LABOR DEPARTMENT PARTICIPATION IN ERISA LITIGATION
AND SIGNIFICANT ISSUES IN LITIGATION
Compiled by the Plan Benefits Security Division

Office of the Solicitor

CALENDAR YEAR 2018

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A. **Employer Stocks**

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

On August 28, 2015, the Secretary filed a complaint against BAT Masonry Company, Inc., in connection with an employer stock purchase by the company's ESOP. Also named as defendants are trustee and former company owner and officer Wayne Booth, as well as a trust and another company controlled by Wayne Booth, trustees and former officers Gregory Booth and Melvin Hinton, former officer John Rosser, special independent ESOP trustee James Joyner, M.H. Masonry & Associates, the successor to BAT Masonry, and Sheldrick, McGhee & Kohler LLC ("SMK"), which provided valuation services to the ESOP. The complaint alleges that Wayne Booth sold BAT Masonry stock to the BAT ESOP in July 2010 for approximately $13.5 million (consisting of cash and notes), a price exceeding the company's fair market value. The original valuation was excessive because, among other reasons, it was based on a $5.8 million "officer notes receivable" from Wayne Booth held by the company that simply represented funds that he withdrew from the company while he controlled it and that he never intended to repay. The complaint further alleges that in July 2012 Gregory Booth and Hinton abandoned the company and the BAT ESOP. In the months leading up to the closure of BAT, Gregory Booth and Hinton formed MH Masonry as a competitor masonry subcontractor. On September 18, 2015, the Secretary filed an adversary complaint in Wayne Booth's Chapter 7 bankruptcy, alleging that his debts are non-dischargeable. On October 2, 2015, the Secretary filed a motion to withdraw that adversary proceeding from the bankruptcy court to the district court. On November 3, 2015, the district court granted the Secretary's motion and ordered the adversary proceeding withdrawn from the bankruptcy court and consolidated with the district court action. On August 16, 2016, the court entered a consent order against SMK, requiring SMK to disgorge the profits it obtained in issuing its valuation. On October 26, 2016, the court entered a consent order against Rosser, requiring him to pay $36,000 in restitution to the ESOP and entering a five-year fiduciary bar against him. On April 14, 2017, the Secretary filed a motion for summary judgment against Gregory Booth, Hinton, Joyner, BAT Masonry and M.H. Masonry & Associates and on May 1, 2017, responded to motions for summary judgment filed by the defendants. On May 8, 2017, the court held a hearing regarding the motions and ordered additional briefing. The court entered consent orders with James Joyner on October 11, 2017, with Wayne Booth on October 12, 2017, and with Gregory Booth on October 16, 2017. The trial is currently scheduled for March 12-16, 2018, and the summary judgment motion regarding M.H. Masonry remains pending. On December 8, 2017, the bankruptcy court approved the consent judgment entered into with Wayne Booth, thereby allowing a claim for $4.8 million related to the Secretary's civil action in Booth's Chapter 7 bankruptcy proceeding. On March 13, 2018, the court approved an order of dismissal resolving the Secretary's remaining claim pending against MH Masonry. Philadelphia Office

Acosta v. Big G Express, Inc. (E.D. Tenn.)

On November 29, 2017, the Secretary filed a complaint against Big G Express, Inc., David Nolan, Stephen Thompson, and the Big G ESOP, in connection with the creation of the ESOP. The complaint alleges that the ESOP purchased 100% of the outstanding shares of Big G

Express at an amount that far exceeded fair market value. The company had retained Thompson to serve as the ESOP's independent trustee. Thompson acquiesced to the selection of 2nd Generation Capital LLC to conduct an appraisal of the company's fair market value. This valuation report concluded that the company was worth $21,000,000 but contained a multitude of errors that resulted in a wildly inflated share price. In conducting its appraisal, 2nd Generation Capital allegedly failed to consider nearly $4 million in interest-bearing debt, incorrectly applied the discounted cash flow ("DCF") analysis, failed to exclude the value of a related investment entity that owned most of the company's real estate, utilized outdated financial data, failed to utilize the mid-year convention in its DCF analysis, failed to adjust for lack of control, and predicted a growth rate for the company that far exceeded its past performance. The errors should have been readily apparent to anyone with a very general knowledge of accounting. However, Thompson accepted the conclusions of the valuation without question, as did the company's Chief Financial Officer and chair of its ESOP Exploratory Committee, David A. Nolan. Nolan advised the other three selling shareholders to agree to the deal, and the complaint alleges that he was a knowing participant in the fiduciary breaches of Big G and Thompson. The complaint seeks restitution of all losses caused by these breaches, as well as appropriate injunctive relief. Defendants filed a motion to dismiss arguing that the six-year statute of limitations under ERISA was a statute of repose and could not be expressly waived, making the executed tolling agreements immaterial. In an order filed on December 21, 2018, the court rejected the defendants' logic and endorsed the Eleventh Circuit's Secretary v. Preston approach, dismissing the defendants' reliance on the "flawed" Harris v. Bruister decision, The court reasoned that "the Eleventh Circuit's opinion is not more persuasive merely because it comes from an appellate court, but rather it is more persuasive because it is right in its legal analysis and conclusion." The court held that ERISA's six-year statute date is not jurisdictional, because Congress had not clearly indicated it was; the court reviewed the applicable statutory text, context, and history. Rejecting the defendants' argument, the court held that the statutes of repose are not categorically nonwaivable. Defendants' answers are due January 11, 2019. Atlanta Office

Acosta v. Boettner (D.N.D.)

On September 29, 2017, the Secretary filed a complaint against Custom Aire, Inc., Custom Holdings, Inc., Scott Boettner, Randal Boettner, and Rickie Bohm, alleging that the company and the ESOP's trustees (two of whom were the company's former owners) sold the shares of the company to the ESOP for more than fair market value. The complaint seeks restoration of losses to the ESOP, as well as an injunction against the trustees. Defendants filed their answer in February 2018. The Court has not yet issued a case scheduling order. Denver Office

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

On March 10, 2016, the Secretary filed a complaint against Cactus Feeders, Inc., Lubbock National Bank, the Cactus Feeders board of directors, and ESOP committee members, alleging that the Bank, as the ESOP trustee, caused the ESOP to pay more than adequate consideration for company stock and that the company, as plan administrator and acting through its board of directors and designated ESOP committee members, had knowledge of the trustee's breach of

duty but did nothing to remedy that breach. The ESOP, which already owned 30% of the company stock, purchased the remaining 70% of the company stock for $100 million. The complaint alleges that the purchase price failed to include sufficient adjustments for warrants and stock options that, when exercised, would dilute the ESOP's equity from 100% to 55%, failed to include any adjustments for lack of marketability as the company remains a private entity, and failed to include any adjustments for an investors' rights agreement that effectively gave the selling shareholders control over the board of directors and the company for fifteen years. On December 30, 2016, the court denied the defendants' motion to dismiss. The parties participated in court-ordered mediation on August 22, 2017. At the conclusion of the mediation, the parties reached agreement on monetary terms and, after several months of additional negotiations, resolved all remaining issues. Lubbock National Bank, agreed to an extensive process agreement that addressed the fiduciary failings in the December 2010 transaction. The fiduciaries, including the Bank and individual members of the company's board of directors and the ESOP Committee, also agreed to pay $5,454,545.45 in plan losses and $545,454.55 in civil penalties. The court entered a dismissal order on June 15, 2018. Dallas Office

Brundle v. Constellis (4th Cir.)

This case concerns prohibited transactions under ERISA and the "adequate consideration" exemption. The questions presented were whether the district court, in considering whether the fiduciary followed a prudent process in causing the prohibited transaction, properly refused to defer to the fiduciary's or its adviser's determination of the fair market value of employer stock; whether the court correctly held that the ESOP should not have paid a control premium when it did not acquire effective control of the company; and whether the court correctly held that the fiduciary's liability for the ESOP's losses due to the prohibited transaction may not be offset by the ESOP's unrelated gains in a separate, subsequent sale. The Secretary filed an amicus brief on July 23, 2018, urging the Fourth Circuit to hold that the fiduciary's hiring of an adviser does not insulate it from judicial scrutiny; that it was improper for the ESOP to pay a control premium without receiving any elements of actual control of the company other than 100% share ownership; and that the fiduciary was not entitled to offset the damages it owed by money the ESOP earned in a separate transaction the following year. Oral argument, in which the Secretary participated, was held on December 11, 2018. Plan Benefits Security Division

Perez v. First Bankers Trust Services, Inc. (Sonnax Industries) (D. Vt.)

On December 28, 2016, the Secretary filed a complaint against First Bankers Trust Services, Sonnax Industries, Inc., and the company's former owners, alleging that the Sonnax Industries ESOP paid more than adequate consideration for company stock on January 3, 2011, when the company redeemed all outstanding shares from the owners for $48.8 million, and simultaneously issued new shares which it sold to the ESOP for $10 million. The complaint alleges that the valuation used by First Bankers, the trustee, to justify both the $48.8 million and $10 million purchases was fundamentally flawed, resulting in a significant inflation of the purchase prices and that the trustee failed to prudently investigate the transaction's merits. On November 17, 2017, the parties reached a conditional settlement after participating in court-ordered early neutral evaluation/mediation. The consent order and judgment, which were entered on April 30,

2018, required that the former owners pay $2,000,000 to the ESOP and a negotiated $200,000 section 502(l) penalty and that Trustee First Bankers pay $225,000 to the ESOP and a negotiated $25,000 section 502(l) penalty. Boston Office

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

On July 17, 2012, the Secretary filed a complaint against the fiduciaries of the SJP Group, Inc. ESOP, alleging that they caused the ESOP to purchase employer stock for millions of dollars in excess of the stock's fair market value. The Secretary alleges that GreatBanc, as the trustee charged with determining the fair market value of the stock, ignored obvious errors in the valuation report and failed to determine whether the financial information provided by the plan sponsor was reliable. The Secretary further alleges that the company and its president Vincent DiPano, as the fiduciaries that appointed GreatBanc as trustee, failed to monitor GreatBanc's performance and allowed the transaction to take place knowing that the purchase price was in excess of fair market value. The defendants filed separate motions to dismiss, which the court denied on May 31, 2013. The defendants filed motions for summary judgment and the parties filed various Daubert motions to preclude admission of each other's experts. On September 29, 2015, the court denied the motions for summary judgment and mostly denied the Daubert motions without prejudice. A pre-trial conference/settlement conference took place on November 16, 2015. At that conference, a settlement agreement in principle was reached with DiPano for $2.25 million and the section 502(l) penalty (conditioned on DiPano obtaining protection against subsequent claims for contribution from First Bankers). The parties filed a consent judgment on January 8, 2016. While the Secretary agreed with DiPano on the settlement terms and the need for a bar order, the parties disagreed on the bar order terms. The bar order terms were submitted to the court for decision: the First Bankers/DiPano terms (proportionate fault reduction and reduction for DiPano's section 502(l) payment) were submitted on January 8, 2016. The Secretary's proposed terms (pro tanto reduction of First Bankers' liability and no reduction for section 502(l) payments) were filed on January 11, 2016. First Bankers filed its opposition to the Secretary's proposed terms on February 2, 2016, to which the Secretary replied on February 9, 2016. Short follow-up briefs on the effect of the proposed bar order language on claims for contribution were submitted on March 8, 2016. Oral argument was held on April 20, 2016. The court upheld the Secretary's position that section 502(l) penalties could not reduce First Bankers' compensatory remedy exposure but also agreed with First Bankers that its exposure should be reduced by DiPano's proportionate fault. Also on April 20, 2016, the court approved the DiPano consent judgment. The parties attempted a mediated settlement in May, 2016, but did not succeed. Trial began on May 23, 2016 and lasted for 16 full days until September 23, 2016. Briefs were filed on October 25, 2016 and replies filed on November 15, 2016. On March 31, 2017, the court ruled in the Secretary's favor, awarding a judgment of $9.485 million (less an offset for earlier settlement payment but plus interest) in restitution. The court upheld the Secretary's expert valuation and adopted the theory advanced by the Secretary's prudence expert that First Bankers should have, at the very least, adhered to the standard of care prevailing among private equity investors. The decision strongly rejects the argument that ESOP transactions receive lesser scrutiny than transactions impacting other kinds of plans. First Bankers appealed this decision. The parties reached a settlement in principle whereby FBTS agreed to restore $8 million to the plan with an enhanced injunction, and they submitted a

consent order to the court for entry on September 21, 2017. On May 3, 2017, the independent fiduciary advised the Secretary that First American Bank, which provided a loan to the sponsoring company of the ESOP, is asserting a security interest in any recoveries the ESOP makes in the lawsuit, specifically including funds on deposit with the court from the Secretary's settlement with DiPano. On May 26, 2017, First American Bank filed its own complaint against the ESOP seeking turnover of all DOL-recovered funds; the DOL was not named as a defendant. In light of First Banker's pending appeal, the court stayed both the First American Bank's action and the Secretary's original action. The court lifted the stay on November 8, 2017, at which time it formally entered the consent order in the Secretary's case. On November 22, 2017, the Secretary filed a Rule 24 motion to intervene in the First American Bank case, which was granted. The Secretary and the plan fiduciary moved to dismiss the First American Bank complaint. On October 31, 2018, the court granted the motions to dismiss and dismissed the Secretary's counter-claims with leave to amend. On November 30, 2018, the parties filed a stipulation in which First American Bank agreed to forego appeal in exchange for the Secretary's dismissal of the counter-claim for attorneys' fees. If intervenor status is granted, the Secretary intends to move to dismiss First American Bank's complaint. The plan's fiduciary will also be moving to dismiss First American Bank's complaint. New York Office

Perez v. Potts (S.D. Ohio)

On June 27, 2016, the Secretary filed a complaint against Thomas E. Potts and Fiduciary Trust Services, Inc., trustees of the Triple T Transport, Inc. ESOP. The complaint alleges that defendants approved a transaction in which the ESOP purchased 80% of the outstanding stock of Triple T Transport, Inc. for $17.46 million. The complaint also alleges that defendants knew or should have known that a valuation opinion on which they relied contained serious flaws, which resulted in the stock being significantly overvalued. As a result of the defendants' actions, the ESOP purchased the stock for a price in excess of fair market value, suffering losses in excess of $5.9 million. On December 15, 2016, the court granted the motion of Gemini Insurance Company to intervene in the case to litigate whether it is contractually obligated to defend or indemnify defendants pursuant to insurance policies it issued to defendants. On November 19, 2018, over the objection of Gemini Insurance Company, the court entered a consent judgment resolving all claims between the Secretary and Defendants Potts and FTS. The consent judgment makes Potts and FTS liable for $2.25 million in plan losses and $225,000 in 502(l) penalties. Due to their financial inability to pay the full judgment, Potts/FTS will restore $415,000 to the ESOP and pay $41,500 in 502(l) penalties over a seven-year period. The ESOP has the potential to recover the remainder of the $2.25 million judgment as a result of ancillary litigation between Potts/FTS and its insurance carrier, Gemini Insurance Company. The consent judgment provides that, in the event Potts/FTS settle their action against Gemini, a portion of any judgment will be allocated to the ESOP. In addition to the monetary provisions, Potts/FTS are also removed as the trustee of the ESOP. Cleveland Office

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

On October 4, 2017, the Secretary filed a complaint against Reliance Trust Company and Steven Carlsen, Paul Lillyblad, and Kelli Watson, Board members of Kurt Manufacturing Company,

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

In response to stipulations filed by the parties, the court extended to July 31, 2018, Defendants' Time to Respond to the Complaints. On July 10, 2018, the parties participated in a mediation, which did not result in a resolution of the case. On July 31, 2018, Defendants Carlsen, Lillyblad, and Watson filed their Answer to the Complaint. On August 17, 2018, the Secretary filed a Motion to Strike Affirmative Defenses of Defendants Carlsen, Lillyblad, and Watson. On August 20, 2018, the Secretary filed an Amended Complaint. On September 4, 2018, Defendant Reliance filed a Motion Pursuant to Rule 12(b)(7), or Alternatively, to Join Party under Rule 21. On September 4, 2018, Defendants Carlsen, Lillyblad, and Watson filed an Answer to the Secretary's Amended Complaint. On September 11, 2018, the Secretary filed a Memorandum in Opposition to Defendant Reliance's Motion Pursuant to Rule 12(B)(7), or Alternatively, to Join Party under Rule 21. On September 26, 2018, the parties filed their Rule 26(f) Report. On October 3, 2018, the parties attended a Pretrial Conference and Hearings on Defendant Reliance's Motion Pursuant to Rule 12(B)(7), or Alternatively, to Join Party under Rule 21 and Secretary's Motion to Strike Affirmative Defenses of Defendants Carlsen, Lillyblad, and Watson. At the hearing the court denied the Secretary's Motion to Strike Affirmative Defenses but required Defendants Carlsen, Lillyblad, and Watson to amend its Answer and make it more specific. On October 10, 2018, Defendant Reliance filed a Supplement Memorandum to its Motion Pursuant to Rule 12(B)(7), or Alternatively, to Join Party under Rule 21. On October 11, 2018, Defendants Carlsen, Lillyblad, and Watson filed an Amended Answer to the Secretary's Amended Complaint. On October 22, 2018, the Secretary filed its Reply to Defendant Reliance's Motion Pursuant to Rule 12(B)(7), or Alternatively, to Join Party under Rule 21. On October 29, 2018, the Court issued an Amended Pretrial Scheduling Order. On November 15, 2018, the parties exchanged their Initial Disclosures. On December 18, 2018, the parties filed a Joint Proposed ESI Protocol setting forth each parties' proposed language. On December 21, 2018, the Court held a telephonic hearing on the parties' disputed ESI Protocol. On December 26, 2018, the Court issued an ESI Protocol. Chicago Office

Acosta v. Saakvitne (D. Haw.)

On April 27, 2018, Secretary filed a complaint against Nicholas L. Saakvitne, Brian Bowers, and Dexter Kubota, fiduciaries of the Bowers and Kubota Consulting ESOP, alleging that in 2012 they caused the plan to purchase 100% of the Bowers + Kubota Consulting Company's stock for 40 million, which was far in excess of the stock's fair market value at the time of the purchase. On June 12, 2018, Bowers and Kubota filed a motion to dismiss. On July 10, 2018, Saakvitne answered the complaint. On September 5, the company filed a motion to dismiss based on its claim that it is not a necessary party. On September 28, 2018, the Department filed two opposition briefs responding to defendants' motions to dismiss the case. On October 9, 2018,

Saakvitne's counsel filed a suggestion of death, stating that Saakvitne had died. On October 12, 2018, the district judge recused himself from hearing the case, and on October 13, 2018, the new judge postponed the oral arguments for the pending motions to dismiss to January 2019. San Francisco and Los Angeles.

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

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

Following mediated settlement negotiations, the court on September 20, 2018, the court signed a consent judgment that approved the parties' mediated settlement agreement. The consent judgment orders Reliance Trust to pay $4,545,454 to the employee stock ownership plan within 30 days. After Reliance Trust made the payment, the Department agreed to assess the company a civil penalty of $454,545. Further, under the terms of the consent judgment, Reliance Trust may not seek direct or indirect contribution or indemnification from Tobacco Rag Processors or the ESOP either to pay the judgment or to pay its legal expenses. In addition, as part of the mediated agreement, the selling shareholders, who were not named in the Secretary's complaint, agreed to reduce the debt owed by the ESOP by $1.5 million. Atlanta Office

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

On December 30, 2014, the Secretary filed a complaint against TPP Holdings Inc. and TPP's owner and chief executive officer Robert Nicholas Preston, alleging that the ESOP fiduciaries: (1) authorized the ESOP to purchase company stock in 2006 and 2008 for more than adequate consideration; (2) failed to act solely in the participants' interests; (3) failed to follow ESOP documents; and (4) engaged in self-dealing. The fiduciaries also allegedly permitted improper

co-mingling of ESOP and corporate funds. The complaint further alleges that the ESOP did not exercise its voting rights in company decision-making, did not release the proper number of shares, and did not make the proper distributions to participants. On May 15, 2015, defendants filed a motion to dismiss, motion to stay pre-answer deadlines, and motion to extend time for defendants to file a responsive pleading. On June 1, 2015, the Secretary filed an opposition to defendants' motion to dismiss. On June 15, 2015, the defendants filed a reply. The defendants' motion to dismiss was predicated on arguments concerning enforceability of tolling agreements as to ERISA's six-year time limit. The court granted the defendants' motion, finding that ERISA's six-year time limit is a statute of repose and cannot be waived or contractually tolled. The Secretary, citing Eleventh Circuit and Supreme Court precedent, filed a motion for reconsideration. On May 2, 2016, the court denied the Secretary's reconsideration motion, but the court invited the Secretary to file a motion for certification for interlocutory appeal. The Secretary filed the motion on September 9, 2016. The defendants filed a response. The district court granted the Secretary's motion and certified the dismissal order for interlocutory review on November 22, 2016.

The Secretary filed a petition for interlocutory review with the Eleventh Circuit on December 2, 2016, arguing that the ERISA six-year limitation is subject to waiver. Defendants filed a response on December 12, 2016. On February 24, 2017, the Eleventh Circuit granted the petition for interlocutory appeal. The Secretary filed an opening brief on April 5, 2017. Defendants filed a response on May 5, 2017. The Secretary filed his reply brief on May 19, 2017. Oral argument was held on August 24, 2017. On October 12, 2017, the Eleventh Circuit issued a favorable decision, reversing the district court and agreeing with the Secretary that ERISA's six-year time limit is waivable. Defendants filed a petition for panel rehearing on November 22, 2017, which was denied on December 13, 2017. The case was remanded to the district court after the Eleventh Circuit's decision and the denial of certiorari by the Supreme Court.

The district court referred the case to mediation by a magistrate judge. The Secretary and defendants participated in mediation on November 6, 2018, but did not reach an agreement. The parties held their 26(f) scheduling conference on November 28, 2018, and submitted their joint report and proposed discovery plan to the district court on December 12, 2018. The Department also served initial disclosures on December 12, 2018, and first discovery requests to defendants on December 13, 2018. Defendants served their initial disclosures on December 21, 2018. On December 26, 2018, in response to an emergency motion filed by the U.S. Attorney requesting a stay of all civil cases in which a federal agency is a party in light of the lapse in appropriations for the Department of Justice, the district court stayed the case. Atlanta Office and, on appeal, Plan Benefits Security Division

Perez v. Vinoskey (W.D. Va.)

On October 14, 2016, the Secretary filed a complaint against Adam Vinoskey, who was the selling shareholder in an ESOP stock purchase that occurred in December 2010, Evolve Bank and Trust, which was the independent fiduciary hired to approve the transaction on behalf of the Sentry Equipment Erectors, Inc. ESOP, and its senior trust officer, Michael New, who approved

the transaction price and the structure of the transaction. The complaint alleges that the ESOP paid $20.7 million for the company's stock that was worth only about $13 million, that the debt taken on to fund this transaction lowered the value of the ESOP stock that had already been allocated to participant accounts from a stock purchase that had occurred several years earlier, and that the fiduciaries took no action to protect existing participants from this drop in the value of the shares that they owned before the 2010 transaction. The total value of both claims is $13.34 million. On January 17, 2017, following defendants' motion to dismiss for failure to state a claim, the Secretary filed an amended complaint. On February 14, 2017, Michael New filed a motion to dismiss on the grounds that he acted only as an "employee" of the named fiduciary and therefore, an ERISA claim could not be asserted against him. On May 2, 2017, following briefing by the Secretary, the court denied New's motion to dismiss, concluding that the Secretary had sufficiently pled facts supporting that New exercised discretionary authority or control over the management of the ESOP assets such that he could be considered a fiduciary. On October 26, 2017, the Secretary filed a motion for summary judgment against all defendants. On December 1, 2017, the Secretary filed responses to the summary judgment motions of Sentry, Evolve Bank and Trust, and Michael New.

On April 17, 2018, the court denied defendants' motions for summary judgment on the counts alleging that the defendants engaged in a prohibited transaction and that related to the named fiduciaries breached their fiduciary duties to the ESOP. The court let stand the count Vinoskey's and the Vinoskey Trust's knowing participation in the fiduciaries' breaches. The court also concluded that the majority of the Secretary's expert's testimony was both reliable and relevant and that the Secretary's expert was qualified to testify. The court, however, excluded expert testimony regarding damages related to the loss in value to the existing plan participants' shares because of the structure of the transaction, finding the method to calculate the damages unreliable. The court also excluded the market comparison contained in the expert report because the expert identified only one comparator. The court granted New's motion for summary judgment concluding that New was not a functional fiduciary in this transaction. In its decision, the court rejected the defendants' position that their decision about fairness of the ESOP transaction should be reviewed under an abuse of discretion standard. In rejecting this position, the court held that it "will review de novo whether Evolve violated its fiduciary obligations to the ESOP, obligations that are "the highest known to the law." The five-day trial of this matter took place in Lynchburg, Virginia from October 22 to October 26, 2018. Post-trial briefing is scheduled to be completed by February 6, 2019. Philadelphia Office

Acosta v. Wilmington Trust (S.D.N.Y.)

On August 21, 2017, the Secretary filed a complaint against Wilmington Trust, N.A., trustee of the HCMC Legal, Inc. ESOP, alleging that Wilmington approved the ESOP's purchase of 100% of HCMC's stock for $46 million, which was millions of dollars more than the fair market value of the stock. The complaint alleges that Wilmington failed to prudently investigate the value of HCMC's stock and improperly relied on a flawed, inflated valuation of the stock's value in approving the ESOP's purchase of the stock. Specifically, the valuation included a premium for control of HCMC even though the ESOP did not acquire control of the company and failed to account for the value of millions of warrants that gave other parties to the transaction the right to

buy nearly 50% of HCMC stock at a preset price in the future – and thereby dilute the ESOP's equity stake. Despite these obvious red flags, Wilmington allegedly made no effort to negotiate the ESOP's purchase price and merely accepted the price presented to it. Wilmington filed an answer to the complaint on October 23, 2017, and the court issued a case management order on November 17, 2017.

In 2018, the Secretary completed fact discovery. The Secretary obtained documents from the trustee, trustee's counsel, trustee's valuation advisor, plan sponsor, selling shareholders, and an investment advisor. The Secretary also deposed eight individuals, and moved to compel production of certain documents withheld by the plan sponsor and the investment advisor; this motion remained pending at the end of 2018. The court denied a motion to quash the Secretary's deposition subpoena of the valuation advisor. To allow for a potential settlement, the court extended certain deadlines in the case management order. Expert witness reports are now due in January 2019. Plan Benefits Security Division

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

On August 22, 2017, the Secretary filed a complaint against Wilmington Trust, N.A., trustee of the Graphite Sales, Inc. ESOP, alleging that Wilmington approved a transaction in which the ESOP purchased 100% of the company's issued stock for $16 million, which was more than adequate consideration. The complaint alleges that as a result of Wilmington's actions, the ESOP suffered losses in excess of $6 million. On December 20, 2017, the court denied Wilmington Trust's motion to transfer venue of the case to District of Delaware. Trial is scheduled to begin in February 2019. Cleveland Office

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

On August 23, 2017, the Secretary filed a complaint against Jeffrey J. Zander and Stephen M. Thompson, as fiduciaries to the Zander Group Holdings, Inc. ESOP, along with the company itself. The complaint alleges that Zander, as trustee and beneficiary of the selling shareholder and as president of the company, actively participated and influenced the valuation process in order to obtain a higher conclusion as to the value of the company prior to the sale. As a result of Zander's participation in the valuation process and the valuation company's use of fundamentally flawed valuation methodologies, the complaint alleges that the company was vastly overvalued, and the ESOP overpaid when purchasing its shares. Zander also named Thompson allegedly as the ESOP trustee. Thompson failed to conduct a prudent investigation into the process by which the valuation was obtained and failed to meaningfully review the valuation report. As alleged in the complaint, had he done so, he would have noted numerous flaws, including that the valuation did not value the entity to be sold, employed stale financial data, employed inaccurate financial data, relied primarily on market approaches even though the entity to be sold was a small, privately held business, employed discounts to the market methods in an unorthodox and inconsistent manner, failed to represent the riskiness of the business, failed to employ a proper tax rate, improperly employed EBITDA as a proxy for net cash flows, and improperly included the value of an ESOP "tax shield" in the pre-transaction value of the business. On September 12, 2018, the court denied defendants' motion and the Secretary's

motion to strike affirmative defenses plead by Thompson. The Zander defendants have filed a separate but related complaint against Katz, Sapper and Miller (KSM), the accounting firm involved in the ESOP transaction, seeking to hold KSM liable for any losses attributed to the Zander defendants. Discovery is ongoing. Atlanta Office

B. **Financing the Employer**

1. **Collection of Plan Contributions and Loan Repayments**

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

On August 21, 2017, the Secretary filed an adversary complaint against Ryan C. Abeln alleging that a $22,722 debt owed to the Missouri Freight Equipment Group Health Plan is non-dischargeable. Instead of remitting withheld employee contributions to the plan during the period from November 2012, through January 2014, Abeln used the contributions to pay personal and corporate expenses and then filed for Chapter 7 bankruptcy. The Secretary alleged that Abeln's conduct constitutes defalcation, making his debt to the plan non-dischargeable. On November 17, 2017, Abeln stipulated to the non-dischargeability of the $21,376.64 debt representing losses to the plan plus $2,941.75 in prejudgment interest. On November 21, 2017, the bankruptcy court issued a judgment ordering that the losses to the plan plus prejudgment interest is non-dischargeable. On June 15, 2017, the Secretary filed a civil complaint against Abeln seeking to restore the specific debt deemed non-dischargeable in the bankruptcy action: the health plan losses. Abeln failed to answer or otherwise respond to the civil complaint. On March 13, 2018, upon the Secretary's motion, the district court entered default judgment against Abeln for a total of $24,318.39 in health plan losses and prejudgment interest. The judgment also enjoined Abeln from violating certain provisions of ERISA in the future. Kansas City Office

Acosta v. AIR, LLC d/b/a TantaComm (W.D. Wis.)

On April 4, 2018, the Secretary filed a Complaint against AIR, LLC d/b/a TantaComm and Charles Eaton alleging that defendants failed to remit and untimely remit employee salary deferral contributions to the AIR, LLC 401(k) Plan. The Complaint alleged that from April 5, 2012 through June 4, 2016 TantaComm and Eaton failed to remit $130,357 in employee salary deferral contributions and failed to timely remit $287,233 in employee salary deferral contributions. The Complaint seeks restoration of the unremitted employee contributions; $31,292 in accrued interest on unremitted employee contributions and untimely delayed remittances; reversal of the prohibited transactions; an injunction permanently enjoining Defendants from serving as fiduciaries and/or service providers to any ERISA-covered plan and removing them from any positions they now hold as fiduciaries of the Plan; appointment of an independent fiduciary; and an order requiring that the fiduciaries pay the reasonable fees and expenses of the independent fiduciary. Defendants filed an Answer on July 6, 2018. A preliminary pretrial conference was held on September 14, 2018. Chicago Office

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

On December 29, 2017, the Secretary filed a complaint against American Hospital Management, LLC ("AHM") and Randall Arlett, an officer of AHM and plan trustee. The complaint alleges that from September 2012 through September 2015, employee elective deferral contributions were withheld from employees' pay but that AHM and Arlett failed to either remit those contributions to the plan in a timely fashion or to do so at all. The complaint also alleges that Arlett failed to respond to requests for distributions from an employee who resigned in November 2015. The complaint seeks restitution of $113,048.27 to the plan and a fiduciary bar against AHM and Arlett. Defendants failed to respond to the complaint, and on June 7, 2018, the Secretary filed a motion requesting entry of default judgment. The court granted this motion on August 2, 2018 and ordered restoration of $128,317.96 to the plan, inclusive of interest. The court also appointed an independent fiduciary to take over plan administration and permanently barred AHM and Arlett from serving as fiduciaries to ERISA-covered plans. Philadelphia Office

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

On March 1, 2016, the court entered a consent judgment and order settling allegations in the Secretary's complaint, filed on July 15, 2015, that the Mathison Company, Marilyn Anstett, and Paul Anstett, who are the company's president and vice president and plan trustees, failed to remit and to timely remit employee contributions and loan repayments to the company's 401(k) Plan and failed to properly administer its ESOP. The consent judgment confirmed the complaint allegations and, among other things, ordered the defendants to pay $14,066.34 to 401(k) plan participants, to terminate the 401(k) plan, and freeze and to take steps to properly administer the ESOP. The court also ordered them to complete ten hours of fiduciary training. Since the filing of the consent judgment, the fiduciaries only have partially fulfilled their 401(k) Plan monetary obligations under the consent judgment ($8,066 in employee contributions is still outstanding to participants) and only partially fulfilled their ESOP monetary obligations under the consent judgment. Accordingly, on November 16, 2017, the Secretary filed a contempt petition to enforce the provisions of the consent judgment. The parties engaged in further discussions and on August 7, 2018, filed a second consent judgment. On August 8, 2018, the court entered an order granting the parties' second consent judgment. The order required the fiduciaries to restore $3,750.08 to the 401(k) Plan participants, to terminate the 401(k) plan, and to pay $106,249.92 to the ESOP participants on a pro rata basis. The court also permanently enjoined the defendants from violating Title I of ERISA and, upon completion of their restitution and plan termination responsibilities, permanently barred them from serving as a fiduciary or service provider to any ERISA-covered employee benefit plan. See also Acosta v. Anstett, Section L. Contempt and Subpoena Enforcement. Denver Office

Acosta v. Avedisian and J&T Enterprises (D. Mass.)
Acosta v. Suren Der Avedisian (In re Suren Der Avedisian) (Bankr. D. Mass.)

On December 18, 2017, the Secretary filed a complaint against Suren Der Avedesian and J&T Enterprises Inc. d/b/a/ Omni Foods Supermarkets, fiduciaries of the company's health plan, alleging that they failed to make full employer contributions to the plan while Avedesian

withdrew $132,257.70 from the company's account. Because of this failure, two insurance companies could not reimburse claims. The fiduciaries also failed to inform the plan participants of the inability to reimburse claims. The participants lost $84,938.84. On December 6, 2016, Avedesian filed for Chapter 13 bankruptcy. Upon discovery of the bankruptcy, the Secretary filed an adversary complaint in the bankruptcy court on December 4, 2017. The Secretary is currently seeking to withdraw the referral of the adversary complaint and to have both cases heard in district court. The district court stayed the case and did not withdraw either the proof of claim or the non-dischargeability case from bankruptcy court. A trial on those issues is set for early 2019 in bankruptcy court. Boston Office

Acosta v. Bratcher (W.D.N.Y.)

On January 5, 2018, the Secretary filed a complaint against Jeffrey Bratcher, Sarah Bratcher, Global Tradequest, Inc. and then Global Tradequest 401(k) PSP & Trust, alleging that they failed to remit to the plan withheld employee contributions and loan repayments between November 16, 2014 and February 16, 2017. The complaint sought to restore these funds to the plan, to bar the Bratchers from serving as fiduciaries for any ERISA-covered plan, and to appoint an independent fiduciary. Defendants filed an answer on April 10, 2018. On May 16, 2018, the parties submitted their proposed discovery plan, and, on May 23, 2018, the court entered a scheduling order. On October 31, 2018, the court entered a consent order and judgment ordering defendants to repay to the Plan $19,865.07 in employee contributions and loan repayments, including interest, that is owed to participants, excluding participants Jeffrey and Sarah Bratcher. New York Office

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

On February 1, 2018, the Secretary filed a complaint against Bridgeport Health Care Center, Inc. ("BHCC") and Chaim Stern, fiduciaries of the company's self-funded Health Plan. The complaint alleged that fiduciaries failed to fund health reimbursement accounts from which third-party administrators paid health claims. As a result, checks were returned for insufficient funds and health claims remained unpaid. The fiduciaries failed to inform participants and beneficiaries that their claims may not be paid. Rather, the fiduciaries misrepresented to participants that they had health care coverage by continuing to withhold employee contributions to the Health Plan from employee paychecks and reassuring participants that their claims would be paid. As of August 13, 2018, over approximately $2.6 million in health claims remain unpaid. On April 18, 2018, BHCC filed for Chapter 11 bankruptcy. Shortly thereafter, various creditors including the Secretary moved to appoint a Chapter 11 trustee. After several days of hearing, the bankruptcy court granted the motion to appoint a Chapter 11 trustee. The Chapter 11 trustee has secured fully-insured health coverage for employees. Currently, the case is in mediation with the court. See also Perez v. Bridgeport Health Care Center, Inc. and Chaim Stern, Section D. Prudence of Investments, and In re Bridgeport Health Care Center, Inc., Section M. Bankruptcy. Boston Office

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

On April 20, 2015, the Secretary filed an amended complaint against AARC Environmental, Inc. (AARC), and Kishore Chainani, AARC's sole owner. The original complaint, filed on December 26, 2014, alleged that they failed to forward employee contributions and loan repayments to the company's 401(k) Plan since December 29, 2007, resulting in more than $78,000 in losses. The amended complaint alleges that they failed to remit all employee and employer premiums to the company's Group Health Plan and allowed coverage to lapse multiple times since 2011, as a result of which they owe participants more than $40,000 in employee premiums and an additional unknown amount for unpaid medical claims. On September 20, 2016, the court entered a default judgment against defendants, granting full relief and awarding more than $86,000 in losses for the 401(k) Plan and more than $40,000 in losses for the Health Plan to 49 participants and beneficiaries. Defendants are also required to hire an independent fiduciary at their own expense and are barred from acting as fiduciaries in the future once the independent fiduciary is in place. Because defendants failed to comply with the default judgment, the Secretary on June 28, 2017, filed a motion to adjudge defendants in contempt. On September 7, 2017, the court issued an order finding defendants in civil contempt and ordered them to make immediate restitution of $86,085.43 to the 401(k) plan and immediate restitution of $39,601.47 to the health plan participants. Defendants hired counsel and entered into negotiations with the Secretary to purge themselves of contempt. On December 22, 2017, the Secretary filed a request for stay of contempt pending defendants' payment of the outstanding debt owed to both plans pursuant to an agreed repayment plan. On January 9, 2018, the court granted the Secretary's stay. Since that time defendants have made timely payments in accord with an agreed repayment plan. See also Acosta v. Chainani, Section L. Contempt and Subpoena Enforcement. Dallas Office

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

On March 2, 2018, the court entered a consent judgment and order affirming the allegations in the Secretary's August 8, 2017 complaint, which alleged that Deborah Clifton and her company, Integrity International, Inc., as fiduciaries, failed to remit $10,537.34 in withheld employee contributions and $4,244.43 in participant loan repayments to the plan. Clifton had entered into an informal settlement with the Secretary in August 2016, but defaulted on the agreed-upon monthly payments. The complaint had sought the restoration of all plan losses and injunctive relief requiring the fiduciaries' compliance with ERISA and an injunction barring Clifton from serving as a fiduciary. Based on a review of Clifton's finances and those of her company, the Secretary obtained defendants' stipulation as to liability for the losses as well as to a fiduciary bar. Dallas Office

Acosta v. Day-Mont Behavioral Health Care, Inc. (S.D. Ohio)

On July 18, 2018, the Secretary filed a complaint against Day-Mont Behavioral Health Care, Inc., Gayle Johnson, and Akil Sharif, fiduciaries of the Day-Mont West Tax-Deferred Annuity Plan and the Day-Mont Behavioral Health Care Inc. Employee Benefit Plan. The complaint alleges that the defendants failed to remit $39,964.57 in contributions to the Day-Mont West

Tax-Deferred Annuity Plan, failed to timely remit additional amounts to that plan and made material misrepresentations and omissions to participants of the Day-Mont Behavioral Health Care Inc. Employee Benefit Plan, causing the participants to incur uncovered health claims. The violations occurred from January 2012 to August 2016. The complaint seeks an order requiring the defendants to restore all losses to both plans and the participants, removing the defendants as fiduciaries, and enjoining them from being fiduciaries or service providers to any ERISA-covered plan. See also Acosta v. Day-Mont Behavioral Health Care, Inc., Section B.3. Miscellaneous. Cleveland Office

Perez v. Demmy (S.D. Ohio)

On May 23, 2016, the Secretary filed a complaint against Demmy Sand & Gravel, LLC, Amy Demmy and the company's Retirement Savings Plan, alleging that the fiduciaries failed to segregate and remit $2,409.65 in employee contributions and $32,883.34 in loan repayments and failed to timely remit loan repayments. The Secretary also alleges that the fiduciaries failed to collect $264,750.36 in prevailing wage contributions. The complaint seeks an order requiring that Amy Demmy restore all losses to the plan with interest, removing her as a fiduciary, enjoining her from being a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to administer the plan. On February 16, 2018, the court entered a consent judgment that makes Demmy Sand & Gravel, LLC and Amy Demmy liable to the plan for $350,234. In addition, Demmy is required to make an immediate $35,293 payment to the plan and forfeit all but 20 percent of her own plan account to restore losses and pay final plan expenses. The consent judgment also removes the defendants as fiduciaries, bars them from future service as fiduciaries to ERISA-covered plans, and appoints an independent fiduciary to administer the plan. Cleveland Office

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

On November 27, 2017, the Secretary filed a complaint against Fletcher-Thompson, Inc. and John Oliveto (plan trustee and one of the company principals). The complaint alleges that the defendants failed to remit $259,172.25 in deferred employee contributions and loan repayments to the Fletcher-Thompson Savings Plan for the period February 27, 2015 to the present. The complaint also alleges that the company failed to remit $22,423.06 representing post-judgment interest on deferred employee contributions and loan repayments to the plan in accordance with the Secretary of Labor v. Fletcher-Thompson, Inc. and Michael S. Marcinek modified consent judgment entered by the court on January 29, 2016. After substantial negotiations, the parties entered into a consent judgment requiring that the company restore $239,391.75 in unpaid contributions, and pay $18,083.55 representing lost opportunity costs relating to monies previously restored to the plan pursuant to a consent judgment filed in Secretary of Labor v. Fletcher-Thompson, Inc. and Michael Marcinek. In addition, the company will pay $29,981.52 to four participants of the Fletcher-Thompson, Inc. Health Plan arising from the company's failure to cover health claims during two periods when its Health Plan was self-insured. Boston Office

Acosta v. General Projection Systems, Inc. (M.D. Fla.)

On May 12, 2017, the Secretary filed a complaint against General Projection Systems, Inc., Cheryl Wayson, and Drake Wayson, alleging that they withheld employee contributions and failed to remit required contributions to the company's 401(k) Plan and the Group Health Plan. As a result of the fiduciaries' failure to remit the health insurance premiums, participants incurred unpaid medical claims totaling approximately $10,217. The complaint asks the court to: (1) permanently enjoin the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee or representative having control over the assets of any employee benefit plan subject to ERISA; (2) enjoin the defendants from engaging in any further action in violation of Title I of ERISA; (3) appoint a successor fiduciary at the defendants' expense to administer the plans; and (4) order the defendants to restore all losses to the plans, including payment of unpaid health insurance claims. Drake Wayson died on September 9, 2017.

On January 12, 2018, the clerk's office docketed one answer for each of the Rule 19 plans and one for the Estate of Drake Wayson, all signed by Cheryl Vason. On March 12, 2018, the court struck these answers. The court, without the Secretary's objection, dismissed the Secretary's claims against Drake Wayson on April 11, 2018, and against Cheryl Wayson on June 8, 2018. After the Secretary achieved service the court deemed sufficient, the clerk entered a default against the company on June 20, 2018. On December 10, 2018, default judgment was entered on the issue of liability, and the court ordered that their remedies issue be briefed separately. The Secretary submitted his brief on remedies on December 31, 2018. Atlanta Office

Acosta v. Halcyon Electronics, LLC (N.D. Ohio)

On December 11, 2018, the Secretary filed a complaint against Halcyon Electronics, LLC and Gust Poulos, alleging that the defendants, who were fiduciaries of the Halcyon Electronics Health Plan, failed to remit $18,263.65 in participant contributions to the plan from May 2015 through March 2017. The complaint seeks an order requiring that all losses be restored to the plan with interest, removing the defendants as fiduciaries, and enjoining them from being fiduciaries or service providers to any ERISA-covered plan. Cleveland Office

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

On September 19, 2014, the Secretary filed a complaint against Hanco, Inc. d/b/a Classico Seating, Harry T. Richardson Jr., and the Hanco, Inc. 401(k), Health, and Dental Plans, alleging that the fiduciaries failed to remit $5,242.08 in employee contributions to the 401(k) Plan from October 14, 2011, through February 17, 2012, failed to remit $22,863.09 in employee insurance premium contributions to the Health Plan from August 5, 2011 through September 30, 2011, and failed to remit $2,282.60 in employee insurance premium contributions to the Dental Plan from February 4, 2011, through May 20, 2011. Richardson filed an answer on February 6, 2015. Hanco did not file an answer. The Secretary filed a motion for default judgment with respect to Hanco on July 22, 2015. The court granted the motion on October 15, 2015. On June 28, 2016, the court set a Rule 16 preliminary pretrial conference for July 11, 2016. The defendant did not attend the preliminary pretrial conference. On August 10, 2016, the court ordered the defendant

to pay $671.07 in costs to the Secretary for failure to appear. On August 23, 2017, the court ordered the defendants to provide funds for the full payment of the Secretary's financial demand. On December 8, 2017, defendants reported to the court that checks have been issued to all but three individuals and that the remaining participants will be paid within 60 days. On April 3, 2018, the court approved a consent order and judgment confirming Richardson restored all $27,233.71 in outstanding losses owed to the Plans and permanently enjoining Richardson and Hanco from acting as fiduciaries or service providers to an ERISA-covered plan. Chicago Office

Acosta v. Hauri (W.D.N.Y.)

On July 24, 2018, the Secretary filed a complaint against Donald Hauri Jr., Hauri Enterprises, LLC, and Hauri Enterprises, LLC 401(K) PSP & Trust. The complaint alleged that defendants failed to remit employee contributions and failed to collect employer contributions between January 31, 2014, and December 31, 2017. The complaint sought the unremitted contributions, the removal of Hauri as the fiduciary, and the appointment of an independent fiduciary. After the plan was served but failed to answer, the Secretary requested and obtained entry of default from the clerk of the court on September 7, 2018. New York Office

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

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

Acosta v. Information Networking (C.D. Cal.); In re John Riddle (Bankr. C.D. Cal.)

On January 18, 2018, the Secretary filed a complaint in the Central District of California seeking to enforce a pocket consent judgment that the Secretary had previously obtained in conjunction with a settlement agreement in which defendants agreed to restore approximately $47,000 in employee and employer contributions to the Plan. On April 6, 2018, the district court granted the Secretary's motion to enter a pocket consent judgment and ordered defendants to pay $47,408.33 to the plan. During the course of the district court litigation, the Department learned that defendant John Riddle had filed for bankruptcy without notifying the Department, as required by his settlement agreement with EBSA, and, moreover, failed to disclose this consent judgment, which includes non-dischargeable debts, in his Chapter 13 reorganization schedules with the bankruptcy court. The Department successfully opposed confirmation of Riddle's Chapter 13 plan in April but the court allowed the bankruptcy to continue by letting Riddle convert the case to a Chapter 11. On May 25, 2018, the bankruptcy court ordered that the

$32,818 debt for employee contributions was non-dischargeable in bankruptcy. Los Angeles Office

Acosta v. Institute of Technical Arts LLC (M.D. Fla.)

On September 17, 2018, the Secretary filed a complaint against the Institute of Technical Arts, LLC (ITA), a now defunct plan sponsor and administrator, and its former owner, Laura Lundberg. The complaint alleged that the fiduciaries untimely remitted and failed to completely remit employee contributions to the ITA 401(k) Profit Sharing Plan and failed to remit employee premiums to the ITA Group Health Plan. The complaint seeks approximately $11,719.21 in plan losses, removal of Lundberg as a fiduciary, appointment of a successor fiduciary, and a permanent injunction against Lundberg serving as a fiduciary to ERISA-covered plans in the future. The defendants have been served, and litigation is proceeding. Atlanta Office

Acosta v. IOTC Financial Services LLC and Global Oil Financial Services LLC (S.D. Fla.)

On January 19, 2018, the Secretary filed a complaint against Kevin Kirkeide, Harry Sargeant, fiduciaries of the plan, IOTC Financial Services, LLC and its successors, and the IOTC Financial Services 401(k) Profit Sharing Plan. On June 4, 2018, the Secretary amended the complaint to name Global Oil Financial Services, LLC, and the Global Oil Financial Services, LLC 401(k) Profit Sharing Plan as defendants. The Secretary's amended complaint alleged that the fiduciaries failed to forward withheld employee contributions to the plans. As a result of the breaches described in the complaint, defendants caused $538,248.61 in losses to the plans dating back to 2011, including interest through September 30, 2018, calculated at the higher of the plans' rate of return or the applicable Internal Revenue Code section 6621 Rate. The Secretary succeeded in negotiating a resolution whereby defendants restored all of these losses to the plans, and agreed to additional injunctive relief. As of September 30, 2018, defendants had made $538,248.61 in restitution payments, and provided proof of these payments to the Secretary. On December 17, 2018, the court entered a consent judgment and order permanently enjoining Kirkeide and Sargeant from acting as a fiduciary to an ERISA-covered plan, appointing an independent fiduciary for the IOTC and GOFS plans with the expenses to be paid by defendants, and appointing an independent fiduciary for any ERISA-covered plan provided by any company Sargeant owns or controls. Atlanta Office

Acosta v. Joseph Gorski, Tradeways, Ltd. and Tradeways Ltd. SIMPLE IRA (D. Md.)

On March 12, 2018, the Secretary filed a complaint against Joseph Gorski, Tradeways, Ltd., and the Tradeways Ltd. SIMPLE IRA Plan alleging that Gorski, president, and Tradeways, Ltd, failed to remit employee and employer contributions from January, 2009 through December, 2015. On March 20, 2018, the court entered a consent judgment against Gorski and Tradeways, Ltd., ordering the repayment of $165,508.31 in unremitted employee and employer contributions and $33,905.80 in pre-judgment interest to the Tradeways, Ltd., Simple IRA. Following the re-payment of the assets to the plan, Gorksi and Tradeways will be permanently barred from serving as a fiduciary to any ERISA-covered plan in the future. Philadelphia Office

Acosta v. JWK Corporation, Jay W. Khim and Scott G. Phillips (E.D. Va)

On June 28, 2018, the Secretary filed a complaint against JWK Corporation, Jay W. Khim (chief executive officer), and Scott G. Phillips (director of operations), which alleged that, from July 2013 through September 2016, defendants failed to remit participant loan repayments to the JWK Corporation 401(K) Salary Savings Plan. After multiple attempts, the Secretary was unable to obtain service on Khim and sought permission from the court to serve Khim by alternative methods. The court granted this request on December 26, 2018, and the Secretary will serve Khim by publication. Philadelphia Office

Acosta v. Kizzang (D. Nev.)

On August 17, 2018, the Secretary filed a complaint against Kizzang, LLC, Robert Alexander and Tom Lee, the fiduciaries of a health and welfare plan established by Kizzang. The plan was funded by both company and participant contributions. During a year-long period in 2015 and 2016, the defendants breached their fiduciary duties by failing to collect the company's contributions and by failing to forward participant's premium contributions to the Plan's health insurance carrier, Anthem BCBS. Having received no premiums, Anthem retroactively cancelled participants' health insurance. Defendants failed to timely notify participants of the possibility of retroactive cancellation, causing some of them to incur uncovered medical expenses. The complaint seeks $83,000.00 for the uncovered medical expenses and $20,000.00 for unforwarded employee contributions. The complaint also seeks to enjoin the fiduciaries from violating ERISA and to bar them from serving as ERISA fiduciaries in the future. On December 3, 2018, the clerk of court entered default against Kizzang LLC and Robert Alexander. San Francisco Office.

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

On July 16, 2014, the Secretary filed a complaint alleging that, from 2007 through 2009, Richard J. Kwasny and the law firm of Kwasny & Reilly, P.C., failed to ensure that discretionary employee contributions to the firm's 401(k) Profit Sharing Plan were remitted and remitted on a timely basis. The defendants filed an answer to the complaint on October 29, 2014. On November 7, 2014, the Secretary filed a motion to strike the company's answers, which the court granted on November 19, 2014. On December 1, 2014, the clerk of the court entered default against the company. Following Kwasny's failure to appear at a July 7, 2015 deposition, the Secretary filed a motion for sanctions that was held under advisement. On July 20, 2016, the court granted the Secretary's motion to deem admitted the plaintiff's request for admissions. On September 8, 2015, Kwasny was ordered to attend his deposition. On August 12, 2015, the Secretary filed a motion for summary judgment against Kwasny and a motion for default judgment against Kwasny & Reilly. Kwasny filed a response and cross-motion for summary judgment on September 23, 2015. The court granted the Secretary's motions on February 9, 2016 and awarded $40,416.30 in damages. Kwasny appealed the court's finding of liability to the Third Circuit Court of Appeals. The appellant raised statute of limitations and res judicata issues on appeal, arguing that the Secretary had actual knowledge more than three years before the lawsuit and that a judgment against him in a state court action offsets the damages in this

case. The individual defendant appealed on April 7, 2016. The appellant filed his opening brief on July 11, 2016, and the Secretary's response brief was filed on August 10, 2016. No oral argument was scheduled; the case was submitted on the briefs on November 7, 2016. On April 5, 2017, the Third Circuit issued a favorable decision, affirming the judgment below and rejecting Kwasny's statute of limitations and res judicata arguments. The Third Circuit remanded to the district court for further proceedings on whether the state court action should offset damages in this case. On remand, Kwasny filed a memorandum in support of an offset. The Secretary filed an opposition on November 16, 2017, arguing that an offset is not warranted because Kwasny cannot prove that he had paid any part of the state court judgment. Kwasny filed a reply on December 1, 2017. The Court ordered on December 11, 2017 that Kwasny can only offset the Secretary's judgment if he can provide proof of payment on the state court judgment.

Kwasny appealed again, and in the Secretary's appellate brief, the Secretary argued that the district court properly ordered an offset to the amount of its judgment only upon proof of payment towards the state court judgment. On September 27, 2018, the Third Circuit issued a favorable decision, affirming the district court's order and holding that the district court's order contains clear language that prevents the Secretary from obtaining a duplicative recovery without affecting the private plaintiff's right to recover damages through the state court default judgment. In addition, the Third Circuit agreed with the Secretary's position that Kwasny can avoid the risk of double payment by paying the state court judgment first and then seeking an offset in that amount, in accordance with the district court's order. Philadelphia Office and, on appeal, Plan Benefits Security Division

Acosta v. Mirjat (N.D. Ill)

On April 27, 2018, the Secretary filed a complaint alleging that Mubarak Mirjat and Maximum Rehabilitation Services Ltd. failed to remit and untimely remitted participant contributions and loan repayments to the Maximum and Mark Rehabilitation 401(k) Plan. The Secretary seeks to have almost $10,000 in losses restored to the Plan, to enjoin Mirjat and Maximum Rehab from serving as a fiduciary or service provider to any ERISA-covered plan, to require the fiduciaries to file Form 5500s and amend the plan's summary plan description to comply with ERISA, and to have the court appoint an independent fiduciary to issue distributions and terminate the Plan. After having denied the Secretary's motion for default judgment, the court on November 29, 2018, granted defendants' motion to set aside their default. On December 13, 2018, the court stayed discovery in order to permit the parties to continue negotiating a consent order to settle the entire case. Chicago Office

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

On March 31, 2016, the Secretary filed a complaint against Michael Lewis, trustee of the Acme Orthotics and Prosthetic Laboratories, Inc. Profit Sharing 401(k) Plan and Trust, and Monica Fox, the company's executive director, alleging that they failed to remit $39,391.17 in employee salary deferral contributions and loan repayment contributions to the plan from July 2010 through April 2012. The complaint also alleges that Lewis misappropriated $66,431.99 in plan

assets from April 2012 through March 2015. On November 15, 2016, the parties agreed on the principal terms of a consent order and judgment, including the amount of losses owed, the method of restoration of losses, and injunctive relief. On March 31, 2016, the Secretary also filed a complaint in the bankruptcy court, alleging that the debts Lewis owes to the plan are non-dischargeable. On August 8, 2016, the bankruptcy court entered a consent order and judgment, finding that the $115,167.99 debt Lewis owes to the plan is non-dischargeable. Lewis will repay all losses pursuant to his Chapter 13 plan, which the bankruptcy court previously approved. On December 19, 2017, the bankruptcy court entered an amended stipulated judgment regarding the non-dischargeability of Lewis' debt to the plan, increasing the amount owed to $128,535.75 as a result of additional documents received by a former participant. On December 21, 2017, the bankruptcy court also entered a stipulated order directing the Chapter 13 trustee to directly restore losses to former plan participants. On January 8, 2018, the court approved a consent order and judgment requiring Lewis to restore all of the $128,535.75 in losses owed to the Plan and permanently enjoining Lewis and Fox from acting as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

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

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

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

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

the 401(k) Plan were non-dischargeable. On August 30, 2017, the Secretary filed a civil action against Parham and Dominion Paving seeking a judgment against both for the amounts owed to the 401(k) Plan and to the ESOP based on the same alleged facts. Defendants filed an answer to the complaint on December 22, 2017. On April 4, 2018, the court entered a consent judgment ordering Parham to restore $92,632.19 to the 401(k) Plan, inclusive of missing employee contributions, loan repayments and lost opportunity costs to restore $85,107.06 to the ESOP. Parham will pay the costs associated with the employment of an independent fiduciary to administer the plan and the ESOP. Arlington Office

Acosta v. Patrick Concrete Constructors, Inc. (W.D.N.Y.)

On June 15, 2018, The Secretary filed a complaint against Patrick Constructors, Inc., Patrick Concrete Constructors, Inc. 401(k) Plan, and John Bell, alleging that, between January 2012 and January 2016, defendants had failed to make proper prevailing wage contributions to the plan, failed to investigate whether the debt owed to the plan could be collected, and failed to explore alternative methods to pay back money due to the plan. The Secretary's complaint sought to restore these amounts due. On August 16, 2018, the court entered a consent order and judgment, ordering defendants to repay $196,723.60 to the plan. New York Office

Secretary of Labor v. Puccio (D. Conn.)

On March 29, 2018, the Secretary filed a complaint against Kathryn Puccio, trustee of the Thomas P. Puccio Pension Plan, alleging that Puccio withdrew plan assets from various plan investment accounts for her own personal use and, thus has been unable to satisfy the $439,501.09 in pension benefit entitlements of two plan participants. Boston Office

Acosta v. Robinette (N.D. Ohio)

On July 9, 2018, the Secretary filed a complaint against Clifford Robinette, Marlene Robinette, Wendy Mowry, and Techniform Industries, Inc., alleging that the defendants, who were fiduciaries of the Techniform Industries, Inc. 401(k) Plan, failed to remit $95,015.51 in contributions and loan repayments to the plan and failed to timely remit additional amounts. The violations occurred from January 2013 to April 2017. The complaint seeks an order requiring that all losses be restored to the plan with interest, removing the defendants as fiduciaries, and enjoining them from being fiduciaries or service providers to any ERISA-covered plan. Cleveland Office

Acosta v. Schwab Contracting, Inc., Adam Schwab, and Jodi Schwab (E.D. Pa.)

On August 21, 2018, the Secretary filed a complaint against Schwab Contracting, Inc., Adam Schwab, the company's owner, and Jodi Schwab, the company's payroll officer, as defendant fiduciaries. The complaint alleges that the defendants systematically failed to remit those contributions to the Schwab Contracting SIMPLE IRA Plan between June 2015 and December 2016. The complaint seeks restoration of approximately $18,531 in losses to the plan and $1,706

in interest, as well as injunctive relief. After defendants failed to answer the complaint, a clerk's default was entered on December 6, 2018. Philadelphia Office

Acosta v. Sharpton Brunson and Company, P.A. (S.D. Fla.)

On August 13, 2018, the Secretary filed a complaint against Sharpton Brunson and Company, P.A. (plan administrator and a fiduciary to the plan), Darryl Sharpton, Brittany Sharpton, and Kevin Adderly, (also fiduciaries to the plan), alleging that from January 15, 2015, to March 31, 2015, the company, Darryl Sharpton, Brittany Sharpton, and Kevin Adderly untimely remitted $2945.15 in employee contributions to the plan. In addition, from March 15, 2016, they failed to forward $8,083.65 in participant funds to the plan. Now that the company is inactive, the fiduciaries did not ensure that participants could receive distributions from the plan or access their individual accounts, essentially abandoning the plan. The complaint seeks the removal of Darryl Sharpton, Brittany Sharpton, Kevin Adderly, and the company as fiduciaries; the appointment of an independent fiduciary to settle the plan; a permanent injunction preventing each defendant from serving as a fiduciary to ERISA-covered plans, and an injunction against defendants from committing future ERISA violations. It also seeks to hold Darryl Sharpton, Brittany Sharpton, and Kevin Adderly personally liable for the payment of unremitted employee contributions, for delayed remittance of other employee contributions, and for the plan's lost earnings resulting from these nonpayments and delays. See also Acosta v. Sharpton Brunson and Company, P.A., Section K. Orphan Plans. Atlanta Office

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

On April 29, 2016, the Secretary filed a complaint against Shirley Sherrod and Leroy Johnson, fiduciaries of the Shirley T. Sherrod, M.D., P.C. Target Pension Plan, alleging that, from September 2012 to the present, the fiduciaries failed to administer the plan, allocate distributions properly, and make distributions to the participants consistent with plan documents. On August 1, 2016, defendants filed their answer. On October 11, 2016, defendants filed a motion for a protective order, which they withdrew on November 7, 2016. On December 1, 2016, defendants filed a motion to amend their answer. On December 19, 2016, the Secretary opposed their motion to amend. On December 30, 2016, defendants filed their reply. On March 27, 2017, the court denied defendants' motion to amend their answer. On April 26, 2017, defendants' attorneys filed a motion to withdraw, which the court granted on May 2, 2017. On December 13, 2017, the court denied defendants motion seeking to limit the Secretary's rights to seek discovery for certain years. On December 21, 2017, defendants' second attorney's motion to withdraw. On September 10, 2018, the Secretary filed a memorandum opposing defendants' July 18, 2018 motion to compel. On September 17, 2018, the defendants filed their reply brief in support of their motion to compel. On December 27 and 28, 2018, the defendants' third set of attorneys filed motions to withdraw. Chicago Office

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

On January 17, 2017, the Secretary filed a complaint against Passages Hospice, LLC, and Sandor Szajkovics (fiduciaries to the company's Dental and Employee Benefits Plans), asserting that

they failed to remit employee salary reduction contributions, totaling more than $60,000, to the plans. The unremitted salary contributions were retained in the company's general corporate account and used to pay corporate expenses. The complaint seeks to have the $60,000, and related lost opportunity costs, restored to the plans and to enjoin Szajkovics from serving as a fiduciary or service provider to any ERISA-covered plan. The company recently filed for bankruptcy, and the Secretary filed a proof of claim in the bankruptcy. On September 22, 2017, Szajkovics filed his answer. On December 15, 2017, the Secretary filed a motion for default judgment against Passages Hospice. On December 29, 2017, the court granted the Secretary's motion and entered judgment against Passages Hospice. On August 30, 3018, the parties held a settlement conference and a settlement in principle was agreed to by the parties. Chicago Office

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

On July 27, 2017, the Secretary filed an adversary complaint against Frank Eric Talbert requesting the bankruptcy court to find the debt he owes the Proteus Group 401(k) Retirement Plan non-dischargeable. The complaint alleges that from January 4, 2012, through November 18, 2016, Talbert, as sole trustee of the plan, failed to remit to the plan in employee salary deferral repayments, contributions and loan repayments. On December 22, 2017, the Secretary filed a complaint in the district court against Talbert and the company based on the same allegations. The Secretary seeks the restoration of all losses, including lost opportunity costs, and an injunction permanently enjoining Talbert and Proteus from acting as fiduciaries or service providers to ERISA-covered plans. On April 23, 2018, the district court approved a consent order and judgment requiring Talbert and Proteus Group, LLC to pay $64,704.72 to the Plan and permanently enjoining them from acting as fiduciaries or service providers to ERISA-covered plans. Chicago Office

Acosta v. Vision Airlines, Inc. (D. Nev.)

On April 16, 2018, the Secretary filed a complaint alleging that Vision Airlines, Inc., William Acor, and Shelley Lynne, fiduciaries to the Vision Airlines, Inc. Health and Welfare Plan failed to forward withheld employee contributions and COBRA payments to the plan. In addition, the defendants failed to pay their share of health insurance premiums and failed to provide participants with timely notice that they were at risk of losing their insurance coverage. As a result, the health insurance was retroactively cancelled, leaving some employees with large, unpaid medical expenses. On October 25, 2018, a consent judgment was entered ordering defendants to pay $219,716 in unremitted employee contributions and medical expenses. The judgment also enjoins the defendants from engaging in any further violations of ERISA, permanently bars William Acor from serving as a fiduciary or service provider to any ERISA-covered plan, and bars Shelley Lynne from serving as a fiduciary or service provider for two years. See also Acosta v. Vision Airlines, F. Participants' Rights and Remedies. San Francisco Office

2. **Insurance Rebates**

None

3. **Miscellaneous**

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

On May 16, 2018, the Secretary filed a complaint against Christopher Bruegger, Kerkis LLC d/b/a Rebel Well Testing ("Rebel Well"), and the Rebel Well Testing 401(k) Plan. The complaint alleges that on July 9, 2014, Bruegger transferred $60,237.27 in plan assets belonging to eight plan participants to his personal bank account. The complaint seeks the restoration of all plan losses, including lost opportunity costs, Bruegger's and Rebel Well's compliance with ERISA, a permanent bar against Bruegger and Rebel Well serving as a fiduciary to an ERISA-covered plan, and the appointment of an independent fiduciary, at defendants' expense, to terminate the plan. On December 18, 2018, the clerk of the court entered default against the defendants for failure to answer or defend. Dallas Office

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

On December 27, 2017, the Secretary filed a complaint against Anthony C. Allen, Mark N. Cain, Brian A. Lutes, James M. Staron, Linda A. Wilson, and Norman E. Zelesky. Defendants are members of the Retirement Savings Plan Advisory Committee, the named fiduciary for four plans sponsored by Sypris Solutions, Inc. The complaint alleges that defendants failed to follow the plans' governing documents regarding use of forfeiture funds. The governing documents required the employer to use forfeiture funds to pay plan expenses prior to using such funds to reduce employer contributions. From 2012 until 2016, defendants caused the four plans to pay plan expenses from plan assets and used the forfeiture funds to reduce employer contributions. As a result of this practice, the employer benefited by reducing the amount of money it contributed to the funds, at the expense of plan participants whose account balances were reduced by paying expenses from plan assets instead of forfeitures. The complaint seeks losses to the plans as a result of this practice, plus lost opportunity costs. Discovery closes in February 2019. Chicago Office

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

On November 28, 2017, the Secretary filed a complaint against David M. Baum and David M. Baum, P.C., fiduciaries of the David M. Baum Profit-Sharing Plan. The complaint alleges that the fiduciaries failed to issue distributions to the plan participants, transferred plan assets to the fiduciaries and parties in interest, and failed to conduct annual valuations and maintain proper records. The complaint seeks an order removing the defendants as fiduciaries to the plan, appointing an independent fiduciary to terminate the plan and distribute the plan's assets to the participants and beneficiaries, and restoring to the plan the more than $30,000 in losses, including lost opportunity costs. On February 2, 2018, the court issued a fully favorable decision

denying the breaching fiduciaries' motion to join additional parties. A consent judgment and order was entered in March 2018, ordering David M. Baum and David M. Baum, P.C. to restore $59,707.77to the Plan; removing the defendants as fiduciaries to the plan; and permanently enjoining them from serving or acting as a fiduciary to any ERISA-covered plan. Chicago Office

Acosta v. Beverly (E.D. N.C.)

On May 2, 2018, the court signed and entered an amended consent judgment and order. The original consent judgment and order, which was signed and entered by Judge Britt on April 11, 2018, was missing one prohibited withdrawal made by plan fiduciary Thomas E. Beverly, Sr. and this payment was not included in the restitution amount sought. The parties were able to agree that this amount was still recoverable under the applicable statute of limitations and agreed to file an amended complaint adding this additional amount. Among other provisions, the fiduciary to the House of Lights, Inc. Pension Plan & Trust, Thomas E. Beverly, Sr., was ordered to pay $1,639,983.24 in restitution, including $331,121 in lost earnings. The order further enjoins Beverly from violating any provisions of ERISA in the future, removed him as fiduciary to the plan, and enjoins him from acting as a fiduciary to any ERISA-covered plan. The order further appointed AMI Benefit Plan Administrators as successor fiduciary to administer all of the plan assets including the restitution paid under this order, and ordered Beverly to pay the successor fiduciary's fees.

The complaint, which was simultaneously filed with the consent judgment and order, alleged that Beverly, in his role as plan administrator and trustee, acted with imprudence, disloyalty, and contrary to plan documents, and engaged in prohibited transactions in violation of ERISA. Between December 30, 1997 and January 31, 2014, Beverly issued 32 checks from the plan checking account to the company, third parties, and himself. These prohibited withdrawals totaled $2,169,157.42.

Due to the six-year statute of limitations, the Secretary was not able to recover the entire amount going back to December 1997. However, the parties did agree that the restitution could go beyond the six years due to fraud and/or concealment. Specifically, Beverly stopped preparing and submitting required financial reports to the Department after the plan year ending October 24, 2010. The Secretary was therefore able to seek restitution from 2010 to 2014, which totaled $1,308, 861.92 plus lost earnings of $331,121.32 through September 15, 2018, the date Beverly was required to make restitution per the order. The Secretary received confirmation from both AMI and Beverly's counsel that Beverly has made and submitted this restitution to AMI for distribution to plan participants and beneficiaries. Atlanta Office

Acosta v. Chemstation International, Inc. (S.D. Ohio)

On October 15, 2018, the Secretary filed a complaint against Chemstation International, Inc., alleging that the defendant, as the plan administrator of its self-funded health plan, administered a wellness program that failed to comply with the non-discrimination provisions of ERISA § 702 and its implementing regulations. The violations occurred during 2014 and 2015. On October 19, 2018, the court entered a consent judgment that orders the defendant to restore $59,189 in

discriminatory premiums and lost opportunity costs incurred by plan participants. The consent judgment also permanently enjoins the defendant from violating ERISA in the future. Cleveland Office

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

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

The defendants filed a notice of appeal on March 28, 2017 and filed their opening brief on November 7, 2017. After the defendants filed their notice of appeal, the Secretary and City National agreed to dismiss the individual board defendants from the lawsuit. Oral argument was held before the Ninth Circuit on January 11, 2019. A decision has not yet been issued. Los Angeles Office and, on appeal, Plan Benefits Security Division

Acosta v. Day-Mont Behavioral Health Care, Inc. (S.D. Ohio)

On July 18, 2018, the Secretary filed a complaint against Day-Mont Behavioral Health Care, Inc., Gayle Johnson, and Akil Sharif, fiduciaries of the Day-Mont West Tax-Deferred Annuity Plan and the Day-Mont Behavioral Health Care, Inc. Employee Benefit Plan. The complaint alleges that the defendants failed to remit $39,964.57 in contributions to the Day-Mont West Tax-Deferred Annuity Plan, failed to timely remit additional amounts to that plan, and made material misrepresentations and omissions to participants of the Day-Mont Behavioral Health Care Inc. Employee Benefit Plan, causing the participants to incur uncovered health claims. The violations occurred from January 2012 to August 2016. The complaint seeks an order requiring the defendants to restore all losses to both plans and the participants, removing the defendants as fiduciaries, and enjoining them from being fiduciaries or service providers to any ERISA-covered plan. See also Acosta v. Day-Mont Behavioral Health Care, Inc., Section B.1. Collection of Plan Contributions and Loan Repayments. Cleveland Office

Secretary of Labor v. Dorel Juvenile Group, Inc. (S.D. Ind.)

On September 28, 2018, the Secretary filed a complaint alleging Dorel Juvenile Group, Inc., as sponsor and administrator of the self-funded Dorel Juvenile Group, Inc. Welfare Benefit Plan, administered a tobacco surcharge wellness program that failed to comply with the non-discrimination provisions of ERISA § 702 and its implementing regulations. From 2013 through 2017, Dorel's tobacco surcharge wellness program charged tobacco users a monthly surcharge and did not include a reasonable alternative standard to quitting tobacco. As a result of collecting more than $180,000 in tobacco surcharges and using them for its own benefit by paying for claims and Plan administrative expenses, the complaint alleges Dorel violated ERISA §§ 404 and 406, in addition to ERISA § 702. On November 28, 2018, the district court approved a consent order and judgment requiring the Plan to pay restitution of $145,635 to 596 employees of the Dorel Juvenile Group, Inc.'s California, Indiana, and Massachusetts facilities who had paid a tobacco use surcharge as part of their medical insurance premium. The consent order and judgment also requires the company to revise its Tobacco Surcharge Wellness Program to comply with ERISA. Chicago Office

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

On December 31, 2014, the Secretary filed a complaint against Eye Centers of Tennessee, Raymond K. Mays, and Larry E. Patterson, alleging that the defendants improperly transferred over 90% of the assets of the company's 401(k) Profit Sharing Plan to real estate projects and used many of these projects for their own financial and personal benefit. The Secretary is seeking approximately $1.1 million in restitution, representing over $800,000 in transferred plan

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

On March 21, 2018, the court issued a decision finding defendants liable for restitution of the full amount of all prohibited transactions, losses from delinquent employer and employee contributions, prejudgment interest, and over $300,000 in unpaid rent to the plan from defendants' gym and tanning salon that they operated on plan property. In total, the court ordered defendants to reverse prohibited transactions and restore losses of $971,622.16 to the plan. On August 17, 2017, the court appointed Robert E. Moore, Jr., of Receivership Management, Inc., to serve as the successive fiduciary to the plan. Mr. Moore is responsible for collecting, marshalling, and administering all of the plan's assets, and to take such other steps as necessary to collect the judgment on behalf of the plan. The defendants made a payment of $250,000 towards the judgment on June 6, 2018. The defendants then sought to negotiate a payment plan and a waiver for the remainder of the judgment due to defendant-participant accounts. The Secretary issued post-judgement discovery, and the defendants agreed to make one lump sum payment of the judgment in exchange for the Secretary waiving the amount due to

defendant-participant accounts. On September 21, 2018, the court signed an amended judgment and order, requiring the defendants to complete payment of the $511,054.86 adjusted judgment amount by September 28, 2018. The Secretary received confirmation of payment on September 26, 2018. Atlanta Office

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

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

On March 21, 2018, the district court denied defendants' motion to strike an EBSA supervisor's declaration supporting losses the Department seeks in its motion for summary judgment. On May 16, 2018, the district court granted most of the Secretary's motion for summary judgment. The court found that the loans to the real estate companies were prohibited transactions, found that the loans and the real estate deal investment violated ERISA's duty of loyalty, and that Leiter's failure to monitor the plan's real estate investment violated the duty of prudence. The court ordered the Secretary to submit an accounting of the losses sought from the defendants and to supplement his Complaint to include allegations concerning a more recent 2017 loan. The court ordered the parties to attend a settlement conference on July 9, 2018, at which the parties arrived at a settlement in principle. On September 28 2018, the district court approved a consent order and judgment ordering Leiter to restore $99,164.29 in outstanding losses owed to the Plan, plus post judgment interest; permanently enjoining Leiter and the Leiter Group from violating ERISA; and ordering Leiter to either terminate the Plan or employ an independent fiduciary to administer the Plan. Chicago Office

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

On August 16, 2017, the Secretary filed a complaint alleging that Macy's Inc., Anthem, and Cigna failed to properly pay out-of-network claims for the Macy's, Inc. Welfare Benefits Plan and alleging that Macy's administered a discriminatory wellness program. The first violations concern Macy's, Anthem's, and Cigna's failure to provide benefits in accordance with the health plan documents, which stated that from the beginning of July 2009, through the end of June 2012, the plan would pay for out-of-network benefits based on the Usual and Customary Rate ("UCR") while the plan fiduciaries actually paid for these benefits on a formula tied to the Medicare Allowable Rate. These two methods, UCR and the Medicare Allowable Rate, use significantly different methodologies to determine rates. Based on the evidence, the Secretary alleges that plan participants paid more for out-of-network benefits received because the fiduciaries used the Medicare Allowable Rate instead of UCR. The Secretary alleges that Macy's, Anthem, and Cigna failed to follow the plan documents regarding out-of-network claims reimbursement. The second set of violations stems from Macy's tobacco surcharge wellness program, in which it charged tobacco users a monthly surcharge. The Secretary alleges that

Macy's violated ERISA's Part 7 non-discrimination provisions when it failed to provide a lawful reasonable alternative to the surcharge and required invalid affidavits from those who attempted to utilize alternative means of compliance from July 1, 2011, through June 30, 2013. The Secretary alleges further violations of Part 7 non-discrimination provisions from July 1, 2013 through the present, based on deficiencies in the documents used by Macy's to administer its tobacco surcharge wellness program. The Secretary's complaint seeks the appointment of an independent fiduciary to readjudicate all out-of-network claims that were processed by Cigna from July 1, 2009 through June 30, 2012, and processed by Anthem from July 1, 2011 through June 30, 2012, in order to restore losses to the affected participants, as well as restoration of all tobacco surcharges collected from July 1, 2011 through the present.

The parties mediated the case before the district court's magistrate judge in December 2017, February 2018, and April 2018, but were unable to reach a resolution. Each of the defendants moved to dismiss the Secretary's complaint on October 1, 2018, and the Secretary opposed the motions on October 31, 2018. Each of the defendants filed replies on November 21, 2018. As of December 31, 2018, the district court had not yet ruled on the motions to dismiss. Chicago Office

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

On July 28, 2017, the Secretary filed a complaint against Metropolitan Building Services, Inc.(MBS), Teresa Febres, Richard Thompson, and Marilyn Ward, seeking the disgorgement and return of $375,000 to the MBS Plan with a pro rata distribution to the affected employee participants. Febres and Thompson are co-owners of P&R Enterprises, which adopted an employee welfare plan under a collective bargaining agreement. Febres also owns an unrelated company, MBS, which adopted its own employee welfare benefit plan funded by employer contributions mandated under the Service Contract Act in connection with MBS's contract with the Federal Reserve. Marilyn Ward served as the trustee for both the P&R Plan and the MBS Plan. The complaint alleges that in 2012, Febres and Thompson attempted to find a way to fund sufficiently the P&R Plan to meet its benefit obligations without increasing P&R Enterprises' contributions. At that time, because MBS's contract with the Federal Reserve had ended, MBS remained idle without any employees and the MBS Plan retained approximately $375,000 in surplus assets that had not been distributed to participants. Febres and Thompson decided that Febres would transfer $375,000 of the MBS Plan's surplus to the P&R Plan to reduce the contributions required by P&R Enterprises. With the approval of Febres, in August 2012 Ward transferred the MBS plan's remaining assets to P&R Enterprises. On November 16, 2017, defendants filed an answer to the complaint. On June 29, 2018, the Secretary filed a consent judgment providing for restitution of $337,667.25 to the MBS Plan and payment of a $37,518.58 penalty. The consent judgment removed Febres as the fiduciary of the MBS Plan and entered a permanent fiduciary bar against Ward. Philadelphia Office

Secretary v. The Neuroscience Center LLC (N.D. Ill.)

On April 27, 2018, the Secretary filed a complaint alleging that Steven R. Devore Best, M.D., transferred plan assets to the plan fiduciary, used monies from the retirement plan to pay for the

operating expenses of companies he owned, including The Neuroscience Center LLC, as well as making improper loans from the plan to himself. On October 12, 2018, the court entered a Consent Order and Judgment against the breaching ERISA fiduciaries. Under a consent judgment, defendants agreed to restore the full amount of losses to the plan, $419,758, which are to be allocated to the participants' pension accounts, with the exception of Dr. Best's account. Defendants are also enjoined from any future violations of ERISA as well as from serving or acting as fiduciaries with respect to any ERISA-covered plan. Chicago Office.

Acosta v. Neurosurgical Solutions P.A. (M.D.N.C.)

On March 3, 2018, the Secretary filed a complaint against Dr. Mark A. Lyerly and his company, Neurosurgical Solutions, PA, alleging that they engaged in a number of prohibited and imprudent transactions while serving as fiduciaries of the Neurosurgical Solutions, PA Employees' 401(k) Profit Sharing Plan. In particular, the complaint contends that Dr. Lyerly and his company authorized the plan to loan over $500,000 to Dr. Lyerly personally, authorized an indirect loan to a company employee to purchase a car, failed to obtain collateral to safeguard loans to a third party despite loan documents authorizing the plan to take a secure interest in collateral, and failed to take any collection when a third party defaulted on repaying a plan loan. The Secretary seeks injunctive and equitable relief, including removal of Dr. Lyerly and his company as fiduciaries of the plan, rescission of prohibited transactions, and restitution of losses to the plan. Atlanta Office

Acosta v. Papa (E.D.N.Y.)

On November 6, 2018, the Secretary filed a complaint against Joseph Papa and Donna Papa (plan trustees) and the United MFRS Supplies Inc. Profit Sharing Plan. The complaint alleges that, between May 2014 and August 2017, Joseph and Donna Papa improperly transferred roughly $455,124.28 in plan assets to the sponsor company, United MFRS Supplies, Inc., to fund the company's business operations. The Secretary sought to have the plan's losses restored, Joseph and Donna Papa barred from serving as a fiduciary to any ERISA-covered plan, and appointment of an independent fiduciary. New York Office

Acosta v. Radow (D.N.J.)

On November 6, 2018, the Secretary filed a complaint against Howard Radow, the Eastern Terminals & Communications, Inc. Profit Sharing Plan, and the Eastern Terminals & Communications, Inc. Retirement Plan, alleging that Radow had had executed loans from the plans to himself and never repaid them. The complaint seeks to restore $53,664.04 plus prejudgment interest that remove Radow as a fiduciary, appoint an independent fiduciary, and permanently enjoin Radow from serving as a fiduciary or service provider to an ERISA-covered plan in the future. New York Office

Acosta v. Stephens (N.D. Ala.)

On May 14, 2018, the court entered a consent judgment between the Secretary and Brandi Box Stephens, a former benefits administrator for the Iron Workers Local Union No. 92 Welfare Plan and the Iron Workers Local Union No. 92 Pension Plan. Stephens is permanently enjoined from acting as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. Stephens altered her paychecks by increasing the amount she was due and by diverting additional payroll checks to herself by securing signatures of plan trustees and substituting her own name for the names of the rightful payees. In addition, Stephens entered false information on the paper stubs attached to the physical checks and made fraudulent entries in the plans' accounting records. Stephens was previously sentenced to serve five years of probation, six months of home confinement, and to make restitution in the amount of $45,896 as a result of a criminal investigation performed by the Secretary. Atlanta Office

Sierra Pacific Health Benefits Plan (unfiled)

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

Acosta v. Tate (S.D. W. Va.)

On October 20, 2017, the Secretary filed a complaint against Donald Tate and Fas Chek Supermarkets, alleging that Tate was a functional fiduciary of the company's Employee Medical Benefit Plan, who exercised discretionary authority and control over plan assets when he took over $36,000 in plan assets for non-plan expenses. The complaint further alleges that as plan administrator, Fas Chek took no steps to stop Tate and benefited from some of the funds Tate misappropriated. As a result of Tate and Fas Chek's actions, the plan was unable to pay $29,921.60 in claims to fifteen participants. The complaint seeks the appointment of an independent fiduciary to pay the outstanding medical claims and seek injunction against defendants to prevent them from serving as fiduciaries to any other ERISA-covered plan. Defendants failed to respond to the complaint and on March 23, 2018, the Secretary filed a motion for default judgment. The court granted the Secretary's motion on September 5, 2018, and ordered restoration of $34,743.99 and the appointment of an independent fiduciary to oversee the plan. Philadelphia Office

Acosta v. Trinkle (E.D. Ky)

On March 6, 2018, the Secretary filed a complaint against Acramold, Inc., Christine Trinkle, as legal guardian of Gail Trinkle, and the Estate of Dallas Trinkle, II, alleging that the defendants, who were fiduciaries of the plans, misappropriated $476,664 from the Acramold, Inc. Defined Benefit Plan, took an improper loan from the Acramold Engineering, Inc. 401(k) Profit Sharing Plan and failed to administer both plans. The violations occurred from November 2008 to the present. The complaint seeks an order requiring that fiduciaries restore all losses to the plans, removing them as fiduciaries, enjoining them from being fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to administer the plans. See also Acosta v. Trinkle, Section K. Orphan Plans. Cleveland Office

Acosta v. Worosilo (D.N.J.)

On February 8, 2018, the Secretary filed a complaint alleging that, in 2017, Sharon Worosilo had stopped administering the New Jersey Pain Management Institute Profit Sharing Plan and sought to transfer its assets to her personal account. On February 9, 2018, the Secretary filed motions for a temporary restraining order and for an order to show cause why a preliminary injunction should not be issued, removing Worosilo as the fiduciary and appointing an independent fiduciary. On February 9, 2018, the court granted the temporary restraining order, appointing the independent fiduciary, and scheduled a show cause hearing for February 16, 2018. On February 21, 2018, the court entered the preliminary injunction. After defendants failed to answer, the Secretary received clerk's entry of default on March 13, 2018. The Secretary's motion for default judgment was granted on May 7, 2018, confirming the appointment of the independent fiduciary and permanently enjoining Worosilo from serving as a fiduciary to any ERISA-covered plan. New York Office

C. **Financing the Union**

Acosta v. Fischer (N.D. Ohio)

On September 28, 2018, the Secretary filed a complaint against the Board of Trustees for, and the individual trustees of, the Toledo Electrical Joint Apprenticeship & Training Trust Fund. The complaint alleges that the fund's fiduciaries caused the fund to pay impermissible travel, entertainment, and other expenses and allowed a fund-owned tool to be used for impermissible purposes. The violations occurred from December 2011 to April 2016. The complaint seeks an order requiring that the fiduciaries restore all losses to the fund with interest and develop and implement policies or procedures to ensure that the fund does not enter into a prohibited transaction in the future. Cleveland Office

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

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

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

On March 27, 2018, the bankruptcy court ruled that Silva's debts, including the judgment entered against him in the ERISA action, were in excess of the $394,725 allowed a debtor under Chapter 13 Bankruptcy. Silva was permitted time to convert his bankruptcy filing to Chapter 11 but when he did not do so, his bankruptcy case was dismissed. On August 30, 2018, the court granted summary judgment in favor of AmeriGuard Security Services, Inc., the last remaining defendant in the case. In the complaint, the Secretary had alleged that AmeriGuard, the employer, breached fiduciary duties by failing, as required by the Taft-Hartley Act, to appoint and monitor a plan trustee for the ERISA-covered retirement and health plans. The court, however, rejected file argument that AmeriGuard was a fiduciary to the plans, finding instead that AmeriGuard did not have authority to appoint a trustee and did not exercise discretionary authority or control over the management of the plan or the disposition of its assets. Philadelphia Office

D. **Prudence of Investments**

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

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

On September 8, 2016, the Secretary filed a complaint against Bridgeport Health Care Center, Inc. ("BHCC") and Chaim Stern, fiduciaries of the company's Retirement Plan. The fiduciaries transferred an undetermined amount of plan assets both directly and indirectly to BHCC, Stern, and Em Kol Chai, a related entity. Between January 2011 and September 2011, the fiduciaries transferred approximately $2.6 million to Em Kol Chai without any contract or agreement related to the transfers. In October 2011, Em Kol Chai executed a Promissory Note for a $3.8 million loan from the plan without any collateral and at an interest rate of 3.25%. The promissory note also provided for a two-year extension, which Stern granted as trustee of the plan without any consideration, such as collateral or a higher interest rate. Between 2011 and 2013, the fiduciaries transferred over $3.6 million directly to Em Kol Chai. On March 23, 2017, the Secretary filed a motion for a preliminary injunction to remove Chaim Stern as fiduciary of the plan and appoint an independent fiduciary. The preliminary injunction motion is pending. On April 18, 2018, BHCC filed for Chapter 11 bankruptcy. Shortly thereafter, various creditors including the Secretary moved to appoint a Chapter 11 trustee. After several days of hearing, the bankruptcy court granted the motion to appoint a Chapter 11 trustee. Chaim Stern was removed from being trustee of the Retirement Plan. Approximately $4.1 million dollars has been returned to the Retirement Plan. Currently, the case is in mediation with the district court. See also Acosta v. Bridgeport Health Care Center, Inc. and Chaim Stern, Section B.1. Collection of Plan Contributions and Loan Repayments and In re Bridgeport Health Care Center, Inc., Section M. Bankruptcy. Boston Office

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

On January 26, 2015, the Secretary filed a complaint against Daniel Byrnes and Fort Orange Capital Management alleging that Byrnes invested approximately 96% of the assets of the company's Profit Sharing Plan Trust in a penny stock with a limited public market. Prior to investing the plan assets in the company, Byrnes and his family had personally owned shares of the company. As of September 2014, Byrnes was the company's president and interim chief financial officer. The Secretary seeks both monetary and injunctive relief, including the removal of Byrnes as plan trustee and an order permanently barring him from serving as a fiduciary or service provider to any ERISA-covered plan. The Secretary engaged a valuation expert to determine the loss to the plan. The Secretary filed a summary judgment motion on June 30, 2016. The individual defendant filed his response on September 7, 2016, and the Secretary replied on October 6, 2016. On July 28, 2017, the court appointed a replacement independent fiduciary to assume control of the plan. On August 10, 2017, the court issued a judgment against Byrnes for $310,000.00 in restitution. On December 12, 2018, the Secretary filed papers for a lien against Byrnes’s property in Albany County. New York Office

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

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

motion to exclude the testimony of the Secretary's expert, which the court denied on August 3, 2018. On September 25, 2018, the Secretary filed two motions for summary judgment, one against LaBow and WPN and the other against DiClemente, Halpin and the Retirement Committee. DiClemente, Halpin and the Retirement Committee, likewise, filed motions for summary judgment asserting that they met their fiduciary obligations to monitor the plans. Philadelphia Office

E. **Preemption**

None

F. **Participants' Rights and Remedies**

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

This case concerns the Fifth Circuit's long-standing interpretation of the Supreme Court's decision in Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101 (1989). In Firestone, the Supreme Court permitted courts to defer to a plan administrator's decision in a benefits case if the plan document grants the administrator the discretion to do so. Without such a grant of discretion, the court reviews the decision de novo. In Pierre v. Connecticut General, 932 F.2d 1552 (5th Cir. 1991), the Fifth Circuit interpreted Firestone in a way contrary to many other circuits. Under Pierre, even if the plan document does not grant discretion, a court must defer to the administrator's factual findings under an abuse of discretion standard. In this case, a panel of three judges in the Fifth Circuit urged the court to revisit Pierre and align the Circuit with the other Circuit courts. The plaintiff filed a petition for en banc rehearing, and the Fifth Circuit granted the en banc rehearing petition on July 10, 2017, and ordered supplemental briefs from the parties to be filed on August 8, 2017. The Secretary filed an amicus brief on August 15, 2017, urging the Fifth Circuit to abrogate Pierre, to align with the other circuits in reviewing plan decisions, including fact-finding, under a de novo standard when the plan does not confer discretion on the plan administrator. Oral argument, in which the Secretary participated, was held on September 19, 2017. On March 1, 2018, the Fifth Circuit did just that, holding that Firestone's default de novo standard of review applies to a plan administrator's factual findings as well as to its interpretation of plan terms. Plan Benefits Security Division

Hitchcock v. Cumberland University (6th Cir.)

This case concerns Cumberland University employees who alleged that the University failed to provide a promised employer matching contribution for their pension contributions and then retroactively amended the plan to eliminate the promised match. The employees contend that the plan amendment violated ERISA's anti-cutback protections. The district court dismissed the claim, concluding that administrative exhaustion was required for the anti-cutback claims and that these were just claims for benefits. The plaintiffs appealed. In support of the plaintiffs, the Secretary filed an amicus curiae brief on September 2, 2016. The Secretary argued that

administrative exhaustion is not required for anti-cutback claims, because these claims are statutory claims that concern the employer's promised funding for the plan. The Secretary also argued that the anti-cutback claims are not disguised benefit claims, because they alleged a fiduciary breach in administrating the plan pursuant to an illegal amendment. Oral argument, in which the Secretary participated, was held on January 25, 2017. On March 14, 2017, the Sixth Circuit issued a favorable opinion, concluding that the anti-cutback and fiduciary claims are statutory claims, not benefit claims. Accordingly, the Sixth Circuit reversed the dismissal, holding that the plaintiffs need not administratively exhaust their claims. Plan Benefits Security Division

Pearce v. Chrysler (6th Cir.)

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

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

This case concerns constitutional standing for plan participants who seek to represent their underfunded defined benefit pension plans. The plaintiffs sued the fiduciaries for failing to diversify their plan and for improperly taking fees for their services. They allege that their violations contributed to the plan's underfunding. After surviving a motion to dismiss, the plan sponsor contributed to the plan and erased the deficit in funding. The district court in Minnesota issued an order dismissing the case based on mootness, concluding that the decision by the defendants to fully fund their plan eliminated any injury. The plaintiffs appealed. The defendants' response brief argued an alternative ground for affirmance based on the plaintiffs' lack of constitutional standing when the lawsuit was filed and when the plan was underfunded. In response to this argument, the Secretary submitted a motion to file an amicus curiae brief out-

of-time on October 19, 2016 and attached the Secretary's proposed brief. The Secretary argued that plan participants sustained constitutional injury when the fiduciary acts contributed to their plan's underfunding and the plan's inability to deliver promised benefits. The defendants filed an opposition to the motion, and the Court deferred its decision to accept the brief to the merits panel that will hear the case. On October 12, 2017, the Eighth Circuit issued a decision that relied on its prior precedent to hold that plaintiffs in overfunded defined-benefit pension plans have no right to sue under ERISA sections 502(a)(2) and (a)(3). By relying on this basis for its decision, the Court did not directly opine on the constitutional issue addressed in the Secretary's amicus brief.

Plaintiffs filed a petition for writ of certiorari, seeking review of the dismissal of their section 502(a)(2) and (a)(3) claims. On October 1, 2018, the Supreme Court invited the Government to file a brief on whether it should grant certiorari. Plan Benefits Security Division

Acosta v. Vision Airlines, Inc. (D. Nev.)

On April 16, 2018, the Secretary filed a complaint alleging that Vision Airlines, Inc., William Acor, and Shelley Lynne, fiduciaries to the Vision Airlines, Inc. Health and Welfare Plan, failed to forward withheld employee contributions and COBRA payments to the plan. In addition, the defendants failed to pay their share of health insurance premiums and failed to provide participants with timely notice that they were at risk of losing their insurance coverage. As a result, the health insurance was retroactively cancelled, leaving some employees with large, unpaid medical expenses. On October 25, 2018, a consent judgment was entered ordering defendants to pay $219,716 for unremitted employee contributions and medical expenses. The judgment also enjoins the defendants from engaging in any further violations of ERISA, permanently bars William Acor from serving as a fiduciary or service provider to any ERISA-covered plan, and similarly bars Shelley Lynne from serving as a fiduciary or service provider for two years. See also Acosta v. Vision Airlines, B.1. Collection of Plan Contributions and Loan Repayments. San Francisco Office

G. **Section 510**

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

On September 20, 2017, the Secretary filed a complaint against FCE Benefits Administrators, Inc. for unlawfully retaliating against an employee and two former employees in connection with the Department's ongoing ERISA lawsuit in Chimes District of Columbia, Inc. et al. in the District of Maryland. FCE is the third party administrator of the employee health and welfare plan at issue in that litigation and is also a named defendant in the lawsuit. The complaint alleges that approximately one month after the Secretary filed the Chimes lawsuit, FCE fired a longtime employee because it believed that she provided information to the Department. In addition, the complaint alleges that FCE sued that employee in Texas state court, alleging that she violated the confidentiality and non-compete clauses of her employment agreement. In the Texas litigation, FCE issued subpoenas to two former employees that required them to produce

their computers and cell phones for imaging and testify at depositions. Both of those former employees are named witnesses in the Chimes litigation. The complaint further alleges that at the depositions of the fired employee and one of the former employees, FCE questioned the employee witnesses extensively about whether they spoke with the Department and other law enforcement agencies. See Perez v. Chimes District of Columbia, Inc., Section J. Financial Institution and Service Provider Cases. On September 11, 2017, the Secretary filed a response in opposition to a motion to dismiss filed by FCE. The court denied FCE's motion to dismiss the claim that it unlawfully retaliated against the informant and specifically rejected FCE's claims that the Department's lawsuit was an unlawful attempt to regulate discovery in the Texas state court action. The court dismissed the retaliation claim arising from FCE's state lawsuit, without prejudice. To proceed with a claim for retaliation arising from the Texas state court action, the court held that the Department must plausibly allege that FCE's conduct in the Texas state court action was "a sham." Discovery is ongoing in this case. Philadelphia Office

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

On May 21, 2014, the Secretary filed a retaliation complaint under section 510 of ERISA, alleging that the trustees and administrator of several Southern California Cement Masons Union pension and welfare funds terminated a fund employee, Cheryle Robbins, because she cooperated with a Department investigator who was investigating Scott Brain, president of the local and one of the funds' trustees and also because she participated in a complaint to the union's international leadership, alleging that Brain was engaging in several schemes resulting in underpayment to the funds and which, if true, would violate ERISA. On June 30, 2014, the Secretary amended the complaint to name Melissa Cook and her law firm, Melissa W. Cook & Associates, as defendants. Cook was counsel to the trust funds and was also Brain's romantic partner from at least May 2013 through at least March 2014, although she never disclosed this conflict to the other trustees. The complaint alleges that Cook stepped outside her role as counsel to effect the removal of Robbins in an effort to protect Brain and that the Cook defendants knowingly participated in ERISA violations. On August 26, 2014, the Cook defendants filed a motion to dismiss. On January 30, 2015, the court denied the motion, adopting the Secretary's position that: (1) there is no statute of limitations applicable to claims brought by the Secretary under ERISA section 510; (2) the Secretary's demand for back pay is not futile; (3) informal, internal complaints are protected under ERISA section 510; (4) the decision to outsource the work of the whistleblower's department was an adverse action; (5) the attorney to the trust funds may be held liable for knowingly participating in the trustees' violations of ERISA; (6) ERISA section 510 applies to "any person," including an attorney to the trust funds; and (7) California law does not immunize an attorney from liability under ERISA sections 404 and 510. The court also permitted the Secretary to file a second amended complaint, which varies from the first in three ways. First, relief is sought from the individual trustees who voted to outsource Robbins' department. Second, it added one additional trustee who participated in such vote. Third, relief is sought from certain defendants for the terminations of Louise Bansmer and Cory Rice (mother and son), who allegedly were terminated by the trust funds' administrator in violation of section 510 for their participation in making internal ERISA-protected complaints and refusing requests by Brain to change contribution rates and because she continued to speak to Robbins while Robbins was on administrative leave. On

August 25, 2015, the court entered a partial consent judgment resolving the case against all defendants except two trustees, including Brain, and Cook and her firm. It provides for $630,000 in back pay and other damages to the three whistleblowers as well as critical injunctive relief, requiring the trustee defendants to make a statement that Robbins's termination was unlawful and calling for Brain's resignation as trustee. On August 6, 2015, the court ruled that the Secretary's communications with the whistleblowers are protected by the common interest doctrine. This order was the result of the Secretary's emergency motion for protective order filed after the Secretary's attorneys were forced to suspend the deposition of a whistleblower because defense counsel refused to stop asking questions about the whistleblower's communications with the Department. On December 14, 2015, the Secretary presented oral argument against defendants' motions for summary judgment. The two remaining trustee defendants sought summary judgment primarily on grounds that they could not be liable for actions taken by votes of the trust funds' full board of trustees or third-party administrator. The Secretary argued that material evidence disputes these asserted facts, showing the trustee defendants' participation in certain votes and influence on other trustees and the funds' administrator in connection with all of the relevant retaliatory votes and actions. The Secretary further contended that Cook conspired with one of the remaining trustee defendants to retaliate, arguing that the co-conspirator exception to hearsay, FRE 801(d)(2)(E), allows the court to impute to her trustee co-conspirator the funds' attorney's statements planning retaliation against the whistleblowers. On January 8, 2016, the court denied Cook's motion and denied Brain and Briceno's motions in part. The court granted summary judgment to Brain and Briceno with regard to their liability under section 510 for the third-party administrator's failure to rehire Robbins after her department was dissolved. The Secretary moved for reconsideration of the court's ruling with regard to Brain. As discussed below, the Secretary's motion was granted following trial. Trial took place on May 17-24, 2016, after which the court issued an order on July 25, 2016, finding that Brain and Cook violated section 510 by retaliating against Robbins for her participation in a DOL investigation and in an internal complaint about Brain and retaliating against Rice for his participation in the internal complaint about Brain The decision established that section 510 violations warrant fiduciary and service provider bars; that such violations constitute breaches of fiduciary duties; that section 510 protects complaints to internal personnel; that the "cat's paw" theory of liability applies and can reach individual defendants; and that attorneys are not immune from liability under ERISA's anti-retaliation provision. In finding Brain liable for retaliation against Robbins, the court granted the Secretary's motion for reconsideration of the court's grant of summary judgment to Brain. In September of 2016, Brain filed a motion to stay the injunction pending appeal. The court denied his motion, but granted a stay of 30 days to permit Brain to seek a stay from the Ninth Circuit. On October 4, 2016, Brain filed a motion for reconsideration of his motion for stay, complaining that the court's judgment was harming his reputation and hurting his chances of reelection as Business Manager of his union. The Ninth Circuit denied that motion as well. On October 14, 2016, the Secretary obtained a final order and permanent injunction memorializing the relief that the Secretary won in July. The injunction removed Brain as trustee to the funds and barred him from serving in any fiduciary capacity, including but not limited to serving as a trustee, to the plans. Brain was also required to give notice of the injunction to all fund participants and beneficiaries and prior to accepting any position as fiduciary to any other ERISA-covered plans. The order also enjoined Cook and her law firm from providing services to the funds, required them to disgorge all of the fees received in

connection with the retaliation, and required them to provide notice of the injunction to all owners, officers, directors, affiliates, subsidiaries, employees, and agents of the firm. On October 14, 2016, and October 17, 2016, Brain and Cook filed separate notices of appeal from the district court's decision. On October 17, 2016, Brain filed a motion for stay in the Ninth Circuit. On October 26, 2016, the Secretary filed a response arguing against the stay. The Ninth Circuit denied the stay request on November 8, 2016. Brain filed his opening brief on March 29, 2017 and Cook filed her opening brief on March 30, 2017. The Secretary filed a response brief on May 30, 2017. Brain filed a reply brief on July 10, 2017 and Cook filed a reply brief on July 11, 2017. The Ninth Circuit heard oral argument on April 10, 2018.

On December 4, 2018, the Ninth Circuit issued a partially favorable decision in the appeal, unanimously affirming the district court's ruling that the defendants violated ERISA's anti-retaliation provision, section 510, but reversing by a 2-1 vote the district court's ruling that Brain breached his ERISA fiduciary duties imposed by section 404. The Ninth Circuit made several favorable rulings in affirming the district court's holding that the defendants violated section 510. First, it affirmed that Robbins's participation in the Department of Labor investigation and Robbins's efforts to report Brain to international union leadership constituted protected activity. Second, the Ninth Circuit affirmed the district court's finding that while Brain and Cook were not the ultimate decision-makers, they were still liable for setting the retaliation into motion. The Ninth Circuit affirmed the district court's order requiring Cook and her law firm to disgorge fees that they had received in connection with their section 510 violation. By a 2-1 vote, the Ninth Circuit reversed the district court's finding that Brain also had violated his fiduciary duties under section 404. The panel majority held that the district court did not address whether Brain was acting in his fiduciary capacity, and rejected the Secretary's argument that Brain's actions to retaliate against Robbins were taken in the course of plan management and administration. Based on this ruling, the panel majority also reversed the district court's holding that Cook and her law firm knowingly participated in Brain's fiduciary breach, and the permanent injunction against the defendants. The remaining panel member dissented, finding that Brain was clearly acting as fiduciary and stating that actions to cover up trust fund mismanagement should not be considered business, rather than fiduciary decisions. Los Angeles Office and, on appeal, Plan Benefits Security Division

H. **Participant Loans**

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

None

I. **MEWAs**

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

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

Between January and May 2018, all objections to the Cease and Desist Order were resolved by individual agreements before the Administrative Law Judge. On March 2 and 10, the AEU defendants and Black Wolf filed answers to the complaint. On September 12, 2018, AEU defendants filed an amended answer and third-party claims against Black Wolf and new third-parties to the action. On October 9, 2018, the Secretary filed an amended complaint and added new defendants: James D'Iorio, Steven Goldberg, Charles LaMantia, Rod Maynor, Stephen Satler, Veritas Benefits, LLC, Veritas PEO, LLC, Wilson Benefit Services, LLC, WBS, LLC, and Donald R. Wilson. On November 14, 2018, a third-party defendant, Tall Tree, LLC filed a motion to dismiss AEU's allegations against it. On December 20, 2018, Satler, Goldberg, AEU defendants filed an Answer to the Secretary's amended complaint. On December 20, 2018, D'Iorio filed an Answer to the Secretary's amended complaint. Chicago Office

Perez v. Doyle (D.N.J. and 3rd Cir.)

On April 28, 2005, the Secretary filed a complaint involving the Professional Industrial & Trade Workers Union (PITWU) Health and Welfare Fund, a MEWA. The Secretary alleged that James Doyle, who marketed the plan's health benefits, diverted employer contributions paid to the plan's trust for non-plan purposes, including for his own commission and fees, and that Cynthia Holloway, as a trustee, failed to institute any proper administration of funds despite clear indications of diversion. The fund collapsed with more than $7 million of unpaid health claims. Following a bench trial in 2009, one defendant, Mark Maccariella, a co-trustee, entered into a consent order in which he agreed to be enjoined from serving as a fiduciary or service provider for any ERISA-covered plan and to restore more than $195,000 to the plan. On June 30, 2010, the district court granted judgment in favor of Doyle and Holloway, finding that the Secretary failed to conclusively establish that the plan was underfunded or that the marketing fees were unreasonable. The Secretary filed an appeal on August 27, 2010, with an opening brief filed on December 13, 2010 and a reply on March 4, 2011. The Secretary argued that the district court erred in holding that Holloway, as trustee, did not breach her duties when the evidence showed that she failed to prudently manage the trust fund and did nothing to prevent the diversion of its assets, and that there was substantial evidence, which the district court failed to address, that Doyle was a fiduciary in that he controlled plan assets and that the fees he forwarded from plan assets were unreasonable. The Third Circuit heard oral argument on April 27, 2011. The Secretary received a favorable decision on March 27, 2011, vacating the decision and remanding for further proceedings. On January 8, 2015, the district court issued a post-remand decision against the defendants, holding Holloway and Doyle liable for diverting over $4.6 million and $3.8 million of plan assets, respectively, in the form of bogus union dues and unnecessary sales commissions. The defendants appealed once more to the Third Circuit. The Secretary filed a response on September 3, 2015 arguing that the paid employer contributions were plan assets, that Doyle is a functional fiduciary based on his control and discretion over the billing and receipt of the paid employer contributions, and that Holloway and Doyle had both breached multiple fiduciary duties in failing to protect these plan assets from diversion. Oral argument, in which the Secretary participated, was held on January 21, 2016. On August 18, 2016, the Third Circuit issued a mostly favorable decision upholding the functional fiduciary status of the appealing defendants. The Third Circuit rejected Doyle's arguments and affirmed in full the lower court's judgment against Doyle. The court also rejected Holloway's arguments that the contributions were not plan assets, but remanded to have the district court make findings as to when Holloway's liability for plan losses arose. The Third Circuit found that Holloway could not simply be held liable for losses starting on the date of her installation as a fiduciary; liability could only attach when sufficient "red flags" (the Third Circuit's phrase) put her on notice. The district court judge issued an "Order on Mandate" re-entering the case on the district court docket on November 3, 2016. The district court assigned the case to a Magistrate Judge for settlement discussions. Pre-trial conferences were held on March 14, 2018, and September 11, 2018. On November 5, 2018, the magistrate judge permitted the Secretary to conduct additional written discovery and take depositions of additional witnesses with respect to Holloway's affirmative defense and set this matter for trial beginning on March 11, 2019. New York Office and, on appeal, Plan Benefits Security Division

Secretary v. Koresko (E.D. Pa. and 3rd Cir.)

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

brief on October 18, 2017. Koresko filed an Emergency Motion for Immediate Release and Vacatur of Orders on November 15, 2017. The Secretary filed a response on November 20, 2017. The Third Circuit denied the motion as moot on November 27, 2017. On December 5, 2017, Koresko filed a new motion, again, urging the Court to release him and the Secretary filed a similar response. On December 19, 2017, the motion was denied. On December 15, 2017, the district court held a hearing with Koresko, asking him to sign a power of attorney, which might have released him from contempt of court. Koresko refused to sign.

Koresko filed two appeals, on January 19, 2018 and February 9, 2018, with the Third Circuit, while awaiting a decision on the contempt and garnishment orders, regarding various district court proceedings and demanding release. The Secretary responded to each appeal, arguing that the court lacked jurisdiction and that Koresko lacked standing to appeal. The Third Circuit denied both appeals for a lack of appellate jurisdiction and also denied his petitions for rehearing. On March 23, 2018, the Third Circuit issued a decision affirming both the contempt and garnishment orders, rejecting Koresko's arguments that he had been wrongfully imprisoned and holding the garnishment was appropriate. On June 12, 2018, the Court denied Koresko's petition for a rehearing, and a mandate was issued on June 20, 2018. Koresko filed one additional appeal with the Third Circuit on June 20, 2018, but it was dismissed for failure to pay the filing fee for the notice of appeal. Subsequently, Koresko was released from federal custody following an order issued by the district court on June 22, 2018, vacating the contempt order once Koresko executed a power of attorney related to the real estate in Nevis.

After receiving extensions to file, on November 1, 2018, Koresko filed a petition for a writ of certiorari with the United States Supreme Court regarding the contempt order, and on November 9, 2018, Koresko filed a petition for a writ of certiorari with the United States Supreme Court regarding the garnishment order. The Government waived a response to both petitions and the Supreme Court denied both petitions. Philadelphia Office and, on appeal. Plan Benefits Security Division

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

On June 7, 2017, the Secretary filed a complaint against National Allied Workers Union Local 831 Insurance Trust Fund and trustees Robert Fiascone, Tonina Cozzo, Patrick Adams, and Vivienne Bailey in connection with the fund, which is a MEWA. Specifically, the complaint alleges that from 2009 through at least 2015, the trustees paid unreasonable fees, including stop-loss premium commissions, to Aegis Administrative Services, Inc. and Noble Consulting Group. The complaint seeks approximately $3.7 million in losses and injunctive relief, including the removal of the trustees, the appointment of an independent fiduciary to administer the fund, internal controls designed to ensure the proper selection and to monitor the fund's service providers, and enhanced reporting requirements. On November 29, 2017, the parties participated in a settlement conference before a magistrate judge. On December 11, 2017, the parties agreed to a settlement in principle. On June 8, 2018, the district court approved a consent order and judgment requiring the defendants to restore $1,113,636 in losses to the Fund. The district court also appointed an independent fiduciary to ensure the fund functions in accordance with ERISA and for the sole benefit of its participants and beneficiaries. Chicago Office

J. **Financial Institution and Service Provider Cases**

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

On October 30, 2015, the Secretary filed a complaint against Chimes District of Columbia, Inc., FCE Benefits Administrators, Inc. ("FCE"), Benefits Consulting Group ("BCG"), and other related defendants alleging that the Chimes D.C. Health & Welfare Plan paid millions of dollars in excessive fees for plan services and that FCE and BCG, the plan's service providers, caused the plan to engage in a number of transactions for their benefit or knowingly participated in such transactions. Among other things, the complaint alleges that Chimes DC officers Albert Bussone and Martin Lampner solicited FCE and BCG to make donations to the Chimes Foundation, the fundraising entity of Chimes International and its other subsidiaries (including Chimes DC). In 2009 and thereafter, FCE and BCG jointly pledged at least $330,000 to the Chimes Foundation and did so in connection with their continued retention as plan service providers. Between 2009 and 2014, FCE paid at least $400,000, and BCG paid at least $282,500, to the Chimes Foundation in connection with their engagement as plan service providers. The complaint also alleges that the Chimes defendants failed to diligently seek alternative service providers for the plan, that FCE improperly used its authority over the plan to cause other service providers to make payments to FCE, and that the claims administration and other services FCE provided to the plan were inadequate. In 2016, the court denied motions to dismiss filed by all of the defendants.

Following the close of discovery, cross motions for summary judgment motions were filed by the Secretary and all defendants. A hearing regarding the motions was held on November 13, 2018. On November 21, 2018, the court granted the defendants' motion for partial summary judgment based on the three-year statute of limitations under 29 U.S.C. § 1113(2), finding that the Secretary had actual knowledge of the "essential facts" relating to the prohibited transactions and fiduciary breaches alleged in the Secretary's complaint. On November 29, 2018, the court granted summary judgment for Benefits Consulting Group and Jeffrey Ramsey. The Secretary alleged that BCG and Ramsey, as service providers and parties-in-interest to the Chimes plan, were knowing participants in the Chimes defendants' fiduciary breaches and prohibited transactions. The court found that there was no evidence that the BCG defendants had knowledge that the fees they received were excessive. Consistent with prior holdings, the court also found against the Secretary on BCG's counterclaim alleging a violation of the Right to Financial Privacy Act, based on the Secretary's inadvertent failure to notify Ramsey of an administrative subpoena to a third party. On December 10, 2018, the court granted the summary judgment motions of Lampner and Bussone, finding that neither functioned as a fiduciary with respect to the plan. The court also denied the cross motions for summary judgment filed by the Secretary and Chimes DC and Chimes International. On December 13, 2018, the court denied both the Secretary's motion for partial summary judgment against FCE (the plan's third-party administrator) and FCE's motion for partial summary judgment against the Secretary. See Acosta v. FCE Benefits Administrators, Inc., Section G. Section 510. Philadelphia Office

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

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

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

On May 15, 2012, the Secretary filed a complaint along with a motion for a temporary restraining order and a preliminary injunction, seeking removal of Matthew D. Hutcheson and his firm, Hutcheson Walker Advisors LLC, and the appointment of an independent fiduciary to take control of plan assets currently under the control of an entity called the Retirement Security Plan & Trust (RSPT). On May 16, 2012, the court entered the temporary restraining order. On June 13, 2012, the court issued a preliminary injunction, granting the Secretary's request to continue the appointment of the independent fiduciary over RSPT and the removal of Hutcheson

through the pendency of the litigation. Hutcheson was criminally convicted on April 15, 2013. The Ninth Circuit affirmed his conviction on May 15, 2015 and denied rehearing on July 9, 2015. On March 29, 2016, the Secretary dismissed the suit as to two now-defunct corporate defendants, Hutcheson Walker Advisors LLC and Green Valley Holdings LLC. On March 29, 2016, the Secretary filed a motion for summary judgment and permanent injunction against Hutcheson, seeking to have him removed from his role at RSPT and permanently barring him from acting as a fiduciary for any ERISA-covered plan. Hutcheson filed his opposition to the summary judgment motion on June 29, 2016. On July 11, 2016, Hutcheson filed a motion for declaratory judgment, seeking, among other things, to have the Secretary's claims against him declared to be invalid; the Secretary filed a response on August 4, 2016. On July 22, 2016, Hutcheson filed a motion requesting an evidentiary hearing on whether he violated ERISA; the Secretary filed an opposition on August 15, 2016. On December 16, 2016, the court denied Hutcheson's motion for declaratory relief, granted the Secretary's summary judgment motion, and entered a final judgment against Hutcheson in favor of the Secretary. The independent fiduciary continues to pursue claims on behalf of the plan and has made monthly activity and expense reports to the Secretary and the district court. On January 20, 2017, defendant Hutcheson filed a notice of appeal of the summary judgment decision. On appeal, Hutcheson's opening brief was filed on July 21, 2017. The Secretary's answering brief on the merits was filed on August 17, 2017. On appeal, Hutcheson challenged the summary judgment on various grounds, including double jeopardy and claim preclusion. After full briefing by the parties, the Ninth Circuit affirmed summary judgment for the Secretary on January 22, 2018. On February 5, 2018, Mr. Hutcheson filed a petition for en banc rehearing by the Ninth Circuit. On May 23, 2018, the Ninth Circuit denied the petition for rehearing. The independent fiduciary continues to pursue claims on behalf of the plan and continues to make monthly activity and expense reports to the Secretary and the district court. Plan Benefits Security Division

Peterson v. UnitedHealthCare (8th Cir.)

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

arguing that the practice violates ERISA's fiduciary duty of loyalty and implements prohibited transactions. The Secretary agreed with the district court that the practice creates an impermissible conflict of interest whereby United Healthcare benefits itself through the offsets and hurts participants by putting them at financial risk for paying costs covered by their plans. UnitedHealthcare filed a reply brief on October 13, 2017. The Eighth Circuit held oral arguments on May 15, 2018. Plan Benefits Security Division

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

On March 30, 2017, the Secretary filed a complaint against Wedbush Securities, Inc., Edward Wedbush and Gary Wedbush, alleging that the defendants, who were all plan fiduciaries, caused or permitted the assets of two retirement plans to be used to pay brokerage fees and commissions to the company and management fees and performance fees to two party in interest hedge funds. It also alleges that the fiduciaries failed to honor participant distribution requests for investments in Wedbush stock. Defendants filed a motion to dismiss based on statute of limitations grounds that the court denied on August 15, 2017. At the August 21, 2017 scheduling conference, the court set a trial date of January 16, 2018. Defendants filed their answer on August 31, 2017. On December 4, 2017, the court granted a two week continuance of the trial date until February 6, 2018, to allow the parties to negotiate a settlement. The parties negotiated a settlement and, on January 12, 2018, filed a stipulation with the Court seeking entry of an order approving the parties' settlement agreement and retaining jurisdiction for purposes of enforcing the terms of the agreement. The settlement agreement requires the payment of $2.3 million, including a reduced 502(l) penalty, to restore participant losses in the two plans and requires the plan fiduciaries to discontinue the practices that violate ERISA. The Court entered the Order approving the settlement on January 18, 2018. Plan Benefits Security Division

K. **Orphan Plans**

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

On May 7, 2015 the Secretary filed this case involving an abandoned plan with over $128,000 in assets. In addition to an independent fiduciary, the Secretary's complaint seeks payment of the independent fiduciary's costs by the previous trustee, whom the Secretary alleges abandoned the plan for a prolonged period of time to the detriment of participants. On July 7, 2015, the defendants filed a motion seeking an extension of 30 days to file an answer and a stay of this action in favor the plan sponsor's pending Chapter 7 corporate bankruptcy liquidation case. On July 16, 2015, the Secretary filed an opposition to these applications in view of (1) the prolonged efforts by the Secretary to get voluntary plan asset distribution (2) the police powers exception to bankruptcy stays and (3) clear statutory and case authority exempting plans and plan assets from the debtor's estate. The defendants filed a response on August 7, 2015, alleging abuse of process and automatic stay violations. The Secretary filed a reply, with leave of the court, on August 14, 2015. That same day, the court denied the defendants' applications for dismissal, stay, and sanctions, and ordered an answer to be filed on August 17, 2015. The defendants filed a motion to dismiss for lack of subject matter jurisdiction; the Secretary filed the opposition on August 21,

2015. On March 1, 2016, the court issued a decision and order denying the defendants' motion to dismiss and indicating its expectation that the Secretary will file a motion for summary judgment. That same day, the defendant filed an interlocutory appeal to the First Circuit. Because this is not a final, appealable order, the First Circuit issued an order to the defendants to show cause as to why the court has appellate jurisdiction over this interlocutory appeal. The defendants filed a brief in response. On December 19, 2016, the First Circuit dismissed the appeal for lack of appellate jurisdiction and ordered a remand to the district court. The Secretary then filed a motion for summary judgment with the district court on April 4, 2017. On May 26, 2017, the district court granted the Secretary's motion for summary judgment, appointing an independent fiduciary and making the individual liable for the independent fiduciary's costs. Defendants filed a motion to reconsider, the Secretary filed an opposition, and the court summarily denied it.

Defendants appealed to the First Circuit on June 14, 2017. On November 7, 2017, the Secretary participated in a mediation conference conducted by the First Circuit's mediation program. On January 12, 2018, as a result of the mediation, the parties entered into a stipulation whereby the Secretary agreed to permit the plan sponsor’s bankruptcy estate to pay the independent fiduciary’s costs under certain conditions. The stipulation also provided that the previous trustee remains liable for the independent fiduciary’s costs until the plan is terminated and the independent fiduciary is paid in full, and that the parties would file a joint motion to dismiss the appeal. On January 29, 2018, the parties filed a joint motion to dismiss the First Circuit appeal, and on January 30, 2018, the appeal was dismissed. New York Office and, on appeal, Plan Benefits Security Division

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

On July 7, 2017, the Secretary filed a complaint against Cambridge Management Companies, LLC, administrator of the Cambridge Retirement Communities 401(k) Plan. The Secretary alleges that Cambridge failed to take responsibility for the operation and administration of the plan and its assets, which totaled $181,168.98, and by failing to appoint anyone to assume that responsibility following the owner's death in 2012. Since the company's cessation of business, which occurred prior to the owner's death in February 2012, plan participants have not been able to obtain distributions of their retirement plan assets, which violates the terms of the plan. On August 1, 2017, the court granted the Secretary's motion to permit service by publication. On November 21, 2017, after service was effectuated by publication, the clerk of the court entered a default. On January 19, 2018, the Secretary filed a motion for default judgment. Following a hearing, the court granted the motion and appointed an independent fiduciary to distribute the plan assets. Philadelphia Office

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

On October 31, 2017, the Secretary filed a complaint against Andrew Carrington (company CEO and plan fiduciary) and Cambridge Technologies Group, Inc., (plan administrator and plan sponsor), alleging that Carrington and the company (defunct since approximately 2004) failed to monitor the on-going operations of the plan, resulting in participants being unable to access the

assets in their plan accounts. The complaint seeks removal of Carrington and the company as fiduciaries and the appointment of an independent fiduciary to administer the plan to effectuate its termination and the distribution of plan assets to the participants and beneficiaries. As of August 23, 2016, the plan assets were $535,790.60 and twenty-four participants were awaiting distributions. On May 22, 2018, the court entered default judgment against the defendants. The court removed the plan fiduciaries and appointed an independent fiduciary to administer the plan, to effectuate its termination, and to distribute the plan assets to the participants. Philadelphia Office

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

On October 26, 2017, the Secretary filed a complaint against C M S H Electrical seeking to appoint an independent fiduciary to receive assets owing to the profit sharing plan and to terminate the plan. The owner and officer of C M S H was previously convicted under state law for embezzling all the plan's assets and is barred from serving as a fiduciary. The plan was bonded by Travelers' Insurance. The Department submitted a proof of claim on June 17, 2017 and requested that the bond proceeds be issued to the plan, restoring $272,003.00 for the five participants. Travelers' Insurance indicated that it will pay the bond proceeds to the plan. On December 20, 2017, the Secretary filed a motion for default judgment requesting that the court appoint an independent fiduciary to administer the plan, distribute its assets and terminate the plan and to award fees and expenses of $2,450.00 from the assets of the plan to the independent fiduciary. The hearing on the motion for default judgment is scheduled for January 24, 2018. On February 20, 2018, the presiding magistrate recommended issuance of a default judgement. The plan sponsor had an additional 14 days to respond, but still failed to respond. On March 19, 2018, the Department filed a notice of non-objection. On April 12, 2018, the court granted the default judgment and appointed Metro Benefits, the new independent fiduciary, to receive the bond proceeds. San Francisco Office

Acosta v. ERI-Environmental Resources Inc. (D. Minn.)

On June 26, 2018, the Secretary filed a Complaint alleging ERI-Environmental Resources Inc. ("ERI") breached its ERISA fiduciary duties by failing to administer the Plan since January 2008 when ERI was administratively dissolved by the Minnesota Secretary of State. ERI's chief executive officer and sole trustee of the Plan died on April 30, 2008. No successor trustee was appointed. As a result, participants have been unable to obtain distributions from their individual account balances. The Complaint seeks to remove ERI as fiduciary to the Plan and to appoint an independent fiduciary to administer the plan, distribute a total of $61,055 in Plan assets to eligible participants, and terminate the Plan. On November 1, 2018, the clerk of court entered a default against defendants for failure to plead or otherwise defend in this action. Chicago Office

Acosta v. Estate of James D. Blankenbeckler (M.D. N.C.)

The Department simultaneously filed a complaint and a consent judgment ordering the appointment of an independent fiduciary to distribute assets and terminate the plan. The court signed and entered the consent judgment on October 15, 2018, and appointed AMI Benefit Plan

Administrators, Inc., as the successor fiduciary for the James D. Blankenbeckler, DDS Profit Sharing Plan. After the death of James D. Blankenbeckler in 2010, his daughter Emily Bivins was appointed the administrator of the estate and the plan. After failing to file sufficient annual accounting, public administrator Bryan Thompson replaced her. The Department found that the estate had been closed in 2016 without ensuring the appropriate distribution of all plan assets to the participants. There were two remaining participants in the plan, which held assets of $46,371. Atlanta Office

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

On August 7, 2017, the Secretary filed a complaint against the International Longshoremen's Association Local 2038, AFL-CIO, fiduciary of the International Longshoremen's Association Local 2038 Pension Fund. The complaint alleges that the defendant failed to administer the plan, as a result of which participants have been unable to obtain distributions from their vested account balances. The action seeks to have an independent fiduciary appointed to administer the fund, distribute the remaining fund assets to eligible participants, and terminate the fund. On October 3, 2018, the court entered a consent order and judgment appointing an Independent Fiduciary to terminate the fund and distribute the fund’s assets. As of August 31, 2015, the Fund had 14 participants and an account balance of $44,941.88. The Judgment also permanently enjoined ILA from violating the provisions of Title I of ERISA. Chicago Office

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

On June 15, 2018, the Secretary filed a complaint against Whitney Jeanminette, alleging that Jeanminette had failed to properly terminate the GC2 Specialty Construction, Inc. 401(k) Plan, leaving 22 participants unable to access a cumulative total of $126,514.45 in plan assets. On November 27, 2018, the Secretary obtained a default judgment awarding injunctive relief against Jeanminette for his ERISA violations that resulted in losses and harm to the plan. In the default judgment, the court appointed an independent fiduciary to distribute those plan assets, enjoined Jeanminette from violating ERISA, and barred him from acting as a fiduciary to any ERISA-covered plan. Dallas Office

Acosta v. Origins Interactive (D. Colo.)

On July 26, 2018, the Secretary filed a complaint naming the Origin Interactive 401(k) Plan as a necessary party and seeking the appointment of an independent fiduciary to distribute plan assets and terminate the plan. Origin Interactive was no longer in business, and the fiduciaries to the plan had abandoned it, preventing the plan participants from obtaining access to their account balances. On November 27, 2018, the Secretary obtained a consent judgment authorizing Thomas J. Lynch, the former Chief Financial Officer of Origins Interactive, Inc., and a former administrator of the plan, to cooperate with ADP Administrative Services, Inc., the plan's third party administrator, to distribute plan assets to eligible participants and to terminate the plan. The Secretary convinced Lynch to enter into the consent judgment and resume duties necessary to terminate the plan, thereby saving the plan participants the cost of an independent fiduciary. Denver Office

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

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

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

On January 26, 2018, the Secretary filed a Complaint against Edward J. Novak and Roy M. Payawal, fiduciaries of the Sacred Heart Hospital Profit Sharing 401(k) Plan. The Complaint alleges Mr. Novak and Mr. Payawal breached their ERISA fiduciary duties by failing to administer the Plan. The participants were unable to obtain distributions from their vested account balances. On October 9, 2018, the court entered a consent order and judgment providing for the removal of Mr. Payawal and Mr. Novak as fiduciaries of the Plan and appointing an Independent Fiduciary to terminate the Plan and distribute Plan assets. Based on the last Plan report, the Plan had nine participants and assets totaling $93,446. The consent judgment also permanently enjoined Mr. Payawal and Mr. Novak from serving as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

Acosta v. RP Martin LLC 401(k) Profit Sharing Trust (S.D.N.Y.)

On August 20, 2016, the Secretary filed a complaint against the RP Martin LLC 401(k) Profit Sharing Trust alleging failure to administer the plan. The complaint seeks the appointment of an independent fiduciary to secure distribution of about $280,000 to two participants. After the plan was served, but failed to answer the Secretary requested and obtained entry of default from the clerk of the court on October 23, 2018. On December 17, 2018, the Secretary moved for default judgment. New York Office

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

On September 28, 2017, the Secretary filed a complaint alleging that Rudraraju and Softalia, Inc. failed to monitor the on-going operations of the Softalia, Inc. 401k Plan, resulting in participants

being unable to access the assets in their plan accounts. The Secretary seeks removal of Rudraraju and the company from their positons as plan trustee and administrator, respectively, and the appointment of an independent fiduciary to administer the plan in order to effectuate its termination and the distribution of plan assets to the participants and beneficiaries. On February 7, 2018, the court entered a consent judgment which removed Rudraraju and Softalia as fiduciaries and appointed an independent fiduciary who was charged with terminating the plan and distributing $129,775.50 in plan assets. Philadelphia Office

Acosta v. Sharpton Brunson and Company, P.A. (S.D. Fla.)

On August 13, 2018, the Secretary filed a complaint against Sharpton Brunson and Company, P.Aplan administrator and fiduciary to the plan, Darryl Sharpton, Brittany Sharpton, and Kevin Adderly, also fiduciaries to the plan, alleging that from January 15, 2015 to March 31, 2015, the company, Darryl Sharpton, Brittany Sharpton, and Kevin Adderly untimely remitted $2945.15 in employee contributions to the plan. In addition, from April 30, 2015 and March 15, 2016, they failed to forward $8,083.65 in participant funds to the plan. Now that the company is inactive, the fiduciaries did not ensure that participants could receive distributions from the plan or access their individual accounts, essentially abandoning the plan. The complaint seeks the removal of Darryl Sharpton, Brittany Sharpton, and Kevin Adderly, and the company as fiduciaries, the appointment of an independent fiduciary to settle the plan, a permanent injunction preventing defendants from servicing as a fiduciary to ERISA-covered plans, and an injunction against defendants from committing future ERISA violations. It also seeks to hold Darryl Sharpton, Brittany Sharpton, and Kevin Adderly personally liable for the payment of unremitted and untimely remitted employee contributions, plus lost earnings on these payments. See also Acosta v. Sharpton Brunson and Company, P.A., Section B.1. Collection of Plan Contributions and Loan Repayments. Atlanta Office

Acosta v. Smedberg Machine Retirement Plan (N.D. Ill.)

On June 15, 2018, the Secretary filed a complaint alleging Jesse Smedberg and Smedberg Machine Corporation ("SMC") breached their ERISA fiduciary duties by failing to administer the Plan since March 2015 when SMC ceased operations. Participants have been unable to obtain distributions from their vested account balances. The Complaint seeks to remove Mr. Smedberg and SMC as fiduciaries to the Plan and permanently enjoin them from serving as fiduciaries or service providers to any ERISA-covered plan in the future. The Complaint also seeks to have an independent fiduciary appointed to administer the plan, distribute a total of $52,550 in Plan assets to eligible participants, and terminate the Plan. On September 11, 2018, the court entered a default against defendants for failure to timely answer or otherwise plead to the complaint. Chicago Office

Acosta v. T & M Hardware, Inc. (D. Ariz.)

On December 31, 2018, the Department filed a complaint alleging that T & M Hardware, Inc. and Pamela Mandile-Croteau, the fiduciaries of the T & M Hardware Profit Sharing Plan, abandoned their fiduciary duties by refusing to follow the terms of the governing plan documents

and authorize required distributions. The plan's seven participants have terminated their employment and requested distributions as authorized under the plan terms. The Department seeks the removal of Ms. Mandile-Croteau as the fiduciary of the plan and the appointment of an independent fiduciary to distribute the assets of the plan to eligible participants and beneficiaries. San Francisco Office

Acosta v. Trinkle (E.D. Ky)

On March 6, 2018, the Secretary filed a complaint against Acramold, Inc., Christine Trinkle, as legal guardian of Gail Trinkle, and the Estate of Dallas Trinkle, II, alleging that the defendants, who were fiduciaries of the plans, misappropriated $476,664 from the Acramold, Inc. Defined Benefit Plan, took an improper loan from the Acramold Engineering, Inc. 401(k) Profit Sharing Plan, and failed to administer both plans. The violations occurred from November 2008 to the present. The complaint seeks an order requiring that fiduciaries restore all losses to the plans, removing them as fiduciaries, enjoining them from being fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to administer the plans. See also Acosta v. Trinkle, Section B.3. Miscellaneous. Cleveland Office

Hugler v. Zagara (N.D. Ohio)

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

L. **Contempt and Subpoena Enforcement**

Acosta v. Accurate Optical Company, Inc. (D. Md.)

On March 2, 2018, the Secretary filed a subpoena enforcement action against Accurate Optical Company, Inc., the Accurate Optical Company, Inc. 401(k) Plan, and Stephen Franklin, asserting that respondents failed to provide responses to administrative subpoenas issued in December 2017. The Secretary's subpoena sought basic documents relating to the plan and to the disposition of amounts withheld as employee contributions. On June 5, 2018, the court entered an order granting the Secretary's petition for enforcement of the administrative subpoenas and requiring respondents to provide the requested documents within seven days. Philadelphia Office

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

On March 1, 2016, the court entered a consent judgment and order settling allegations in the Secretary's complaint, filed on July 15, 2015, that the Mathison Company, Marilyn Anstett, and

Paul Anstett, who are the company's president and vice president and plan trustees, failed to remit and to timely remit employee contributions and loan repayments to the company's 401(k) Plan and failed to properly administer its ESOP. The consent judgment confirmed the complaint allegations and, among other things, ordered the defendants to pay $14,066.34 to 401(k) plan participants, to terminate the 401(k) plan, and freeze and to take steps to properly administer the ESOP. The court also ordered them to complete ten hours of fiduciary training. Since the filing of the consent judgment the fiduciaries only have partially fulfilled their 401(k) Plan monetary obligations under the consent judgment ($8,066 in employee contributions is still outstanding to participants) and only partially fulfilled their ESOP monetary obligations under the consent judgment. Accordingly, on November 16, 2017, the Secretary filed a contempt petition to enforce the provisions of the consent judgment. The parties engaged in further discussions and on August 7, 2018, filed a second consent judgment. On August 8, 2018, the court entered an order granting the parties' second consent judgment. The order required the fiduciaries to restore $3,750.08 to the 401(k) plan participants, to terminate the 401(k) plan, and to pay $106,249.92 to the ESOP participants on a pro rata basis. The court also permanently enjoined the defendants from violating Title I of ERISA and, upon completion of their restitution and plan termination responsibilities, permanently barred the defendants from serving as a fiduciary or service provider to any ERISA-covered employee benefit plan. See also Acosta v. Anstett, Section B.1. Collection of Plan Contributions and Loan Repayments. Denver Office

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

On June 30, 2015, the court entered a consent judgment between Joel E. Aycock and the Secretary, ordering Aycock to make restitution payments totaling $49,033.88 directly to JEA Architects SIMPLE IRA Plan's participants over a period of two years. Aycock made payments totaling $4,631.50 through August 2015, but failed to make further payments. The Secretary filed a motion for contempt against Aycock on October 12, 2016. The court set a motion hearing for February 5, 2017. On February 3, 2017, Aycock filed a notice of filing of bankruptcy. Subsequently, the Secretary sought recovery of the losses through the bankruptcy proceeding. In May 2018, the Secretary obtained an abstract of judgment. Since entering into a settlement agreement with the U.S. Trustee, Mr. Aycock has made timely payments towards $150,000 of debt, which includes a portion of the debt to plan participants. Atlanta Office

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

On April 20, 2015, the Secretary filed an amended complaint against AARC Environmental, Inc. (AARC) and Kishore Chainani, AARC's sole owner. The original complaint, filed on December 26, 2014, alleged that they failed to forward employee contributions and loan repayments to the company's 401(k) Plan since December 29, 2007, resulting in more than $78,000 in losses. The amended complaint alleges that they failed to remit all employee and employer premiums to the company's Group Health Plan and allowed coverage to lapse multiple times since 2011, as a result of which they owe participants more than $40,000 in employee premiums and an additional unknown amount for unpaid medical claims. On September 20, 2016, the court entered a default judgment against defendants, granting full relief and awarding more than $86,000 in losses for the 401(k) Plan and more than $40,000 in

losses for the Health Plan to 49 participants and beneficiaries. Defendants are also required to hire an independent fiduciary at their own expense and are barred from acting as fiduciaries in the future once the independent fiduciary is in place. Because defendants failed to comply with the default judgment, the Secretary on June 28, 2017, filed a motion to adjudge defendants in contempt. On September 7, 2017, the court issued an order finding defendants in civil contempt and ordered defendants to make immediate restitution of $86,085.43 to the 401(k) plan and immediate restitution of $39,601.47 to the health plan participants. Defendants hired legal counsel and entered into negotiations with the Secretary to purge themselves of contempt. On December 22, 2017, the Secretary filed a request for stay of contempt pending defendants' payment of the outstanding debt owed to both plans pursuant to an agreed repayment plan. On January 9, 2018, the court granted the Secretary's stay. Since that time defendants have made timely payments in accord with an agreed repayment plan. See also Acosta v. Chainani, Section B.1. Collection of Plan Contributions and Loan Repayments. Dallas Office

Secretary v. Cloverleaf Consulting Group, LLC (E.D. Mich.)

On October 23, 2018, the Secretary filed a Petition to Enforce an Administrative Subpoena Duces Tecum to compel Cloverleaf Consulting Group, LLC, owned and operated by Ronald D. Bush II, to respond to an Administrative Subpoena Duces Tecum issued by the Secretary on April 6, 2018. Respondent Cloverleaf sponsors a 401(k) Plan. Despite several attempts to obtain compliance, respondent Cloverleaf failed to comply with the subpoena. Chicago Office

Acosta v. Jewelry Television (E.D. Tenn.)

After the Department's onsite investigation, on October 14, 2016, the Department issued a subpoena to Respondent for certain documents. After not receiving the documents, the Secretary filed a petition with the court asking the court to compel Respondent Jewelry Television to produce the documentary evidence as requested in the subpoena. The Secretary argued the documents requested in the subpoena are necessary to complete the investigation of the plan. The Department explained further that it did not already have the information and that enforcement of the subpoena would not abuse the court's process. Respondent filed an answer to the petition, denying that Petitioner is entitled to the relief requested. In its brief, Respondent argued that there was a preliminary issue as to whether the subpoena is duplicative of the production that has already occurred during the onsite investigation, and therefore, precluded under 29 U.S.C. § 1134(b). Respondent then waived this issue and agreed to produce all the requested documents pursuant to the subpoena, conditioned on the court stating that such documents are confidential and will be returned to Respondent upon completion of the audit and resolution of any issues. The Department argued that it could not agree to Respondent's request to return the documents after the investigation because it must comply with record retention laws. In addition, the Department explained that it retains documents from all of its investigations to provide a basis for its findings. The Department further explained that it performs internal audits of investigative files to ensure investigations are handled properly and that such audits are not possible if documents are not retained. In addition, the Department had suggested Respondent mark any documents of concern as "confidential" in order to trigger the protections provided in the Freedom of Information Act. The court ultimately ruled in the Secretary's favor and ordered the production of the requested documents. Atlanta Office

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

On November 16, 2017, the Secretary filed a subpoena enforcement action against Mayerhauser Realty Co., seeking production of certain documents relating to the company's 401(k) Plan & Trust. On December 20, 2017, the court granted the Secretary's petition and ordered Mayerhauser Realty to produce the documents. On February 7, 2018, the Secretary filed a motion seeking civil contempt and a coercive fine, which was granted on February 26, 2018. On April 12, 2018, the Secretary filed a motion seeking contempt incarceration of John Mayerhauser, Mayerhauser Realty's sole officer. The court scheduled a hearing for April 27, 2018, following which the court entered an order with an agreement-upon schedule for compliance with the subpoena. New York Office

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

On October 12, 2016, the Secretary filed a petition to enforce an administrative subpoena against N&B Lundy Corp. d/b/a/ Pitter Patter Day School that was issued as part of an investigation of the Pitter Patter Day School Health Plan. On October 13, 2016, the court issued an order to show cause requiring N&B Lundy Corp. to appear at a hearing to show cause as to why it should not be required to produce all of the documents requested. The company failed to appear at the hearing which was held on November 18, 2016, after which the court granted the Secretary's motion and ordered that all subpoenaed documents be produced. After the company failed to produce the subpoenaed documents, the Secretary filed a motion for adjudication of civil contempt which was granted on May 3, 2017. The court found that N&B Corp and its president and owner, Bobbi Jo Lundy were guilty of civil contempt of court and ordered them to produce all responsive documents, entered a coercive fine of $250 per day for each day that they fail to comply with the order, and ordered respondents to reimburse the Secretary for the costs and attorney's fees incurred in preparing and filing the motion. On September 25, 2017, the court granted the Secretary's request that the statute of limitations be equitably tolled until such time that respondents comply with the court's order of contempt. On August 17, 2018, the court purged the contempt order against Lundy after she executed a declaration that stated that she did not possess any additional responsive documents. Philadelphia Office

Secretary v. United Employee Benefit Fund Trust Agreement (N.D. Ill.)

On December 21, 2018, the Secretary filed a Petition to Enforce an Administrative Subpoena issued to the United Employee Benefit Fund Trust to compel the Fund to respond to an Administrative Subpoena Duces Tecum issued by the Secretary in May 2018. The Fund provides death benefits to member participants, who are both union and non-union employers. The Fund has provided various documents in response to the subpoena, but has failed to produce all responsive documents. Despite several attempts to obtain compliance, respondent United Employee Benefit Fund failed to comply with the subpoena. Chicago Office

Acosta v. Woerner (E.D.N.Y.)

On September 27, 2018, after Stephen Woerner failed to appear to testify at an administrative deposition and to produce documents called for by an administrative subpoena, the Secretary filed a motion to compel. On October 18, 2018, the court granted the Secretary's motion and ordered Woerner to appear to testify and produce the documents. On October 30, 2018, the Secretary filed a letter seeking a pre-motion conference to file a civil contempt motion. On November 15, 2018, the court waived the pre-motion conference requirement and set a briefing schedule on the Secretary's motion for contempt. Contempt papers were served on Woerner. When Woerner failed to respond, the Secretary filed an unopposed motion for contempt on December 21, 2018. New York Office

M. **Bankruptcy**

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

Perez v. Harris (8th Cir. BAP and 8th Cir.)

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

The Eighth Circuit agreed with the Secretary’s position in an August 3, 2018 decision and confirmed that the debt is nondischargeable. It held that Harris acted in a fiduciary capacity for purposes and diverted plan assets for non-plan purposes. The court concluded that Harris had acted with reckless disregard for violating his fiduciary duties when he decided to pay himself and other creditors instead of remitting the employee contributions to the plan. Chicago Office, Kansas City Office and, on appeal, Plan Benefits Security Division

In re Sky Skan Incorporated (Bankr. D. N.H.); In re Steven T. Savage and Virginia A. Savage (Bankr. D. N.H.); Acosta v. Steven T. Savage and Virginia A. Savage (Bankr. D. N.H.)

On March 26, 2018, the Secretary filed an adversary proceeding for a determination of non-dischargeability of debt against Steven and Virginia Savage, the trustees and fiduciaries of the Sky-Skan 401(k) Plan in the bankruptcy court. The Savages failed to remit employee contributions, loan repayments, and failed to collect and remit employer matching safe harbor contributions to the plan. The Secretary previously filed proofs of claim in the Savages' Chapter 11 bankruptcy and company/plan sponsor Sky-Skan, Inc.'s Chapter 11 bankruptcy. Both are pending in the bankruptcy court. Prior to filing their bankruptcy petition, the Savages transferred $704,075 from the company to themselves as reimbursement for use of credit cards, travel expenses, rent and repayment of personal loans. The Secretary alleged that this misappropriation of employee contributions and failure to collect employer contributions while taking money for themselves was reckless and constituted defalcation. The Secretary and the Savages entered into a stipulation that the $152,685.47 of outstanding employee and employer contributions and loan repayments owed to the 401(k) plan is nondischargeable debt pursuant to 11 U.S.C. section 523(a)(4). The court approved the stipulation on August 27, 2018. The Department continues to protect the interests of the 401(k) Plan in the two bankruptcies. The hearing on Sky-Skan's amended disclosure statement and the Savages' disclosure statement took place on December 17, 2018. The Department had filed an objection to Sky-Skan's amended disclosure statement because it failed to adequately describe how payments to the 401(k) Plan would be made to satisfy the outstanding amounts due. The Department further advised the court that counsel for the Savages had indicated he would be amending their disclosure statement, and in light of inconsistencies between the two current disclosure statements, the Department reserved the right to object to any amended disclosure statements. The U.S. Trustee also objected, citing inter alia, insufficient detail in the Sky-Skan amended disclosure statement on how the 401(k) amounts would be paid. The judge told the debtors to amend their disclosure statements to address the Department of Labor's and the U.S. Trustee's concerns and provide more detail on how the 401(k) claims would be paid. A new hearing will be held in 2019 ordered the debtors to request a new hearing date in 2019. Boston Office

In re Bridgeport Health Care Center, Inc. (Bankr. D. Conn.)

On April 18, 2018, Bridgeport Health Care Center, Inc., a defendant in both Perez v. Bridgeport Health Care Center, Inc. and Chaim Stern and Acosta v. Bridgeport Health Care Center, Inc. and Chaim Stern filed for Chapter 11 bankruptcy. Shortly thereafter, various creditors including the Secretary moved to appoint a Chapter 11 trustee. After several days of hearing, the bankruptcy court granted the motion to appoint a Chapter 11 trustee. Chaim Stern was removed from being trustee of the Retirement Plan. Approximately $4.1 million has been returned to the Retirement Plan. Currently, the cases are in mediation with the district court. The Chapter 11 trustee has secured fully-insured health coverage for employees. See also Acosta v. Bridgeport Health Care Center, Inc. and Chaim Stern, Section B.1. Collection of Plan Contributions and Loan Repayments, and Perez v. Bridgeport Health Care Center, Inc. and Chaim Stern, Section D. Prudence of Investments. Boston Office

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

On March 3, 2017, the Secretary filed an adversarial action arguing that the bankruptcy court should not discharge amounts owed by Phelps to the Phelps and Phelps Consulting 401(k) Plan related to missing employee contributions and missing loan repayments. On December 18, 2017, the court entered a consent order finding that the $23,861.05 owed by Phelps to the plan was non-dischargeable. On May 15, 2018, the Secretary filed a civil action in the district court alleging that Phelps breached fiduciary duties owed to the 401(k) Plan. On August 1, 2018, the court entered a consent judgment ordering full recovery of $23,861.05 owed to the 401(k) Plan, barring Phelps from serving as an ERISA fiduciary in the future, and appointing an independent fiduciary to terminate the plan and distribute its assets. Arlington Office

N. **Miscellaneous**

Acosta v. Azer (D. Md.)

On April 7, 2017, the Secretary filed a complaint against Rida N. Azer, president of the Metropolitan Washington Orthopaedic Associates, Chartered 1975 & Allied Specialties and fiduciary of the Metropolitan Washington Orthopaedic Associates, Chartered 1975 Employees Pension Plan and against plan fiduciary Donald Nobel. The Secretary alleges that Azer repeatedly over-reported the plan's assets and under-reported the plan's liabilities in the plan's Form 5500s and that Noble and Azer authorized the use of plan assets as collateral for a loan that did not exclusively benefit the plan. The Secretary seeks the appointment of an independent fiduciary and a permanent bar preventing the defendants from serving as fiduciaries to any ERISA-covered plan in the future. The defendants filed answers to the complaint on July 21, 2017. On June 1, 2018, the Pension Benefit Guaranty Corporation filed a complaint against Metropolitan Washington Orthopaedic Association Chartered 1975, seeking appointment of the PBGC as the plan's statutory trustee. The Secretary's case has been stayed until March 4, 2019, pending the outcome of the PBGC complaint. Philadelphia Office

Acosta v. Charles Simmons, Donald Hutchins, and the Sojourner Douglas College Health Plan (D. Md.)

On March 23, 2018, the Secretary filed a complaint against Charles Simmons, president and plan fiduciary; Donald Hutchins, vice president of administration and fiscal affairs, and plan fiduciary; and the Sojourner Douglas College Health Plan. The complaint alleges that Simmons and Hutchins failed to remit both employee and employer contributions to the health care plan, causing the plan to be cancelled, and failed to notify participants of the lack of coverage. As a result of the defendants' actions and in reliance on the representation that health care coverage was in place, the plan participants incurred $271,841.11 in unpaid health care claims. The complaint seeks an order requiring Simmons and Hutchins to restore assets to the plan as necessary to pay the outstanding health claims, appointing an independent fiduciary, and

permanently barring the defendants from serving as fiduciaries to any ERISA-covered plan in the future. The case is currently in the discovery phase. Philadelphia Office

Acosta v. Stapleton (S.D. Ohio)

On September 20, 2017, the Secretary filed a complaint against the Board of Trustees of the Plumbers and Steamfitters Local No. 577 Annuity Plan and 11 trustees of the plan. The complaint alleges that the defendants caused the plan to pay service provider fees for plan accounts of inactive participants, which should have been distributed prior to the fees being incurred. The complaint seeks injunctive relief and an order requiring the defendants to restore all losses to the plan. On November 29, 2018, the parties notified the court that they had reached an agreement in principal to resolve the case. It is anticipated that a proposed consent judgment will be submitted to the court in January of 2019. Cleveland Office

Acosta v. WH Administrators, Brenden Turner, Susanne Sheil (D. Md.)

On May 2, 2018, the Secretary filed a complaint against WH Administrators, the owner and Chief Executive Officer Brenden Turner, and the Chief Operating Officer Susanne Sheil. The complaint alleges that defendants induced employers to purchase welfare plans on the promise that if the employer paid "premiums" all medical claims that properly accrued under the plan would be paid and that the employer would bear no additional responsibility. The Secretary alleged that over $8 million in claims had been adjudicated but remained unpaid. The Secretary asserted that defendants breached numerous fiduciary duties under § 404; that they failed to hold assets in trust under § 403; and that the defendants engaged in multiple prohibited transactions under § 406. Because, at the time of filing, twenty one employers continued to participate in WH Administrator plans, the Secretary filed a motion for a temporary restraining order seeking to have defendants removed as fiduciaries to the plans and asking for the appointment of an independent fiduciary. On July 6, 2018, the Secretary filed a notice and proposed consent order resolving the temporary restraining order. The consent order required WH Administrators to immediately stop offering welfare benefit plans and to terminate services to any remaining welfare plans within 30 days of entry of the order. The order also prohibits WH Administrators, Turner and Sheil, from acting as fiduciaries to any ERISA-covered plans. Discovery is ongoing regarding the remainder of the case. Philadelphia Office