IX. Labor

Paul J. Ondrasik, Jr., John F. Ring, Eric G. Serron, Thomas Veal, and Daniel P. Bordoni

I. Employment Law Developments 234
A. Employment Discrimination 234
1. The Third Circuit Recognizes "Subgroup" Disparate Impact Claims 234
2. Eleventh Circuit Holds That Job Applicants Lack Status to Sue for Disparate Impact Under the ADEA 236
3. The Fifth Circuit Rules That Damages for Pain and Suffering Are Not Available for Retaliation Claims Under the ADEA.... 237
4. Eleventh Circuit Announces New Standard for Mixed-Motive Discrimination Claims Based on Circumstantial Evidence 237
B. Wage and Hour 239
1. Supreme Court Finds That Statistically Valid Evidence of Liability Supports Class Certification 239
2. The Fifth Circuit Holds That an FLSA Plaintiff May Recover for Emotional Distress Resulting from Retaliation 240
C. Fair Credit Reporting Act 241
II. Labor Law Developments 242
A. National Labor Relations Act 242
1. Sixth Circuit Becomes First Federal Appeals Court to Uphold Local Right-to-Work Law 242
2. The NLRB Eliminates the Previous Employer Consent Requirement for Combined Bargaining Units of Supplier and User Employees 243
3. NLRB Rules That Graduate Students Performing Teaching and Research Services at Columbia University Are Statutory Employees under the NLRA 244
III. Employee Retirement Income Security Act (ERISA) 245
A. *Gobeille v. Liberty Mutual Life Ins. Co.*: ERISA Preemption Is Alive and Well 245

Paul J. Ondrasik, Jr. is a partner in the Washington, D.C., office of Steptoe & Johnson LLP and chair of the Labor Committee. John F. Ring is a partner in the Washington, D.C., office of Morgan Lewis & Bockius LLP and a vice-chair of the Labor Committee. Eric G. Serron is a partner in Steptoe & Johnson LLP's Washington, D.C., office. Thomas Veal is Of Counsel to Steptoe & Johnson in its Chicago office. Daniel F. Bordoni is an associate in the Washington, D.C., office of Morgan Lewis & Bockius LLP.

B. Standing ... 246
1. *Spokeo, Inc. v. Robins*: An Article III Standing Decision with ERISA Implications ... 246
2. *Lee v. Verizon Communications, Inc.* and *Soehnlen v. Fleet Owners Insurance Fund*: Early Applications of the *Spokeo* Standing Doctrine in ERISA Cases ... 247
C. *Whitley v. BP, p.l.c.*: Closing the Door on Employer Stock Drop Claims ... 250
D. *Halo v. Yale Health Plan*: "Substantial Compliance" with Claims Procedure Regulations May Not Be Enough to Foreclose De Novo Review ... 253
E. *Chesemore v. Fenkell*: Split Widens Over Whether Indemnification Among Fiduciaries Is Available Under ERISA .. 254

The Labor Committee's report reviews important decisions over the past year in federal employment, labor, and employee benefit laws. The report's employment law section reviews significant federal court decisions and agency actions pursuant to all of the major federal employment statutes. As described below, of particular note is a Supreme Court decision that addresses the use of representative sampling as evidence for purposes of establishing liability in support of class certification in the wage and hour context and clarifies the scope of a prior Supreme Court decision on the evidence that can support class certification. The labor law section covers several important National Labor Relations Act (NLRA) decisions, including an appellate decision of first impression on the validity of local right-to-work laws and an NLRB ruling regarding whether graduate students can qualify as statutory employees under the NLRA. Finally, the employee benefits section of the report examines two important Supreme Court decisions—one on ERISA preemption and the other on constitutional standing—and early appellate court decisions applying the latter. The employee benefits section also reports on a number of other significant ERISA decisions, including recent appellate rulings that confirm that the Supreme Court's decision in *Dudenhoeffer* raised the pleadings bar for plaintiffs attempting to bring ERISA employer stock drop cases.

I. Employment Law Developments

A. Employment Discrimination

1. The Third Circuit Recognizes "Subgroup" Disparate Impact Claims

In *Karlo v. Pittsburgh Glass Works, LLC*,[1] the U.S. Court of Appeals for the Third Circuit held that a disparate impact claim brought by a "subgroup" of persons aged fifty and older is cognizable pursuant to the Age Discrimination in

1. 849 F.3d 61 (3d Cir. 2017).

Employment Act (ADEA), even though the younger employees who allegedly received favorable treatment were also members of the ADEA's protected class of persons aged forty and older. The court ruled that the ADEA "prohibits disparate impacts based on *age*, not forty-and-older identity."[2] The Third Circuit's decision creates a split with the Second, Sixth, and Eighth Circuits,[3] each of which has rejected subgroup disparate impact claims.

The plaintiffs were former employees of Pittsburgh Glass Works, LLC (PGW) who had been separated during a 2009 reduction in force when each was age fifty or older. Following their separations, the plaintiffs filed a putative collective action asserting multiple claims under the ADEA, including a disparate impact claim. They alleged that as members of a subgroup of employees aged fifty and older, they were disproportionately impacted by a reduction in force policy that favored younger employees, including employees in their forties.

On appeal, the Third Circuit reversed a district court decision that had rejected the plaintiffs' fifty-and-older "subgroup" claim and found that an ADEA disparate impact claim must compare employees who are forty and older with those who are thirty-nine and younger. Rather, the Third Circuit concluded that an ADEA plaintiff can demonstrate a disparate impact "with various forms of evidence, including forty-and-older comparisons, subgroup comparisons, or more sophisticated statistical modeling, so long as that evidence meets the usual standards for admissibility."[4] The court relied heavily on the Supreme Court's decision in *O'Connor v. Consolidated Coin Caterers Corp.*[5] for the proposition that "the ADEA proscribes *age* discrimination, not forty-and-over discrimination."[6] In the Third Circuit's view, it is "utterly irrelevant" if an alleged beneficiary of age discrimination is also over the age of forty.[7] To hold otherwise would contravene the purpose of the ADEA by allowing facially neutral policies that have a disparate impact on much older employees as long as younger members of the ADEA's protected class received "sufficiently favorable treatment."[8] "Simply put," the Third Circuit explained, "evidence that a policy disfavors employees older than fifty is probative of the relevant statutory question: whether the policy creates a disparate impact 'because of such individual[s'] age.' "[9]

2. *Id.* at 66.
3. *See* Lowe v. Commack Union Free Sch. Dist., 886 F.2d 1364 (2d Cir. 1989); *see also* Smith v. Tenn. Valley Auth., 924 F.2d 1059 (6th Cir. 1991) (table opinion); EEOC v. McDonnell Douglas Corp., 191 F.3d 948 (8th Cir. 1999).
4. *Karlo*, 849 F.3d at 68.
5. 517 U.S. 308 (1996).
6. *Karlo*, 849 F.3d at 71; *see also O'Connor*, 517 U.S. at 313 ("Because the ADEA prohibits discrimination on the basis of age and not class membership, the fact that a replacement is substantially younger than the plaintiff is a far more reliable indicator of age discrimination than is the fact that the plaintiff was replaced by someone outside the protected class.").
7. *Karlo*, 849 F.3d at 71 (internal quotation marks omitted) (citing *O'Connor*, 517 U.S. at 312).
8. *Id.* at 74.
9. *Id.* at 71 (alteration in original) (quoting 29 U.S.C. § 623(a)(2)).

2. *Eleventh Circuit Holds That Job Applicants Lack Status to Sue for Disparate Impact under the ADEA*

In *Villarreal v. R.J. Reynolds Tobacco Co.*,[10] the Eleventh Circuit, en banc, held that an applicant for employment cannot sue an employer for disparate impact discrimination under the ADEA because he has no "status as an employee."[11] In so holding, the court rejected the Equal Employment Opportunity Commission's (EEOC's) contrary interpretation of the statute.[12] While the Sixth and Tenth Circuits had previously recognized that the ADEA may authorize recovery for applicants on a disparate-impact theory,[13] the Supreme Court has not yet addressed this issue for applicants for employment.[14]

At the age of forty-nine, the plaintiff applied for a sales position with the employer. The employer had contracted with a recruiting agency to fill its sales positions and provided the agency with specific hiring guidelines. These guidelines instructed the agency to target individuals "2–3 years out of college" and those who "adjust[] easily to change," but to avoid applicants with eight to ten years of sales experience.[15] The plaintiff did not follow-up on his application and the agency never informed him that he had been rejected.

After filing a charge and receiving a right-to-sue notice from the EEOC, the plaintiff brought a disparate impact claim under the ADEA against the employer and the agency. The district court dismissed on the ground that such claim was not available to job applicants. A divided Eleventh Circuit panel reversed, finding that the pertinent provision of the ADEA—Section 4(a)(2)—was ambiguous and deferring to the EEOC's interpretation of the statute.

On rehearing en banc, the Eleventh Circuit reached a contrary conclusion, holding that "[t]he plain text of section 4(a)(2) covers discrimination against employees. It does not cover applicants for employment."[16] Section 4(a)(2) of the ADEA states that it is "unlawful for an employer . . . to limit, segregate, or classify his employees in any way which would deprive or tend to deprive any individual of employment opportunities *or otherwise adversely affect his status as an employee*, because of such individual's age."[17] The court explained that "[t]he key phrase in section 4(a)(2) is 'or otherwise adversely affect his status as an employee.'"[18] By inserting that language, Congress announced its intent to make the second half of the sentence a subset of the first and, thus, protected an individual "only if he has 'status as an employee.'"[19] Having found

10. 839 F.3d 958 (11th Cir. 2016).
11. *Id.* at 961.
12. *Id.*
13. *See* Wooden v. Bd. of Educ. of Jefferson Cty., 931 F.2d 376 (6th Cir. 1991); Faulkner v. Super Valu Stores, Inc., 3 F.3d 1419 (10th Cir. 1993).
14. *See* Smith v. City of Jackson, Miss., 544 U.S. 228 (2005) (recognizing disparate impact claim for employees).
15. *Villarreal*, 839 F.3d at 961.
16. *Id.* at 963.
17. 29 U.S.C. § 623(a)(2) (emphasis added).
18. *Villarreal*, 839 F.3d at 963.
19. *Id.*

Congress's intent to be clear and unambiguous, there was no need to defer to the EEOC's interpretation of the statute and doing so was improper.

3. *The Fifth Circuit Rules That Damages for Pain and Suffering Are Not Available for Retaliation Claims Under the ADEA*

In *Vaughan v. Anderson Regional Medical Center*,[20] the Fifth Circuit held that plaintiffs bringing ADEA retaliation claims may not recover damages for pain and suffering or punitive damages.[21] In so ruling, the Fifth Circuit created a circuit split with the Seventh Circuit.[22]

A nurse supervisor sued her employer (a medical center), alleging she was discharged in retaliation for making age-discrimination complaints. After ruling that punitive and pain and suffering damages were not available for retaliation claims under the ADEA, the district court certified the issue for interlocutory appeal, and the Fifth Circuit accepted the appeal.

The Fifth Circuit affirmed, citing its prior decision in *Dean v. American Security Insurance Co.*[23] The court rejected the plaintiff's argument that *Dean* precluded such damages only in ADEA discrimination claims, explaining that *Dean* "held in unqualified terms" that "neither general damages [*i.e.*, compensatory damages for pain and suffering] nor punitive are recoverable in private actions posited upon the ADEA."[24]

The Fifth Circuit similarly rejected the plaintiff's argument that 1977 amendments to the Fair Labor Standards Act (FLSA) enlarged remedies under the ADEA. While it acknowledged that the remedies provisions of the FLSA and ADEA have been interpreted consistently, it rejected the notion that the 1977 FLSA amendments expanded ADEA remedies because those amendments "incorporated remedial language substantively identical to passages *already provided* in the ADEA," which the Fifth Circuit had "already construed in the context of the ADEA—in *Dean*."[25] The Fifth Circuit rejected the Seventh Circuit's contrary conclusion that the 1977 FLSA amendments enlarged ADEA remedies and declined to defer to the EEOC's position that such damages were available under the ADEA, finding that they were at odds with Fifth Circuit precedent.

4. *Eleventh Circuit Announces New Standard for Mixed-Motive Discrimination Claims Based on Circumstantial Evidence*

In *Quigg v. Thomas County School District*,[26] the Eleventh Circuit rejected the *McDonnell-Douglas* burden-shifting framework when evaluating mixed-motive discrimination claims based on circumstantial evidence. The court found that a plaintiff need only produce sufficient evidence that his or her protected

20. 849 F.3d 588 (5th Cir. 2017).
21. *Id.* at 589, 591.
22. Moskowitz v. Trs. of Purdue Univ., 5 F.3d 279, 284 (7th Cir. 1993).
23. 559 F.2d 1036 (5th Cir. 1977).
24. *Vaughan*, 849 F.3d at 591 (quoting *Dean*, 559 F.2d at 1040).
25. *Id.* at 592 (emphasis in original).
26. 814 F.3d 1227 (11th Cir. 2016).

characteristic was a motivating factor for the defendant's alleged adverse employment action. The Eleventh Circuit's decision adds to an already existing circuit split on the issue.

The plaintiff served as superintendent of a Georgia school district. After several years of satisfactory performance reviews, and just prior to the end of her contract, several school board members suggested to her that she reorganize her administration and hire a male assistant superintendent. The plaintiff refused and thereafter her contract was not renewed.

The plaintiff filed suit alleging sex discrimination under Title VII. In support of her claim, the plaintiff proffered evidence that various board members had commented that she needed a tough "hatchet man" in the position, a "guy" whom she could send to "handle" things, and "a strong male . . . to handle problems, someone who could get tough."[27] Further, after the plaintiff suggested a female employee for the position, one board member replied, "[w]e have no males in the school system?"[28] Finally, when discussing the assistant superintendent position, one board member told a parent that "it is time to put a man in there."[29]

The district court granted summary judgment for the school district, holding that the plaintiff presented only circumstantial evidence of discrimination. The district court analyzed the plaintiff's claim under the *McDonnell-Douglas* burden-shifting framework. According to that standard, a defendant need only articulate a legitimate reason for the alleged adverse action with the burden then shifting to the plaintiff to demonstrate that the defendant's proffered reason was a pretext for discrimination. The district court found no triable issues of discrimination because the school district had proffered evidence of a legitimate, nondiscriminatory reason for failing to renew the plaintiff's contract, which the plaintiff failed to demonstrate was a pretext.

On appeal, the Eleventh Circuit rejected use of the *McDonnell-Douglas* framework in mixed-motive claims, i.e., claims where the plaintiff alleges both lawful and unlawful motives for the alleged adverse action. The court found that the *McDonnell-Douglas* framework was "fatally inconsistent with the mixed-motive theory of discrimination because the framework is predicated on proof of a single, 'true reason' for an adverse action."[30] As the court explained, "if an employee cannot rebut her employer's proffered reasons for an adverse action but offers evidence demonstrating that the employer also relied on a forbidden consideration, she will not meet her burden" under *McDonnell-Douglas*.[31] Accordingly, despite the school district's assertion of a legitimate, non-discriminatory basis for the nonrenewal of contract, the court concluded that the plaintiff had established a triable issue of mixed-motive discrimination based on her proffered evidence that the

27. *Id.*
28. *Id.* at 1233.
29. *Id.* at 1234.
30. *Id.* at 1237.
31. *Id.* at 1238.

board members' preference for men was a motivating factor for the non-renewal of her contract.

The Eleventh Circuit's decision added to a circuit split by joining the Second, Third, Fifth, Sixth, and Tenth Circuits in applying the motivating factor standard when analyzing mixed-motive discrimination claims.[32] The Eighth Circuit, by contrast, still requires the *McDonnell-Douglas* approach in mixed-motive cases.[33]

B. Wage and Hour

1. Supreme Court Finds That Statistically Valid Evidence of Liability Supports Class Certification

In *Tyson Foods, Inc. v. Bouaphakeo*,[34] the Supreme Court upheld the use of representative sampling as evidence for purposes of establishing liability in support of class certification. The Court clarified that *Wal-Mart Stores, Inc. v. Dukes*[35] "does not stand for the broad proposition that a representative sample is an impermissible means of establishing classwide liability."[36]

The plaintiffs, employees at a Tyson Foods plant, brought a class and collective action seeking unpaid overtime for time spent donning and doffing protective gear required to perform their jobs. Since their claims related to unpaid overtime, each employee had to prove work in excess of 40 hours a week, including the time spent donning and doffing protective gear. Because the employer did not record donning and doffing time, the employees were forced to rely on representative evidence, including an expert report based on a sample of class members that identified the average time spent donning and doffing their protective gear.

Before certifying a class action under Federal Rule of Civil Procedure 23, a court must find that "questions of law or fact common to class members predominate over any questions affecting only individual members."[37] Tyson Foods argued that a class should not be certified because donning and doffing time necessarily would vary by employee and thus would require an individualized factual inquiry that made classwide recovery too speculative and predominated over any common question of fact. The district court disagreed and certified the class, and the Eleventh Circuit affirmed.

The Supreme Court affirmed the Eleventh Circuit's decision, explaining that "[a] representative or statistical sample, like all evidence, is a means to establish or defend against liability" and is permissible, depending upon "the degree to which the evidence is reliable in proving or disproving the elements of the

32. *See* Holcomb v. Iona Coll., 521 F.3d 130, 141–42 (2d Cir. 2008); Makky v. Chertoff, 541 F.3d 205, 214 (3d Cir. 2008); Rachid v. Jack In The Box, Inc., 376 F.3d 305, 312 (5th Cir. 2004); White v. Baxter Healthcare Corp., 533 F.3d 381, 400 (6th Cir. 2008); Fye v. Okla. Corp. Comm'n, 516 F.3d 1217, 1224–26 (10th Cir. 2008).

33. Griffith v. City of Des Moines, 387 F.3d 733, 736 (8th Cir. 2004).

34. 136 S. Ct. 1036 (2016).

35. 564 U.S. 338 (2011).

36. *Tyson*, 136 S. Ct. at 1048.

37. FED. R. CIV. P. 23.

relevant cause of action."[38] "In many cases," the Court continued, "a representative sample is the only practicable means to collect and present relevant data establishing a defendant's liability."[39] This was the case here because Tyson Foods had failed to record time spent by employees donning and doffing their gear. The Court further explained that such evidence is permissible where "each class member could have relied on that sample to establish liability if he or she had brought an individual action."[40]

Finally, the Court clarified that *Wal-Mart* did not hold that representative statistical evidence was an impermissible means of establishing classwide liability. The *Wal-Mart* employees failed to prove that they were similarly situated because there was no common policy applicable to each member of the proposed class. Here, "each [of the Tyson Foods] employee[s] worked in the same facility, did similar work, and was paid under the same policy."[41]

2. The Fifth Circuit Holds That an FLSA Plaintiff May Recover for Emotional Distress Resulting from Retaliation

In *Pineda v. JTCH Apartments, LLC*,[42] the Fifth Circuit held that an employee who brings a retaliation claim under the FLSA may recover damages for emotional distress, joining the Sixth and Seventh Circuits, which previously reached the same conclusion.[43] The plaintiff lived in an apartment owned by the defendant. In exchange for discounted rent, he performed maintenance work in the apartment complex. Alleging that he was owed overtime pay under the FLSA, the plaintiff filed suit against the owner. Shortly thereafter, the plaintiff received a notice to vacate the apartment for nonpayment of rent and the owner also demanded back rent in an amount equal to the rent reductions that the plaintiff had received for his maintenance work. After receiving the notice to vacate, the plaintiff moved out of the apartment.

The plaintiff amended his complaint to add a FLSA retaliation claim based on the owner's demand for back rent. The matter proceeded to trial and the jury ultimately found in the plaintiff's favor on both his overtime and retaliation claims. However, the district court refused the plaintiff's request for a jury instruction on emotional distress damages, ruling that such damages were not available in an FLSA retaliation suit.

On appeal, the Fifth Circuit held that the district court should have instructed the jury to consider whether the plaintiff was entitled to emotional distress damages. In ruling that such damages are available in FLSA retaliation cases, the Fifth Circuit relied on the FLSA's remedies provision, which provides not only for unpaid wages and overtime compensation but also "such legal or

38. *Tyson*, 136 S. Ct. at 1046.
39. *Id.*
40. *Id.*
41. *Id.* at 1048.
42. 843 F.3d 1062 (5th Cir. 2016).
43. *See id.* at 1064 (citing Moore v. Freeman, 355 F.3d 558, 563 (6th Cir. 2004); Travis v. Gary Cmty. Mental Health Ctr., 921 F.2d 108, 112 (7th Cir. 1990)).

equitable relief as may be appropriate."[44] The court held that "the FLSA's broad authorization of 'legal and equitable relief' encompasses compensation for emotional injuries suffered by an employee on account of employer retaliation."[45] The court therefore reversed and remanded the case for further proceedings.

C. Fair Credit Reporting Act

In *Syed v. M-I, LLC*,[46] the Ninth Circuit held that a prospective employer willfully violated the Fair Credit Reporting Act (FCRA) when it included a liability waiver on the same document as a statutorily required consumer report disclosure. Pursuant to the FCRA's disclosure provision, a prospective employer cannot obtain a consumer report on a job applicant unless a disclosure about the potential report is made to the applicant in writing "in a document that consists *solely* of the disclosure."[47] The Ninth Circuit concluded that the statute's plain language mandates that consumer report disclosure forms contain *only* the disclosure. Inclusion of space for an applicant's "authorization" of procurement of the report is the lone exception to the statute's prohibition on extraneous information.

The plaintiff applied for a job with M-I, LLC. During the application process, M-I provided the plaintiff with a document styled as a "pre-employment disclosure release." In addition to advising the plaintiff about procurement of a consumer report, the form also included a waiver of the plaintiff's right to sue M-I and its agents for any violations of the FCRA. Given the nature of the form, the plaintiff's signature "served simultaneously as an authorization for M-I to procure his consumer report, and as a broad release of liability."[48]

After learning that M-I had obtained the report, the plaintiff filed a putative class action, alleging that M-I's disclosure form violated the FCRA because it included a liability waiver and sought statutory and punitive damages. The district court dismissed the complaint, holding that the plaintiff had failed sufficiently to plead "willfulness" on M-I's part, which was necessary to establish liability for statutory and punitive damages under the FCRA.

On appeal, the Ninth Circuit reversed. It held that the FCRA's plain language "unambiguously bars a prospective employer from including a liability waiver on a disclosure document provided a job applicant."[49] In large part because the statutory language was clear, the court found that M-I's noncompliance to be willful. The court rejected each of M-I's arguments opposing the willfulness finding, holding that its subjective intent was irrelevant and that its proposed interpretation of the statute as allowing for inclusion of liability waivers was "objectively unreasonable." Although a separate subpart of § 1681b(b)(2)(A) states

44. *Id.* (quoting 29 U.S.C. § 216(b)).
45. *Id.* at 1066.
46. 846 F.3d 1034 (9th Cir. 2017).
47. *See* 15 U.S.C. § 1681b(b)(2)(A) (emphasis added).
48. *Syed*, 846 F.3d at 1039.
49. *Id.* at 1044.

that an "authorization" may appear on the same document as the disclosure, the court held that this limited exception does not create ambiguity or open the door for the inclusion of additional extraneous information, such as a liability waiver.

II. Labor Law Developments

A. National Labor Relations Act

1. *Sixth Circuit Becomes First Federal Appeals Court to Uphold Local Right-to-Work Law*

In *Auto Workers Local 3047 v. Hardin County*,[50] the Sixth Circuit held that the National Labor Relations Act's (NLRA's) union-security agreement protections do not preempt a Kentucky county's right-to-work law. The Sixth Circuit is the first federal appeals court to uphold a local right-to-work law.

Section 8(a)(3) of the NLRA permits union-security agreements between unions and employers that require employees to join a union or pay dues to the union. However, Section 14(b) of the NLRA also allows state right-to work laws, i.e., "State or Territorial" laws that prohibit such agreements and permit employees to opt out of union membership and paying dues. The NLRA is silent as to whether a local government may enact such a law prohibiting union security agreements.

In January 2015, Hardin County, Kentucky, passed Ordinance 300, which provided in Section 4 that no employee could be required to join a union or pay union dues. Section 4(E) of the Ordinance further prohibited "hiring hall" agreements, which operate to require prospective employees to be "recommended, referred, or cleared by or through a labor organization." [51] Finally, Section 5 of the Ordinance prohibited "dues checkoff provisions," preventing employers from automatically deducting union dues or other charges from an employee's paycheck. The union sued to prevent enforcement of Sections 4, 4(E), and 5, claiming that NLRA Section 8(a)(3) preempted these provisions of the local ordinance. The lower court found in favor of the unions, agreeing with the unions' argument that Section 14(b) does not protect the laws of political subdivisions.[52]

On appeal, the Sixth Circuit reversed and affirmed the district court's holding in part. First, the appeals court held that the "right-to-work" provision of the ordinance was protected by Section 14(b) of the NLRA. In the court's view, it was "logical and necessary" for a consistent reading of "State or Territory" throughout Section 14(b) to include the laws of political subdivisions of the State.[53] In reaching this conclusion, the court relied on the Supreme Court's decision in

50. 842 F.3d 407 (6th Cir. 2016).
51. *Id.* at 410–13.
52. *Id.* at 411–12.
53. *Id.* at 413.

Wisconsin Public Intervenor v. Mortier[54] that the Federal Insecticide, Fungicide, and Rodenticide Act—which expressly permitted "States" to regulate pesticides—did not preempt local governments from doing so because "local governmental units are created as convenient agencies for exercising such of the governmental powers of the State as may be entrusted to them . . . [and] the exclusion of political subdivisions cannot be inferred from the express authorization to the 'States.'"[55]

The appeals court, however, affirmed the district court's ruling as to Sections 4(E) and 5 of the ordinance because those sections were not explicitly "encompassed within the § 14(b) exception."[56] The Sixth Circuit quickly disposed of the issue, finding that Section 14(b) specifically concerned preemption of right-to-work provisions.

2. *The NLRB Eliminates the Previous Employer Consent Requirement for Combined Bargaining Units of Supplier and User Employees*

In *Miller & Anderson, Inc.*,[57] the NLRB overturned its 2004 decision in *Oakwood Care Center*,[58] deciding that temporary workers on loan from a staffing agency (supplier employees) may be combined in the same bargaining units as regular employees of a host employer (user employees) without the consent of both employers. In *Oakwood Care Center*, the Board had held that both employers must consent to bargaining units that combined such employees. In deciding *Miller & Anderson*, the Board announced a return to its prior standard promulgated in *M.B. Sturgis*.[59] Moving forward, the Board will apply the "traditional community of interest factors" to determine whether a unit is proper.[60]

Miller & Anderson and a temporary staffing agency (Tradesmen International) both supplied sheet metal workers for a job in Pennsylvania. The Sheet Metal Workers International Association, Local Union No. 19 filed a petition to represent both the Miller & Anderson employees and the temporary workers employed in a particular geographic area. Miller & Anderson opposed the petition, arguing that under *Oakwood* bargaining units may not be comprised of both user employees and supplier employees.

The Board considered Sections 1, 7, and 9(b) of the NLRA, construing them to provide for the greatest possible freedom for employees in organizing and bargaining collectively. The Board found it notable that Section 9(b), concerning bargaining units, proscribes no restriction on combining user and supplier employees jointly employed by a user and supplier employer. In addition, the Board reasoned that the NLRA did not compel *Oakwood*'s holding requiring employer consent—in fact, because the NLRA is open as to the ideal bargaining unit arrangement between user and supplier employees, the Board is free to

54. 501 U.S. 597 (1991).
55. *United Auto.*, 842 F.3d at 413–14.
56. *Id.* at 421.
57. 364 NLRB No. 39 (July 11, 2016).
58. 343 NLRB No. 659 (Nov. 19, 2004).
59. 364 NLRB No. 39, slip op. at 2 (citing M.B. Sturgis, 331 NLRB No. 173 (Aug. 25, 2000)).
60. *Id.* at 2.

decide that another arrangement more effectively furthers the aims of the Act. Ultimately, the Board determined that the *Sturgis* rule better served those purposes.

3. NLRB Rules That Graduate Students Performing Teaching and Research Services at Columbia University Are Statutory Employees Under the NLRA

In *Columbia University*,[61] the NLRB overruled prior precedent and held that students who perform teaching or research services at a university in connection with their studies are "employees" within the mentioning of the NLRA. This holding adds to the Board's somewhat fragmented rulings on the NLRA's coverage of students at universities.

Graduate students at Columbia generally spend five to nine years of study within their disciplines. During that time, most Ph.D. candidates are required to take on teaching or research duties, and Columbia fully funds most graduate student assistants for at least their first five years, conditioned on the students performing teaching or research duties. Both teaching and research occur under the guidance of a faculty member or academic department, and poor performance by teaching and research assistants can result in remedial training.

The Board began by rejecting its existing precedent under *Brown University*,[62] which established a test of "whether an employment relationship is secondary to or coextensive with an educational relationship."[63] Instead, the Board reasoned that "[s]tatutory coverage is permitted by virtue of an employment relationship; it is not foreclosed by the existence of some other, additional relationship that the Act does not reach."[64] Accordingly, the Board looked to the common law definition of "employee," which generally requires that an employer have the right to control an employee's work and that the work be performed in exchange for compensation. The Board found that Columbia's graduate students satisfied that test whether they were teaching assistants or research assistants because the university directed and oversaw their activities, poor performance could subject them to counseling or removal, and the university compensated the students for their services because it conditioned receipt of a full financial award upon performing teaching duties or research. In short, the Board found "a significant economic component to the relationship between universities . . . and their student assistants."[65]

The Board rejected arguments that imposing collective bargaining on graduate students would infringe upon First Amendment academic freedom and intrude on the educational process. In particular, the Board pointed to the experience of student collective bargaining at public universities as evidence that

61. 364 NLRB No. 90, slip op. at 1 (Aug. 23, 2016).
62. 342 NLRB 483 (2004).
63. *Columbia Univ.*, 364 NLRB No. 90, slip op. at 6, 17.
64. *Id.* at 2.
65. *Id.* at 16.

universities and unions can successfully navigate "delicate topics near the intersection of the university's dual role as educator and employer."[66] The Board similarly ruled that the finite terms of student assistants did not defeat their status as "employees." Then, having ruled that Columbia's graduate students were statutory employees, the Board found that a unit combining undergraduate, Master's degree, and Ph.D. students was appropriate because they performed similar work under the direction of the university regardless of the degree they were pursuing.

III. Employee Retirement Income Security Act (ERISA)

A. *Gobeille v. Liberty Mutual Life Ins. Co.*: ERISA Preemption is Alive and Well

The scope of ERISA § 514(a)'s preemption of state laws that "relate to" ERISA-covered employee benefit plans, conventionally thought to have been narrowed by the Supreme Court's decision in *New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Insurance Co.*,[67] received a significant boost from *Gobeille v. Liberty Mutual Life Insurance Co.*[68] At issue in *Gobeille* was a Vermont law requiring health plans to report extensive data concerning medical claims, with no exclusion for plans covered by ERISA. Seventeen other states had enacted similar reporting requirements, and the Affordable Care Act specifically does *not* preempt them. Nonetheless, in *Gobeille*, the Supreme Court struck down the reporting requirements imposed on health plans by Vermont as preempted by ERISA.

The plaintiff in *Gobeille*, Liberty Mutual Insurance Co., maintains a self-funded health plan with over 80,000 participants in 50 states, of whom only a small number live in Vermont. After the state ordered the plan's third party administrator "to transmit to a state-appointed contractor all the files it possessed on member eligibility, medical claims, and pharmacy claims for Vermont members," [69] Liberty Mutual instructed its administrator not to comply and then filed suit to prevent Vermont from enforcing its order on ERISA preemption grounds.

In finding that ERISA preempted the state data collection law, the Supreme Court agreed with Liberty Mutual's argument that the state requirement impermissibly exposed the company's plan to "the threat of conflicting and inconsistent State and local regulation." The majority opinion, joined by six of the eight sitting Justices, held that state reporting mandates impinge on "reporting, disclosure, and recordkeeping [requirements that] are central to, and an essential part of, the uniform system of plan administration contemplated by ERISA."[70]

66. *Id.* at 8-9.
67. 514 U.S. 645 (1995).
68. 136 S. Ct. 936 (2016).
69. *Id.* at 942.
70. *Id.* at 945.

> Vermont's reporting regime, which compels plans to report detailed information about claims and plan members, both intrudes upon "a central matter of plan administration" and "interferes with nationally uniform plan administration." The State's law and regulation govern plan reporting, disclosure, and—by necessary implication—recordkeeping. These matters are fundamental components of ERISA's regulation of plan administration. Differing, or even parallel, regulations from multiple jurisdictions could create wasteful administrative costs and threaten to subject plans to wide-ranging liability. . . . Pre-emption is necessary to prevent the States from imposing novel, inconsistent, and burdensome reporting requirements on plans.[71]

The Court did not demand that the employer quantify the burden imposed by the state law. It was enough for preemption purposes to show "the possibility of a body of disuniform state reporting laws and, even if uniform, the necessity to accommodate multiple governmental agencies. A plan need not wait to bring a pre-emption claim until confronted with numerous inconsistent obligations and encumbered with any ensuing costs."[72]

B. Standing

1. Spokeo, Inc. v. Robins*: An Article III Standing Decision with ERISA Implications*

Although decided under a different statute, *Spokeo, Inc. v. Robins*[73] has important Article III standing implications for claims under ERISA. *Spokeo* arose under the Fair Credit Reporting Act of 1970, which requires certain agencies that disseminate information about consumers to "follow reasonable procedures to assure maximum possible accuracy" and provides consumers with a right to sue for "any actual damages" caused by a violation or for statutory damages of "not less than $100 and not more than $1,000."[74]

The defendant, Spokeo, Inc., gathers facts about individuals through Internet searches and sells its findings to interested parties, such as companies that are deciding whether to hire prospective employees. The plaintiff alleged that the report concerning him contained serious errors of fact. The errors were not defamatory; the report apparently overstated his education, income, and employment history. The plaintiff nonetheless brought a purported class action seeking statutory damages against Spokeo, which responded by arguing that he had suffered no actual or imminent harm and thus lacked Article III standing to pursue his claim.

71. *Id.* (citations omitted).
72. *Id.*
73. 136 S. Ct. 1540 (2016).
74. 15 U.S.C. §§ 1681e(b), 1681n(a)(1)(A).

The district court agreed with the defendant. However, the Ninth Circuit reversed, holding that, in order to meet the threshold for Article III standing, the plaintiff needed to allege only that the defendant violated his rights under the statute and that those rights were personal to him rather than collective. Consequently, the Ninth Circuit concluded that the alleged violation of his statutory rights was "sufficient to satisfy the injury-in-fact requirement of Article III."[75]

The Supreme Court disagreed, finding that the Ninth Circuit's analysis was incomplete. The predicate to standing—"injury in fact"—has two elements: an injury that was both "particularized" and "concrete"; the lower court had considered only the former. The interesting part of the Court's opinion, from an ERISA point of view, is its discussion of what constitutes a "concrete" injury. While the Court made clear that "concrete" meant something " 'real,' and not 'abstract,' " it indicated that, at times, intangible injuries could meet that standard. However, it emphasized that an alleged violation of a statutory right, even when coupled with a right to sue, did not necessarily satisfy the concrete injury requirement. As the Court explained:

> Congress' role in identifying and elevating intangible harms does not mean that a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right. Article III standing requires a concrete injury even in the context of a statutory violation. For that reason, Robins could not, for example, allege a bare procedural violation, divorced from any concrete harm, and satisfy the injury-in-fact requirement of Article III.[76]

The Court therefore vacated the Ninth Circuit's judgment and remanded the case for further consideration of whether the plaintiff's alleged injury was "concrete."

The decision has important standing implications in the ERISA context. ERISA's civil enforcement scheme grants a participant broad statutory standing to sue for violations of the Act, many of which may not have resulted in any actual or real risk of harm to the participant. *Spokeo* would seem to confirm that notwithstanding this statutory right to sue, participants would lack Article III standing to pursue such claims unless they can demonstrate that they suffered the "concrete" injury essential to meeting the injury in fact standard. It can be anticipated that this standing issue will arise in many ERISA cases.

2. Lee v. Verizon Communications, Inc. *and* Soehnlen v. Fleet Owners Insurance Fund*: Early Applications of the* Spokeo *Standing Doctrine in ERISA Cases*

The first appellate cases applying *Spokeo* to ERISA claims indicate that it has raised the standing bar for plaintiffs attempting to bring claims based on alleged statutory violations. The Fifth Circuit was the first circuit to weigh in on

75. Robins v. Spokeo, Inc., 742 F.3d 409, 413–14 (9th Cir. 2014).
76. *Spokeo*, 136 S. Ct. at 1544.

Spokeo's implications for ERISA actions in *Lee v. Verizon Communications, Inc.*[77] The case was before the Fifth Circuit on remand from the Supreme Court for reconsideration in light of the *Spokeo* decision.[78]

Lee arose out of a "de-risking" transaction, in which Verizon's pension plan purchased a group annuity contract covering a large portion of plan liabilities. Two classes of participants challenged this action as a violation of ERISA's fiduciary standards, one consisting of those whose benefit liabilities had been transferred to the annuity provider, the other of those who continued to look to the plan's trust for their benefits. The Fifth Circuit had dismissed the latter class's claims for lack of standing, holding that they had alleged no "injury in fact," and it was this decision that the Supreme Court asked the lower court to revisit in light of *Spokeo*.

On remand, the Fifth Circuit reissued its prior opinion with a preface setting forth the basis for its conclusion that *Spokeo* left its original reasoning intact.[79] The plaintiffs whose benefit liabilities had not been transferred alleged that the de-risking transaction violated their right under ERISA to "proper plan management." The court saw nothing in *Spokeo* that elevated the violation of that alleged right, without any further showing of harm to the plaintiff's interests, to the level of a "concrete" injury. In particular, the plaintiff's failure to allege any real risk to the ultimate payment of their plan benefits was fatal. The Fifth Circuit concluded that *Spokeo* only reinforced its prior view:

> *Spokeo* maps surprisingly well onto the present case: in *Spokeo*, the Supreme Court held that a bare allegation of a Fair Credit Reporting Act violation based on inaccurate reporting of consumer information was insufficient to establish injury-in-fact, as "not all inaccuracies cause harm or present any material risk of harm." [citation omitted] In the same way, we recognized in this case that [the plaintiff's] allegation of an "invasion of [a] statutory right[] to proper [p]lan management" under ERISA was not alone sufficient to create standing where there was no allegation of a real risk that [plaintiff]'s defined-benefit-plan payments would be affected. In short, because [plaintiff]'s "concrete interest" in the plan—his right to payment—was not alleged to be at risk from the purported statutory deprivation, [plaintiff] had not suffered an injury that was sufficiently "concrete" to confer standing.[80]

In *Soehnlen v. Fleet Owners Insurance Fund*,[81] the Sixth Circuit reasoned similarly in affirming the dismissal of a ERISA complaint. A multiemployer welfare plan and its trustees were sued in federal court in an action that alleged a variety of ERISA statutory violations stemming from the plan's alleged failure

77. 837 F.3d 523 (5th Cir. 2016).
78. 623 F. App'x 132 (5th Cir. 2015), *cert. granted, vacated and remanded sub nom.* Pundt v. Verizon Commc'ns, Inc., 136 S. Ct. 2448 (2016).
79. 837 F.3d 523 (5th Cir. 2016).
80. *Id.* at 529–30.
81. 844 F.3d 576 (6th Cir. 2016).

to comply with the Affordable Care Act's restrictions on annual and lifetime benefit caps. The plaintiffs included two employees covered by the plan, who purported to represent a class of similarly situated participants. Invoking ERISA § 502(a)(1)(B),[82] they claimed that they were seeking to clarify their right to future benefits under the plan, specifically, their right to benefits in excess of the plan caps. Under ERISA § 502(a)(3), they sought to enjoin the alleged ACA violations and to obtain other appropriate equitable relief. Significantly, none of the plan participants alleged that they had suffered any personal harm from the alleged failure to comply with the ACA, i.e., that they had incurred or faced any unpaid medical expenses as a result of the alleged violations.[83] The district court dismissed the action in its entirety, in part, for lack of standing.[84] Although it did not have the benefit of *Spokeo*'s teaching, the district court held that the participants had failed to satisfy the Constitutional prerequisite of injury-in-fact.

On appeal, the Sixth Circuit affirmed, rejecting the plaintiffs' argument that *Spokeo* "radically altered the landscape for pleading injury-in-fact [and permitted them to meet their Article III obligation] by merely alleging a violation of ERISA rights."[85] To the contrary, the Supreme Court had held in *Spokeo* that a concrete injury was required even in the case of statutory violations. Thus, the court concluded that only a plaintiff who can show a "real risk of harm" stemming from the alleged violation has standing.[86]

In the Sixth Circuit's view, the plaintiffs failed to meet this test. Their alleged injuries consisted of, first, the impact of the plan's benefit caps on other members of the purported class (alleged with "extreme generality") and, second, that they had made contributions to a plan that was allegedly non-compliant with the ACA. Neither was sufficient to meet their burden of "show[ing] precisely what concrete harm they suffer as a result of Defendants' violations of their ERISA rights."[87] As to the first, the court held that they had not alleged any personal harm; they could not rely on alleged harm to others merely because they brought a purported class action. As to the second, the court relied on a prior Sixth Circuit decision, which held that contributing to a plan that violated ERISA was inadequate absent more than a "conjectural and hypothetical" argument that, without the violations, the plaintiff would have contributed less.[88]

The plaintiffs' final argument, relying principally on the Sixth Circuit's pre-*Spokeo* decision in *Loren v. Blue Cross and Blue Shield*, was that the standing

82. 29 U.S.C. § 1132(a)(1)(B).

83. The defendants asserted that the plan was exempt from the ACA mandates at issue as a grandfathered plan, but the case never reached that issue. *Id.* at 579.

84. Soehnlen v. Fleet Owners Ins. Fund, 2016 U.S. Dist. LEXIS 8932 (N.D. Ohio, Jan. 26, 2016).

85. *Soehnlen*, 844 F.3d at 582.

86. *Id.*

87. *Id.*

88. Loren v. Blue Cross & Blue Shield, 505 F.3d 598, 608 (6th Cir. 2007).

criteria for injunctive relief in cases of alleged fiduciary breach are more lenient and did not require allegations of individualized harm.[89] The Sixth Circuit acknowledged "that some ambiguity may have been engendered by that decision" and offered clarification:

> [I]t is not sufficient merely to state . . . that the plan is deficient without showing which specific fiduciary duty or specific right owed to them was infringed. . . . Plaintiffs' argument again suffers from the same lack of concreteness with respect to injury as previously explained. We recognize that misconduct by the administrators of a benefit plan can create an injury if "it creates or enhances a risk of default by the entire plan." *LaRue v. DeWolff, Boberg & Assoc, Inc.*, 552 U.S. 248, 255, 128 S. Ct. 1020, 169 L. Ed. 2d 847 (2008). But Plaintiffs make no showing of actual or imminent injury to the Plan itself.[90]

Thus, the Sixth Circuit held that the plaintiffs lacked standing to pursue their claims for injunctive relief.

C. *Whitley v. BP, p.l.c.*: Closing the Door on Employer Stock Drop Claims

Following the Supreme Court's decisions in *Fifth Third Bancorp v. Dudenhoeffer*[91] and *Amgen, Inc. v. Harris*,[92] the Courts of Appeals have begun addressing the pleading standards for ERISA employer stock drop claims, i.e., claims by plan participants seeking to recover losses on employer stock held in their ERISA individual account pension plans, such as ESOPs and 401(k) plans, on alleged fiduciary breach grounds. In *Dudenhoeffer*, the Supreme Court rejected the so-called *Moench* presumption of prudence limiting such claims that virtually all of the Circuits had adopted, but erected an equally daunting pleading standard. Specifically with respect to claims that plan fiduciaries—often company executives—possessed "inside information" that they should have used to protect participants from losses on company stock, the Court held that a participant must plausibly allege that the defendant had an alternative available: (1) that was consistent with the federal securities laws; and (2) that "a prudent fiduciary . . . would not have viewed as more likely to harm the fund than to help it."[93] The Court went on to clarify that under the "more harm than good" prong of the standard, lower courts should consider:

> [W]hether the complaint has plausibly alleged that a prudent fiduciary in the defendant's position *could not have concluded* that stopping purchases—which the market might take as a sign that insider fiduciaries viewed the employer's stock as a bad investment—or publicly disclosing negative information would do more harm

89. *Id.* The plaintiffs also relied on a Third Circuit decision cited with approval in *Loren*. Horvath v. Keystone Health Plan East, Inc., 333 F.3d 450 (3d Cir. 2003).
90. *Soehnlen*, 844 F.3d at 585.
91. 134 S. Ct. 2459 (2014).
92. 136 S. Ct. 758, 760 (2016).
93. *Dudenhoeffer*, 134 S. Ct. at 2472.

than good to the fund by causing a drop in the stock price and a concomitant drop in the value of the stock already held by the fund.[94]

Thereafter, in summarily reversing a Ninth Circuit decision that a stock drop complaint met the new standard, the Court in *Amgen* made clear both that it meant what it said in *Dudenhoeffer* and that the plaintiffs must allege facts plausibly meeting that test on the face of their complaint.[95]

The Fifth Circuit's opinion in *Whitley v. BP, p.l.c.*[96] is one of the first post-*Dudenhoeffer/Amgen* appellate decisions to consider the new pleading standard in the insider knowledge context. The case arose out of the *Deepwater Horizon* oil spill and the subsequent drop in BP's stock price. The district court initially dismissed the case, relying on the *Moench* presumption. While the case was on appeal, the Supreme Court decided *Dudenhoeffer* and the Fifth Circuit remanded the case for reconsideration in light of the new standard.

On remand, the plaintiffs, participants in BP's 401(k) plans, sought to amend their complaint to meet the *Dudenhoeffer* test. They alleged, among other things, that the defendants had been, or should have been, aware of alleged deficiencies in BP's safety procedures, that the non-disclosure of those deficiencies had caused BP stock to be overvalued, and that it was imprudent to permit participants to continue investing in the allegedly inflated stock. The plaintiffs asserted that the defendants had alternatives to continued investment that were compatible with the federal securities laws, most notably, public disclosure of the alleged safety deficiencies and/or a freeze on additional company stock purchases. Those alternatives, they alleged in conclusory fashion, would have resulted in more good than harm.

The district court concluded that the plaintiffs had satisfied the *Dudenhoeffer* test and allowed them to file an amended complaint against certain defendants who were alleged to have had actual knowledge of safety issues, but not without struggling with the issue. While the court determined that the two alternatives noted above were consistent with the federal securities laws, it had significant difficulty applying the "more harm than good" prong of the standard. It felt that the defendants' formulation of the standard—that a complaint must plausibly allege that no prudent fiduciary could have concluded that the proposed alternatives would cause more harm than good—would be virtually impossible to meet. At the same time, the decision expressed concern that the plaintiffs' formulation—that a complaint need only allege that a prudent fiduciary could have concluded that the proposed alternatives would have resulted in more good than harm—would allow virtually any complaint to go forward, turning "the filter of *Dudenhoeffer* into a tap, forcing EIAP fiduciaries to wait until summary judgment for relief from meritless lawsuits."[97]

94. *Id.* at 2473 (emphasis added).
95. *Amgen*, 136 S. Ct. at 760.
96. 838 F.3d 523 (5th Cir. 2016).
97. *In re* BP, p.l.c. Secs. Litig., 2015 U.S. Dist. LEXIS 27138, at *114 (S.D. Tex. Mar. 4, 2015).

Believing itself "caught between two untenable positions," the district court ultimately adopted a standard more akin to that advocated by the plaintiffs. Because it could not "determine, on the basis of the pleadings alone, that *no* prudent fiduciary would have concluded that removing the BP Stock Fund as an investment option, or fully disclosing the state and scope of BP's safety reforms, would do more good than harm," it allowed the amendment to go forward.[98] However, given its struggle with the issue, it certified the question for interlocutory appeal to the Fifth Circuit, and the Fifth Circuit agreed to hear the case.

On appeal, the Fifth Circuit reversed, despite amicus briefs from the Department of Labor and the Securities and Exchange Commission supporting the plaintiffs. By the time of its ruling, the Fifth Circuit had the benefit of the Supreme Court's intervening *Amgen* decision. The Fifth Circuit first held that the district court effectively got the standard backwards in allowing the case to proceed because it could not determine, on the basis of the pleadings, that "*no* prudent fiduciary would have concluded that [the alternatives] would do *more good than harm*."[99] Rather, the Fifth Circuit held that under the *Dudenhoeffer/Amgen* standard, "the plaintiff bears the significant burden of proposing an alternative course of action so clearly beneficial that a prudent fiduciary *could not conclude* that it would be more likely to harm the fund than to help it."[100]

Applying that standard, the Fifth Circuit easily found that it had not been satisfied:

> The amended complaint states that BP's stock was overvalued prior to the Deepwater Horizon explosion due to "numerous undisclosed safety breaches" known only to insiders. . . . Based on this fact alone, it does not seem reasonable to say that a prudent fiduciary at that time could not have concluded that (1) disclosure of such information to the public or (2) freezing trades of BP stock—both of which would likely lower the stock price—would do more harm than good. In fact, it seems that a prudent fiduciary could very easily conclude that such actions would do more harm than good.[101]

Whitley is not the only post-*Dudenhoeffer/Amgen* appellate decision to strictly apply the standard. In *Rinehart v. Lehman Brothers Holdings Inc.*[102] and *Loeza v. JPMorgan Retirement Plan*,[103] the Second Circuit also affirmed dismissals of stock drop complaints based on a strict reading of the test. These decisions suggest that the new pleading standard for these types of actions will be even more difficult for plaintiffs to meet than the *Moench* presumption it replaced.

98. *Id.* at *113, *115 (emphasis in original).
99. *BP, p.l.c.*, 838 F.3d at 528–29.
100. *Id.* at 529.
101. *Id.*
102. 817 F.3d 56, 68 (2d Cir. 2016), *cert. denied*, 137 S. Ct. 1067 (2017).
103. 659 F. App'x 44 (2d Cir. 2016) (summary order).

D. *Halo v. Yale Health Plan*: "Substantial Compliance" with Claims Procedure Regulations May Not Be Enough to Foreclose *De Novo* Review

Halo v. Yale Health Plan[104] arose out of a rather routine dispute over health benefits. The plaintiff, a student covered by the Yale University medical plan, received out-of-network treatment for vision problems. The plan denied reimbursement for her treatments because they had not been pre-authorized or necessitated by emergency. After the denial was upheld in the plan's appeals process, the plaintiff sued for reimbursement of her expenses under ERISA, claiming that they were covered by the plan.

A threshold issue for the district court was whether the denial should be reviewed *de novo* or accorded deferential review under the "arbitrary and capricious" standard. The plaintiff argued for *de novo* review on the ground that the plan administrator had deviated from the Department of Labor's regulations governing the processing of benefit claims.[105] The district court agreed that the plan's handling of the plaintiff's claims deviated from the regulation in one respect—the initial benefit denial failed adequately to explain the reasons for the denial and the plan provisions on which it was based. However, later notices contained adequate explanations. Finding that the plan had "substantially complied" with the regulations, the district court determined that it had not lost the benefit of the "arbitrary and capricious" review standard and applying that standard, ultimately entered summary judgment in the plan's favor.

On appeal, the Second Circuit reversed, holding that "substantial compliance" was not enough. In its view, plans are required to adopt and follow procedures that comply to the letter of the claims regulations. A plan's failure to do so requires *de novo* review, unless the plan can show that the failure was "inadvertent *and* harmless" (emphasis in original).[106]

The court added that failure to follow proper claims procedures might be grounds for admitting evidence to supplement the administrative record. However, it indicated that such evidence should be admitted only "if the plan's failure to comply with the claims-procedure regulation adversely affected the development of" that record.[107] The case was remanded to the district court to determine whether the plan's departure from the letter of the DOL regulations meets the "inadvertent *and* harmless" standard.

---

104. 819 F.3d 42 (2d Cir. 2016).
105. *See* 29 C.F.R. § 2560.503-1.
106. *Halo*, 819 F.3d at 45.
107. *Id.* at 60.

E. *Chesemore v. Fenkell*: Split Widens Over Whether Indemnification Among Fiduciaries Is Available Under ERISA

Chesemore v. Fenkell[108] addresses a question on which the Circuits have long split. Reaffirming the position that it took three decades ago in *Free v. Briody*,[109] the Seventh Circuit held that, where fiduciaries differ significantly in their responsibility for a breach, courts may order the relatively more "guilty" parties to indemnify their relatively "innocent" co-fiduciaries.

In *Chesemore*, a holding company spun off a subsidiary by selling 100 percent of its stock to an ESOP at an allegedly inflated price. The independent enterprise soon foundered, its stock became worthless, and the ESOP participants sued. The district court inter alia ordered the ESOP trustees to restore $6.5 million to the plan's assets. The court went on to order the holding company and its president, who had "used their positions of authority over the [defendant] Trustees and their control of the [holding company ESOP's] plan assets to orchestrate a transaction at an inflated price," to indemnify the trustees.[110]

This indemnification order was "the only significant legal issue" to reach the Seventh Circuit.[111] On appeal, the holding company's president did not contest his liability or deny his central role in the fiduciary breach. However, he did object to reimbursing the liability assessed against the ESOP trustees, arguing ERISA does not permit that remedy.

The Seventh Circuit rejected his argument, concluding that indemnification and contribution among fiduciaries was available under ERISA. The court, as it had done in *Free*, derived the availability of indemnification from ERISA's roots in the law of trusts.[112] The Second Circuit reached the same result as *Free*, though by a route that principally emphasized ERISA common law. It drew the "common law" right from the fact that "the right of contribution among co-trustees has been for over a century, and remains, an integral and universally-recognized part of trust doctrine."[113] The decision's reasoning thus aligns with the Seventh Circuit's, although it is less precisely expressed.

In contrast, the Eighth and Ninth Circuits have held that ERISA provides no right of indemnification among fiduciaries.[114] Both courts concluded that the statute does not explicitly provide that right and indemnification does not

108. 829 F.3d 803 (7th Cir. 2016).
109. 732 F.2d 1331 (7th Cir. 1984).
110. Chesemore v. Alliance Holdings, Inc., 948 F. Supp. 2d 928, 949 (W.D. Wis. 2013).
111. *Chesemore*, 829 F.3d at 811.
112. *Id.* at 812.
113. Chemung Canal Tr. Co. v. Sovran Bank/Maryland, 939 F.2d 12, 16 (2d Cir. 1991), *cert. denied sub nom.* Fairway Spring Co. v. Sovran Bank/Maryland, 505 U.S. 1212 (1992).
114. Travelers Cas. & Sur. Co. of Am. v. IADA Servs., 497 F.3d 864, 867 (8th Cir. 2007); Kim v. Fujikawa, 871 F.2d 1427, 1432–33 (9th Cir.1989).

meet the strict criteria for adoption as ERISA common law. Thus, at this point, there is a clear and indeed longstanding Circuit conflict on the authority of courts to allocate damages for fiduciary violations among fiduciaries in proportion to guilt. Given that the issue is far from unimportant, it appears to be a question that is ripe for Supreme Court review.