the number of bargaining sessions; (4) the amount of progress made in negotiations and how near the parties are to concluding an agreement; and (5) whether the parties are at impasse.

4. Union Representations Receive Protection from Challenge Following a Merger or Acquisition

In *UGL-UNICCO*,⁴⁸ the NLRB overruled *MV Transportation*,⁴⁹ which had dispensed with a doctrine known as the successor bar, implemented by the Clinton board in *St. Elizabeth Manor*.⁵⁰ The successor bar was designed to block the ability of employees to select new union representation or no union representation following a lawful successorship transaction.

The NLRB majority in *UGL-UNICCO* re-implemented the successor bar to "create[] a *conclusive* presumption of majority support for a defined period of time, preventing any challenges to the [incumbent] union's status."⁵¹ The

44. No. 16-RD-001597, 2011 WL 3916075, at *1 (NLRB Aug. 26, 2011).

45. 337 N.L.R.B. 434 (2007).

46. *Lamons Gasket*, 2011 WL 3916075, at *10.

47. 334 N.L.R.B. 399 (2001).

48. No. 16-RD-001597, 2011 WL 3916076, at *1 (NLRB Aug. 26, 2011).

49. 337 N.L.R.B. 770 (2002), *overruled by UGL-UNICCO*, 2011 WL 3916076.

50. 329 N.L.R.B. 341 (1999), *overruled by UGL-UNICCO*, 2011 WL 3916076.

51. *UGL-UNICCO*, 2011 WL 3916076, at *4.

NLRB reasoned that “the number and scale of corporate mergers and acquisitions has increased dramatically over the last 35 years,” and that unions are placed in “vulnerable position[s]”⁵² when these transactions occur. In its view, the “successor bar” was needed to ensure the incumbent union a “reasonable” period of time, without any potential challenge, to represent the employees in collective bargaining with the successor employer.⁵³

The NLRB defined the length of the reasonable period for bargaining based upon whether the successor employer exercised its right to set new initial terms and conditions of employment. In cases where the successor employer does not exercise that right and instead adopts the predecessor’s terms and conditions of employment (but not the collective bargaining agreement itself), the successor bar will last for a period of six months after the first bargaining meeting between the union and the successor employer. In cases where the successor employer exercises the right to establish new terms and conditions, the bar will be longer—a minimum of six months and a maximum of one year, with the actual period determined under the multifactor approach of *Lee Lumber & Building Material Corp.*⁵⁴ Finally, if the parties negotiate a new collective bargaining agreement during the “reasonable period,” the NLRB’s “contract bar,” which blocks election petitions during the term of a contract, will be imposed for two years instead of the normal three years if the predecessor’s employees did not have an open period to file an election petition during the final year of the predecessor’s operation.⁵⁵

5. NLRB Holds Mandatory Arbitration Agreement (MAA) Unlawfully Restricts Employees’ Right to Participate in Collective Actions

In a plurality decision, the NLRB in *D.R. Horton, Inc.* held a non-union employer violated the NLRA by requiring arbitration of all claims on an individual basis and precluding any class and collective action proceedings.⁵⁶ The MAA in question provided that “all disputes and claims relating to the employee’s employment” would be determined by arbitration, and further, that the arbitrator “may hear only [an] employee’s individual claims,” and “does not have authority to fashion a proceeding as a class or collective action or to award relief to a group or class of employees in one arbitration proceeding.”⁵⁷

In holding the MAA violated the NLRA, the NLRB’s plurality decision reasoned that “employees who join together to bring employment-related claims on a classwide or collective basis in court or before an arbitrator are exercising

52. *Id.* at *4, 7.

53. *Id.* at *11.

54. *Id.* at *13.

55. *Id.*

56. No. 12-CA-025764, 2012 WL 36274, at *1 (NLRB Jan. 3, 2012).

57. *Id.* at *1–2.

rights protected by Section 7 of the NLRA.”⁵⁸ The NLRB therefore concluded the employer, by making the MAA a condition of employment, explicitly restricted activities protected by § 7.⁵⁹

The fact that employees agreed to the MAA, in the NLRB’s view, could not change the result because it was an individual agreement restricting § 7 rights.⁶⁰ The NLRB recognized that it is “well settled . . . that a properly certified or recognized union may waive certain Section 7 rights.”⁶¹ The NLRB also acknowledged that the U.S. Supreme Court’s decision in *14 Penn Plaza LLC v. Pyett*⁶² saw no “distinction between the status of arbitration agreements signed by an individual employee and those agreed to by a union representative.”⁶³ Nonetheless, the NLRB plurality suggested that a “properly certified or recognized union,” engaging in bargaining based on the “exercise of Section 7 rights,” was necessary for an agreement like the MAA to be lawful.⁶⁴

The NLRB plurality further maintained that its decision did not create a conflict between the Federal Arbitration Act (FAA) and the NLRA, reasoning that the Supreme Court, in upholding the resolution of statutory rights in FAA arbitrations, has indicated that such arbitrations do not require a party to “forgo the substantive rights afforded by [a] statute.”⁶⁵ In its view, the employer’s agreement, by barring class and collective claims, “directly violates the substantive rights vested in employees by Section 7 of the NLRA.”⁶⁶

The *D.R. Horton* decision is not without limits. The decision does not require employers to “permit, participate in, or be bound by a class-wide or collective arbitration proceeding.”⁶⁷ It still is lawful under the NLRA for employers “to insist that *arbitral* proceedings be conducted on an individual basis.”⁶⁸ In addition, the decision only applies to “employees” as defined in the NLRA, and thus has no direct impact on employers and employees not covered by the NLRA.

Finally, a number of questions remain following the *D.R. Horton* decision. Among those is the NLRB’s authority to issue a decision with only two members presiding (the third existing member of the board recused himself). Indeed, the U.S. Supreme Court in *New Process Steel, L.P. v. NLRB* held the NLRB must have a minimum of three members for case resolutions to be valid.⁶⁹

58. *Id.* at *3.

59. *Id.* at *5.

60. *Id.*

61. *Id.* at *13; see also *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270, 280 (1956).

62. 556 U.S. 247 (2009).

63. *D.R. Horton*, No. 12-CA-025764, 2012 WL 36274, at *13 (NLRB Jan. 3, 2012) (quoting 14 *Penn Plaza LLC v. Pyett*, 556 U.S. 247, 258(2009)).

64. *Id.* at *13.

65. *Id.* at *11 (citing *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991)).

66. *Id.* at *12.

67. *Id.* at *16.

68. *Id.*

69. 130 S. Ct. 2635, 2644 (2010).

6. Labor Management Relations Act (LMRA)

The Eleventh Circuit held in *Mulhall v. UNITE HERE Local 355* that a neutrality agreement can be a thing of value that, if demanded or given as payment, could constitute a violation of § 302 of the LMRA.⁷⁰ Section 302 makes it unlawful for “any employer . . . to pay, lend, or deliver, any money or thing of value . . . to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer. . . .”⁷¹ The Eleventh Circuit declined to adopt the Third and Fourth Circuits’ view that neutrality agreements are not “things of value” under § 302.⁷²

Plaintiff Mulhall, an employee of Hollywood Greyhound Track, Inc. d/b/a Mardi Gras Gaming (Mardi Gras), was opposed to being unionized. Mardi Gras and UNITE HERE Local 355 (Unite) entered into a memorandum of agreement under which Mardi Gras agreed to “(1) provide union representatives access to non-public work premises to organize employees during non-work hours; (2) provide the union a list of employees, their job classifications, departments, and addresses; and (3) remain neutral to the unionization of employees.”⁷³ UNITE promised to lend financial support to a ballot initiative on casino gaming and spent more than \$100,000 campaigning for the ballot initiative. UNITE also promised that, if it was recognized as the exclusive bargaining agent for Mardi Gras’s employees, it would refrain from picketing, boycotting, striking, or undertaking other economic activity against Mardi Gras.

Mulhall sought to enjoin enforcement of the agreement as a violation of § 302. The district court dismissed his complaint for failure to state a claim, finding the assistance promised did not constitute a “thing of value” under § 302.

On appeal, the Eleventh Circuit addressed for the first time whether a neutrality agreement could be a “thing of value” for purposes of the prohibition in § 302. The Fourth Circuit concluded in a similar case that organizing assistance had no ascertainable value and, therefore, could not support a § 302 claim.⁷⁴ Similarly, the Third Circuit held that a neutrality agreement did not violate § 302 regardless of its benefits to an employer and union, because the organizing assistance does not qualify as a payment, loan, or delivery.⁷⁵

In departing from the Third and Fourth Circuits, the Eleventh Circuit focused on policy concerns underlying § 302. In its view, if employers offer organizing assistance with the intention of improperly influencing a union, the bribery and

70. 667 F.3d 1211 (11th Cir. 2012).

71. 29 U.S.C. § 186(a)(2) (2006).

72. See *Adcock v. Freightliner LLC*, 550 F.3d 369, 374 (4th Cir. 2008); *Hotel Emps. & Rest. Emps. Union, Local 57 v. Sage Hospitality Res., LLC*, 390 F.3d 206, 219 (3d Cir. 2004).

73. *Mulhall*, 667 F.3d at 1213.

74. *Adcock*, 550 F.3d at 374.

75. *Hotel Emps. & Rest. Emps. Union, Local 57*, 390 F.3d at 219.

extortion concerns that § 302 was designed to address are implicated. The court thus held it would be too broad to hold that all neutrality and cooperation agreements are exempt from the prohibitions of § 302. The court therefore concluded that organizing assistance can be a “thing of value” and remanded the case for a determination of whether an improper payment was made in this case.

D. OTHER FEDERAL COURT DECISIONS

1. Antitrust Risks of Employer Mutual Aid Assistance Agreements

In *California v. Safeway*,⁷⁶ the Ninth Circuit, en banc, held that a mutual strike assistance agreement among four supermarket chains was subject to antitrust challenge under the “rule-of-reason” standard. Specifically, the court reasoned the nonstatutory labor exemption did not apply to a revenue-sharing provision (RSP) because the RSP did not, in its view, relate to the core subject matter of collective bargaining.

The case arose from a 2003 collective bargaining negotiation between the United Food and Commercial Workers (UFCW) union and a multi-employer collective bargaining unit comprised of three Southern California supermarket chains. Faced with threats of selective strikes, the three supermarkets, along with a related supermarket whose labor agreement was set to expire, entered into a mutual strike assistance agreement. The agreement stated that the supermarkets would lock out union employees within forty-eight hours of a strike and included an RSP that required supermarkets to pool revenues earned during a strike and share them according to prestrike market shares. The RSP was intended to level the negotiating playing field by blunting the effects of whipsaw tactics by the union. By its terms, the agreement would only take effect upon the commencement of a strike or lockout and would automatically terminate two weeks after the strike or lockout ended.

After a strike and the implementation of the agreement, the state of California sued the supermarkets, alleging the RSP violated federal antitrust law. On cross-motions for summary judgment, the district court held that the RSP was not immune from antitrust scrutiny under the nonstatutory labor exemption and that the legality of the RSP would be evaluated under the rule-of-reason standard. That standard requires consideration of the actual competitive effects, both procompetitive and anticompetitive, of a challenged agreement. Under this standard, agreements violate the antitrust laws only if they are in fact unreasonable and anticompetitive. That decision ultimately resulted in judgment for the supermarkets because the state had already stipulated it would not seek to establish liability under the rule-of-reason standard.

On appeal, a Ninth Circuit panel upheld the lower court’s decision on the nonstatutory labor exemption. It reversed the district court’s rule-of-reason

76. 651 F.3d 1118 (9th Cir. 2011).

reasoning, however, holding the RSP was a naked market allocation agreement subject to condemnation under the so-called quick-look standard for antitrust liability. Under this standard, agreements are presumptively illegal, and the defendant bears the burden of establishing that the procompetitive benefits of the agreement clearly outweigh the agreement's presumed anticompetitive effects.

The Ninth Circuit thereafter agreed to hear the case en banc. The en banc court held that the nonstatutory labor exemption did not apply to the RSP because the RSP did not relate to the core subject matter of collective bargaining, namely, wages, hours, and working conditions. The agreement, in its view, was directed at maintaining the status quo in the retail grocery market rather than directly influencing the labor market. As noted in the dissent, the court's holding that the nonstatutory labor exemption did not apply to the RSP conflicted with the Second Circuit's decision in *Kennedy v. Long Island R.R.*⁷⁷ and the D.C. Circuit's decision in *Airline Pilots Association International v. Civil Aeronautics Board*,⁷⁸ which held that a strike insurance plan and mutual aid pact, both of which closely resembled the RSP, were exempt from antitrust challenge.⁷⁹

While the en banc court upheld the panel's ruling on the labor exemption, it overturned the panel's determination that the quick-look standard applied to the agreement. The court did not view the RSP as the type of agreement that would always or almost always tend to restrict competition, and thus should be presumptively illegal under the antitrust laws. The RSP was of limited duration, there were other significant competitors in the market, and it was entered into to aid legitimate collective bargaining activities. According to the court, "in light of the novel circumstances and uncertain economic effects of the RSP," the agreement needed to be analyzed under a full rule-of-reason analysis.⁸⁰ Ultimately, the court did not express an opinion about the legality of the RSP under the rule-of-reason standard.

2. First Circuit Holds Sarbanes-Oxley's Whistleblower Protections Do Not Apply to Employees of Private Companies Who Are Contractors of Public Companies

In *Lawson v. FMR LLC*, the First Circuit held that the Sarbanes-Oxley Act's (SOX) whistleblower protections do not apply to employees of private companies who are contractors of public companies.⁸¹ The two plaintiffs were formerly employed by subsidiaries of a privately held company that serves as an agent for the publicly held mutual funds it manages. One plaintiff alleged that defendant terminated him in retaliation for raising concerns about the inaccuracies in the Securities and Exchange Commission (SEC) filings of certain mutual funds.

77. 319 F.2d 366 (2d Cir. 1963).

78. 502 F.2d 453 (D.C. Cir. 1974).

79. *Safeway*, 651 F.3d at 1140 (Kozinsky, J., dissenting).

80. *Id.* at 1139.

81. 670 F.3d 61 (1st Cir. 2012).

The other plaintiff alleged defendant retaliated against her after she raised concerns relating to cost accounting methodologies.

The district court denied the defendant's motion to dismiss the claims, finding that, because the employer acted as an agent of public companies, its employees were covered by SOX's whistleblower protections. The district court, however, certified an interlocutory appeal, asking the First Circuit to consider this matter of first impression.

The First Circuit reversed, holding that plaintiffs' retaliation claims were not cognizable under SOX because their direct employer was not a public company. The First Circuit noted that its reading of the term "employee" as excluding from coverage agents of public companies is "strongly confirmed" by the legislative history of SOX's whistleblower provision, other sections of the act, and the overall purpose of the legislation.⁸² Further, the majority reasoned that it owed no deference to the SEC's and Department of Labor's (DOL's) positions supporting plaintiffs because the SEC has no rulemaking or enforcement authority as to SOX, and the DOL's arguments mirrored the plaintiffs' arguments and thus were not based on any specialized experience. The court concluded its analysis by stating that if "Congress intended the term 'employee' . . . to have a broader meaning than the one we have arrived at, it can amend the statute."⁸³

E. EMPLOYEE RETIREMENT INCOME SECURITY ACT (ERISA)

1. Supreme Court Holds ERISA § 502(a)(1)(B) Provides No Relief for Misrepresentations in a Summary Plan Description

In *Cigna Corp. v. Amara*,⁸⁴ the U.S. Supreme Court held that statements in a summary plan description are not "terms of [the] plan" for purposes of an action to recover plan benefits under § 502(a)(1)(B) of ERISA, and that courts have no authority under that section to reform a plan's written terms. Participants in *Amara* sued their employer, alleging that it violated its ERISA disclosure obligations when it replaced an existing pension plan with a cash balance plan that in certain respects provided less generous benefits. The district court found that the employer's disclosures violated §§ 102(a), 104(b), and 204(h) of ERISA.⁸⁵ In awarding relief, the court found the evidence sufficient to establish that the disclosure violations caused participants "likely harm."⁸⁶ The court reformed the new plan to provide additional benefits and ordered the employer to pay benefits

82. *Id.* at 68.

83. *Id.* at 83.

84. 131 S. Ct. 1866 (2011).

85. Sections 102(a) and 104(b) of ERISA, respectively, require a plan administrator to provide participants with a summary plan description and summaries of material modifications. Section 204(h) prohibits pension plan amendments that provide for "a significant reduction in the rate of future benefit accrual" unless the plan administrator provides participants with a written notice containing sufficient information to allow them to understand the amendment's effect.

86. 131 S. Ct. at 1871.

accordingly, pursuant to § 502(a)(1)(B). The district court declined to address whether § 502(a)(3) authorized such relief, noting that the U.S. Supreme Court had “severely curtailed” the relief available under that section in *Sereboff*, *Great-West*, and *Mertens*.⁸⁷ The Second Circuit summarily affirmed the district court’s judgment.

The U.S. Supreme Court granted certiorari to consider whether a showing of likely harm is sufficient to entitle participants to recover benefits based on disclosure violations. Before turning to that issue, however, the Court considered whether § 502(a)(1)(B) authorized the district court to reform the plan’s written terms. Because § 502(a)(1)(B) “speaks of ‘enforc[ing]’ the ‘terms of the plan,’ not of *changing* them,”⁸⁸ the Court found no authority for the district court’s revision of the plan’s written terms. The Court noted that the relief the district court provided was “less like the simple enforcement of a contract as written and more like an equitable remedy.”⁸⁹

The Court also rejected the Solicitor General’s argument that the “terms of [the] plan” included statements in summary plan descriptions. The Court concluded that the summary plan description, which is required under § 102(a) to apprise participants of their rights “under the plan,” is “not *itself part* of the plan.”⁹⁰ The Court expressed concern that making the summary description legally binding might defeat the very purpose of such a summary, which is to provide a “clear, simple communication” that the average participant can easily understand.⁹¹

The majority went on to consider whether the relief ordered by the district court was within the scope of “appropriate equitable relief” available under § 502(a)(3) of ERISA.⁹² Finding the district court’s concerns about the scope of such relief under its prior decisions in *Sereboff*, *Great-West*, and *Mertens* “misplaced,”⁹³ the Court concluded that the relief awarded by the district court was potentially available under § 502(a)(3).

The Court distinguished the instant case from the decisions in *Sereboff*, *Great-West*, and *Mertens*, noting that *Amara* involved a suit by participants against a plan fiduciary regarding the terms of a plan, which was “the kind of lawsuit that, before the merger of law and equity, [the participants] could have brought only in a court of equity, not in a court of law.”⁹⁴ Noting that the remedies available in such courts generally were considered equitable, the Court determined that the relief ordered by the district court resembled equitable remedies:

87. *Id.* at 1876 (internal quotations omitted). See *Sereboff v. Mid Atl. Med. Servs., Inc.*, 547 U.S. 356 (2006); *Great-West Life & Annuity Ins. Co. v. Knudson*, 534 U.S. 204 (2002); *Mertens v. Hewitt Asscs.*, 508 U.S. 248 (1993).

88. *Id.* at 1877.

89. *Id.*

90. *Id.*

91. *Id.* at 1877-78.

92. Justices Scalia and Thomas concurred only in the judgment, and would have stopped there and remanded the case. 131 S. Ct. at 1882-85.

93. *Id.* at 1878.

94. *Id.* at 1879.

(1) reformation of a contract to prevent fraud, (2) equitable estoppel to hold a party to its promise, and (3) surcharge to compensate for a loss resulting from a trustee's breach of trust or to prevent a trustee's unjust enrichment. With respect to the potential surcharge remedy, the Court distinguished *Mertens*, which held that damages-like remedies, such as make-whole relief, did not constitute equitable relief available under § 502(a)(3), on the ground that the defendant there was not an ERISA fiduciary.

The Court then turned to the appropriate legal standard for determining whether class members were injured. Finding no particular standard in ERISA, the Court concluded that "the standard of prejudice must be borrowed from equitable principles, as modified by the obligations and injuries identified by ERISA itself."⁹⁵ The Court agreed that the remedy of estoppel requires proof of "detrimental reliance," but indicated that other equitable remedies would not always require such a showing.⁹⁶ In the case of surcharge, for example, the Court stated that a participant would have to prove harm and causation, but that it would "not always [be] necessary to meet the more rigorous standard implicit in the words 'detrimental reliance.'"⁹⁷

Because the district court had not determined whether the remedies available under § 502(a)(3) might be appropriate for the violations it identified, the Court remanded the case for the district court to make that determination in the first instance.⁹⁸

2. Employer Stock Drop Update: Circuit Court Decisions

Since Enron's demise, employer stock drop cases have dominated ERISA fiduciary litigation. These cases, which often look like securities fraud actions, seek to recover losses on employer stock held in 401(k) plans, ESOPs, and similar individual account plans on a variety of fiduciary breach theories, most notably, the alleged imprudence of the investment and the failure to properly disclose the investment's financial risks.

While no plaintiff has prevailed on the merits, many of these cases have been settled for significant amounts. However, in recent years and, in particular, after the more stringent pleadings standards set out in *Bell Atlantic Corp. v. Twombly*⁹⁹ and *Ashcroft v. Iqbal*,¹⁰⁰ these cases have been dismissed with increasing frequency. The principal basis for dismissal has been the so-called *Moench* presumption of prudence,¹⁰¹ under which a fiduciary's decision to remain invested in company stock is deemed prudent and subject to review under an abuse of

95. *Id.* at 1882.

96. *Id.*

97. *Id.* at 1881–82.

98. The Court's discussion of potential § 502(a)(3) remedies elicited a sharply worded objection from Justice Scalia, joined by Justice Thomas, who described that discussion as "purely dicta, binding upon neither us nor the District Court." *Id.* at 1884 (Scalia, J., concurring).

99. 550 U.S. 544 (2007).

100. 129 S. Ct. 1937 (2009).

101. *Moench v. Robertson*, 62 F.3d 553 (3d Cir. 1995).

discretion standard. In two recent and closely watched cases, the Second Circuit strongly endorsed this approach. But just when it appeared that the death knell for these cases had been sounded, the Sixth Circuit reached a contrary view, stating, albeit in dicta, that the *Moench* presumption was not applicable at the motion to dismiss stage. These decisions are summarized below.

a. Second Circuit Adopts Moench Presumption of Prudence

In two related decisions issued by the same panel on the same day, *In re Citigroup ERISA Litigation*¹⁰² and *Gearren v. McGraw-Hill Cos., Inc.*,¹⁰³ the Second Circuit formally adopted the *Moench* presumption as the plaintiff's pleading burden in employer stock drop litigation. The Second Circuit joined four other circuits in recognizing a presumption that provides protection to plan fiduciaries against these actions.¹⁰⁴ In both cases, the Second Circuit affirmed dismissals of ERISA fiduciary breach claims because the factual allegations in the plaintiffs' complaints failed to overcome the presumption. The court also affirmed the dismissal of related claims invoking ERISA fiduciary disclosure duties, the duty to monitor appointees, the duty of loyalty, and co-fiduciary liability claims.

In *Citigroup*, participants in two 401(k) plans that qualified as eligible individual account plans (EIAPs)¹⁰⁵ brought ERISA prudence, disclosure, and related fiduciary breach claims after the value of their employer's stock dropped by just over 50 percent to approximately \$27 a share. The plaintiffs alleged that the defendant fiduciaries should have divested the plans of company stock because the company's exposure to the subprime securities market rendered the investment imprudent. Notably, plan documents required that an employer stock fund be offered among the plan's investment options. The disclosure claim alleged the failure to provide complete and accurate information to participants regarding the risks to the employer stock fund posed by the employer's exposure to the subprime market.

The district court dismissed the prudence claim on two grounds. First, the court held that the defendants were not fiduciaries with regard to the plans' offering of an employer stock fund because under the plans' terms they had no discretion to eliminate it as an investment option. Alternatively, the court held that the defendants were entitled to a presumption that investment in employer stock

102. 662 F.3d 128 (2d Cir. 2011).

103. 660 F.3d 605 (2d Cir. 2011). The *McGraw-Hill* decision essentially mirrors the decision of *Citigroup*.

104. See *Moench*, 62 F.3d at 553; *Edgar v. Avaya, Inc.*, 503 F.3d 340 (3d Cir. 2007); *Kirschbaum v. Reliant Energy, Inc.*, 526 F.3d 243 (5th Cir. 2008); *Kuper v. Iovenko*, 66 F.3d 1447 (6th Cir. 1995); *Pfeil v. State St. Bank & Trust Co.*, 671 F.3d 585 (6th Cir. 2012); *Quan v. Computer Scis. Corp.*, 623 F.3d 870 (9th Cir. 2010). Subsequent to *Citigroup*, the Eleventh Circuit also adopted the presumption. *Lanfear v. Home Depot, Inc.*, 2012 U.S. App. LEXIS 9321 (11th Cir. May 8, 2012).

105. Employer stock holdings by EIAPs are not subject to ERISA's diversification requirements or other limitations on investments in employer securities and also are exempted from ERISA's prudence standard to the extent it requires diversification. See ERISA §§ 404 (a)(2), 407(b)(1), 29 U.S.C. §§ 1104(a)(2), 1107(b)(1).

was prudent and that the facts alleged by the plaintiffs were insufficient to overcome that presumption.

On appeal, the Second Circuit rejected the district court's conclusion that the defendants were insulated from fiduciary liability because they lacked discretion to eliminate the company stock fund. However, it affirmed the dismissal on the basis of the district court's alternative holding. Formally joining the other circuits that had adopted the *Moench* presumption, the Second Circuit held that failure of an EIAP fiduciary to divest the plans' company stock holdings was entitled to a presumption of prudence and should be reviewed only for abuse of discretion. This presumption was warranted, in large part, due to the "favored status Congress has granted to employee stock investments in their own companies."¹⁰⁶

The Second Circuit next addressed whether the presumption was applicable at the motion to dismiss stage, an issue that previously had been addressed only by the Third Circuit. Like the Third Circuit, it answered that question in the affirmative, rejecting the notion that the presumption was only an evidentiary standard. As the Second Circuit explained,

[t]he "presumption" is not an evidentiary presumption; it is a standard of review applied to a decision made by an ERISA fiduciary. Where plaintiffs do not allege facts sufficient to establish that a plan fiduciary has abused his discretion, there is no reason not to grant a motion to dismiss.¹⁰⁷

Turning to application of the presumption, the court concluded that the district court had correctly found that the facts alleged were insufficient to state a claim. The presumption, the court emphasized, is a "substantial shield" that protects fiduciaries from liability whenever "there is room for reasonable fiduciaries to disagree as to whether they are bound to divest from company stock."¹⁰⁸ "[M]ere stock fluctuations" cannot overcome the presumption; similarly, a fiduciary was not required to "divest . . . at the sign of any impending price decline."¹⁰⁹ Rather, the court explained that the presumption could be overcome only by "circumstances placing the employer in a 'dire situation' that was objectively unforeseeable by the [plan's] settlor."¹¹⁰ Despite the company's stock decline, the court found that the plaintiffs had failed to allege facts demonstrating that Citigroup faced such a "dire situation," emphasizing the company's large market capitalization and significant stock price during the class period.

106. *Citigroup*, 662 F.3d at 136 (quoting *Langbecker v. Elec. Data Sys. Corp.*, 476 F.3d 299, 308 (5th Cir. 2007)).

107. *Id.* at 139. The Eleventh Circuit recently joined the Second and Third Circuits in concluding that the presumption applies at the motion to dismiss stage. *Lanfear*, 2012 U.S. App. LEXIS 9321, at *35.

108. *Citigroup*, 662 F.3d at 140 (citations omitted).

109. *Id.* at 140.

110. *Id.*

Finally, in affirming dismissal of the disclosure claim, the Second Circuit held that fiduciaries owe no “duty to provide participants with nonpublic information pertaining to specific investment options” where participants were warned about the volatility of the company stock investment option.¹¹¹ The court dismissed allegations of misrepresentation and omission because “there are no facts alleged that would, if proved, support a conclusion that defendants made statements, while acting in a fiduciary capacity, that they knew to be false.”¹¹²

The district court’s decision in *McGraw-Hill* was affirmed by the Second Circuit largely on the basis of *Citigroup*. The only significant factual distinction between the two cases was that the plan in *McGraw-Hill* did not expressly require that company stock be offered as an investment option. Judge Straub dissented in both decisions.¹¹³

b. Sixth Circuit Construes Kuper Presumption of Prudence

In *Pfeil v. State St. Bank & Trust Co.*,¹¹⁴ a Sixth Circuit panel construed the presumption of prudence crafted by the Sixth Circuit, largely on the basis of *Moench*, in *Kuper v. Iovenko*.¹¹⁵ In contrast to Second and Third Circuits, *Pfeil* found in dicta that the presumption was an evidentiary matter, inapplicable on a motion to dismiss.

State Street Bank and Trust was a fiduciary of two General Motors’ EIAPs that offered a GM stock fund for participant-directed investment. Participants brought an ERISA fiduciary breach action alleging that State Street violated its duties by continuing to allow participants to invest in GM stock even though reliable public information indicated that GM was headed for bankruptcy. The district court dismissed the complaint, holding that State Street’s alleged breach of duty could not have plausibly caused losses because “participants had a menu of investment options from which to choose and . . . retained control over the allocation of assets in their accounts at all times.”¹¹⁶ Notably, the district court did not dismiss the action based on the presumption of prudence, but instead held “that the plaintiffs had sufficiently pleaded a breach of State Street’s fiduciary duty by alleging that State Street continued to operate the General Motors Common Stock Fund after public information raised serious questions about GMs’ short-term viability as a going concern without resort to bankruptcy.”¹¹⁷

The Sixth Circuit reversed and remanded on causation and other issues, but found no error in the district court’s decision that the complaint pleaded facts sufficient to overcome the presumption of prudence. However, in pure dicta, the panel took the “opportunity” to address whether the Sixth Circuit’s version

111. *Id.* at 143.

112. *Id.* at 142.

113. Subsequent efforts to have the decisions reheard or reheard en banc were denied in February 2012.

114. 671 F.3d 585 (6th Cir. 2012).

115. 66 F.3d 1447 (6th Cir. 1995).

116. *Pfeil*, 671 F.3d at 590.

117. *Id.*

of the presumption represents a heightened pleading standard or an evidentiary presumption.¹¹⁸

Contrary to the Second and Third Circuits, the *Pfeil* panel concluded that the presumption is an evidentiary standard, rather than a pleading standard enforceable on a motion to dismiss. The court reasoned that *Kuper* had adopted a different and more lenient standard for rebutting the presumption than the Second and Third Circuits. As the Sixth Circuit explained, the Second and Third Circuit standard requires “proof that the company faced a ‘dire situation,’ something short of ‘the brink of bankruptcy’ or an ‘impending collapse.’”¹¹⁹ The Sixth Circuit’s presumption, however, was a presumption of “reasonableness” that could be rebutted by “‘showing that a prudent fiduciary acting under similar circumstances would have made a different investment decision.’”¹²⁰ In the panel’s view, the stricter standard was amenable to disposition on a motion to dismiss, while the Sixth Circuit’s “reasonableness” standard was an “evidentiary” presumption that was not resolvable at the motion-to-dismiss stage.¹²¹

3. Excessive Fees Update: Circuit Court Decisions

a. Seventh Circuit Affirms Dismissal of Excessive Fees Case

In *Loomis v. Exelon*,¹²² the Seventh Circuit affirmed the dismissal of an ERISA excessive fees action brought by 401(k) plan participants. The plaintiffs had alleged that the defendants breached their ERISA fiduciary duties by (1) offering retail mutual funds that charged unreasonable fees and expenses, and (2) requiring participants to pay those fees and expenses, rather than having the plan itself pay them.

The district court found the complaint’s allegations indistinguishable from those in *Hecker v. Deere & Co.*¹²³ and dismissed the complaint. The Seventh Circuit essentially agreed, noting that the Exelon plan offered thirty-two invest-

118. See *id.* at 593 (“Because the plaintiffs have pleaded facts to overcome the presumption, we need not decide whether the *Kuper* presumption creates a heightened pleading standard in order to resolve this appeal.”).

119. *Id.* at 595. The Sixth Circuit also pointed out that, although the Fifth and Ninth Circuits have not yet “addressed whether a plaintiff must plead enough facts to rebut the presumption of reasonableness to survive a motion to dismiss,” those circuits also had adopted the same more stringent standard employed in the Second and Third Circuits. *Id.*

120. *Id.* 593 (quoting *Kuper*, 66 F.3d at 1459) (emphasis in original).

121. *Id.* at 593-596.

122. 658 F.3d 667 (7th Cir. 2011).

123. 556 F.3d 575, *reh’g denied*, 569 F.3d 708 (7th Cir. 2009). In *Hecker*, the Seventh Circuit affirmed the dismissal of another ERISA excessive fees case, holding that the plan sponsor satisfied any fiduciary duty it might have by furnishing “an acceptable array of investment vehicles.” 556 F.3d at 586. The plan in *Hecker* offered twenty-five investment options (including twenty-three retail mutual funds) with expense ratios ranging from .07 percent to just over 1.0 percent, an employer stock fund, and a brokerage window option providing access to more than 2,500 additional funds. The court emphasized in *Hecker* that the available options had a “wide range” of expense ratios that “were set against the backdrop of market competition.” *Id.* The court also found it irrelevant that other funds “might have had even lower ratios,” stating that “nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which might, of course, be plagued by other problems).” *Id.*

ment options, including twenty-eight retail mutual funds, with expense ratios ranging from 0.03 percent to 0.96 percent.¹²⁴ The court explained that it would have to overrule *Hecker* for the plaintiffs to prevail, that two circuits had agreed with *Hecker*, and that plaintiffs had not persuaded it to “overrule *Hecker* and create a conflict.”¹²⁵

In the process, the court rejected as a “non-starter” the plaintiffs’ argument that the plan sponsor should have contributed more money to cover the plan’s investment expenses.¹²⁶ As the court recognized, the decision to cover such expenses is a nonfiduciary, plan design decision; employers do not act as ERISA fiduciaries in deciding how much to contribute to a plan. The court also rejected plaintiffs’ contention that the plan fiduciaries were duty bound to offer only institutional funds, as opposed to retail funds; to attempt to negotiate lower mutual fund fees or insist that the mutual funds charge a flat capitation fee instead of an asset-based fee; or to create in-house or captive mutual funds for the plan.

b. Seventh Circuit Reverses Summary Judgment in Favor of Defendants in Excessive Fees Case

In *George v. Kraft Foods Global*,¹²⁷ the Seventh Circuit reversed, in large part, a summary judgment dismissing an ERISA excessive fees action brought by 401(k) plan participants. Plaintiffs had alleged, among other things, that the defendants acted imprudently by (1) failing to take steps to minimize or eliminate investment drag and transactional drag in two unitized employer stock funds, (2) paying excessive fees to the plan’s record keeper, and (3) failing to determine how much float income the plan’s trustee was earning. The Seventh Circuit upheld the district court’s summary judgment on the float claim, but in a two-to-one decision reversed the district court’s summary judgment on the other two issues.

Participants who invest in a unitized employer stock fund acquire units of the fund rather than actual shares of company stock. Unitized employer stock funds typically maintain a small amount of cash to facilitate same-day settlement of trades.¹²⁸ The plaintiffs in *Kraft* argued that this cash buffer caused the fund to underperform actual shares of company stock when the stock appreciated in value, which plaintiffs called investment drag. The plaintiffs further contended that unitization encouraged participants to trade frequently because trading costs were shared pro rata among all participants instead of being allocated to the participants who initiated the trades. This higher trading volume increased the fund’s transaction costs, which plaintiffs called transactional drag.

124. *Loomis v. Exelon*, 698 F.3d 667, 669 (7th Cir. 2011).

125. *Id.* at 670 (citing *Renfro v. Unisys Corp.*, 671 F.3d 314 (3d Cir. 2011); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009)).

126. *Id.* at 671.

127. 641 F.3d 786 (7th Cir. 2011).

128. Without such a cash buffer, trade settlement can take as long as three business days. *See id.* at 793.

The district court granted summary judgment on the unitized fund claim based on a determination that the defendants had weighed the costs and benefits of attempting to eliminate or reduce investment and transactional drag and concluded that the costs of making changes outweighed the benefits. In reversing, the Seventh Circuit found no evidence that the defendants “ever made a decision on these matters.”¹²⁹ Although there was evidence that the defendants had discussed such matters, the majority found genuine factual disputes as to (1) whether defendants “made a decision with respect to the proposed solutions to investment and transactional drag,” and (2) “whether the circumstances prevailing [at the relevant time] would have caused a prudent fiduciary to make a decision on these matters.”¹³⁰

On the question of record keeper fees, the district court found that defendants had acted prudently in relying on advice from their consultants that the fees paid to the record keeper were reasonable, and further, that the contrary opinions offered by plaintiffs’ expert were “of limited relevance” because the expert’s experience involved smaller retirement plans than the Kraft plan.¹³¹ In reversing, the Seventh Circuit determined that the district court erred by weighing the opinions of plaintiffs’ expert at the summary judgment stage and by determining that the defendants satisfied their duty of prudence by relying on their consultants’ advice. In the majority’s view, if the opinions of plaintiffs’ expert were admissible under Federal Rule of Evidence 702 (and there was no argument that they were not), those opinions created a genuine issue as to whether defendants acted prudently. The majority also found that the advice of defendants’ consultants had been equivocal on the reasonableness of the record keeper fees.

Finally, the Seventh Circuit affirmed the district court’s ruling on the float claim. The defendants had submitted a declaration from a plan fiduciary stating that the record keeper provided annual reports to defendants disclosing the amount of its float income. Plaintiffs produced no evidence contradicting that declaration and did not show that the defendants had failed to review these reports.

Judge Cudahy issued a dissent describing the plaintiffs’ case as “an implausible class action based on nitpicking with respect to perfectly legitimate practices of the fiduciaries.”¹³² As to the unitized fund claim, Judge Cudahy indicated that he saw nothing in ERISA that would “require a reasoned decision on the record about such a universally accepted investment practice as unitization.”¹³³ He also suggested that the majority raised more questions than it answered in reversing summary judgment on the record keeper fee claim.

129. *George*, 641 F.3d at 795.

130. *Id.* at 796-97.

131. *Id.* at 798.

132. *Id.* at 801.

133. *Id.* at 802.

c. Third Circuit Affirms Dismissal of Excessive Fees Case

In *Renfro v. Unisys Corp.*,¹³⁴ the Third Circuit affirmed dismissal of an ERISA excessive fees action brought by 401(k) plan participants against the plan's in-house fiduciaries, its third party trustee, and affiliates of the trustee. The plaintiffs alleged that the defendants breached fiduciary duties of loyalty and prudence by selecting and retaining retail mutual funds that charged excessive fees.

The district court dismissed the fiduciary breach claims against the trustee and its affiliates because the trust agreement made clear that they did not act as fiduciaries with respect to the selection of the plan's investment options. Relying on the Seventh Circuit's decision in *Hecker*, the district court also dismissed the fiduciary breach claims against the plan sponsor and the related individual defendants because the plan's range and mix of investment options made any such claim against them implausible. In the alternative, the district court ruled that the plan sponsor and related individual defendants were entitled to summary judgment because the safe harbor in ERISA § 404(c) exempted them from liability.

The Third Circuit affirmed the dismissal without reaching the ERISA § 404(c) issue. Based on the trust agreement's terms, the court concluded that the trustee's limited role as directed trustee "d[id] not encompass the activities alleged as a breach of fiduciary duty; the selection and maintenance of the mix and range of investment options included in the plan."¹³⁵ The court noted also that a directed trustee "is essentially 'immune from judicial scrutiny'" because of its lack of discretion.¹³⁶

Turning to the fiduciary breach claims asserted against the employer and the related individual defendants, the court examined the decisions of the Seventh and Eighth Circuits in *Hecker* and *Braden*,¹³⁷ and concluded that "the range of investment options and the characteristics of those included options, including the risk profiles, investment strategies, and associated fees, are highly relevant and readily ascertainable facts against which the plausibility of claims challenging the overall composition of a plan's mix and range of investment options should be measured."¹³⁸ Applying this standard, the court affirmed the dismissal of the fiduciary breach claims, explaining that the "range of selections" of investment options was "much closer" to those in *Hecker*, which had upheld the dismissal of similar claims, than it was to the fewer options available in *Braden*, which had reversed the dismissal of similar claims.¹³⁹

134. 671 F.3d 314 (3d Cir. 2011).

135. *Id.* at 323.

136. *Id.* (citing *Moench v. Robertson*, 62 F.3d 553, 571 (3d Cir. 1995)).

137. *Hecker*, 556 F.3d at 575; *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585 (8th Cir. 2009).

138. 671 F.3d at 327.

139. *Id.* The Unisys plan offered seventy-three investment options, which consisted of a stable value fund, an employer stock fund, four collective investment funds, and sixty-seven retail mutual funds with expense ratios ranging from .1 percent to 1.21 percent annually. *Id.* at 318.