

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

CALENDAR YEAR 2011

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A. Financing the Employer

1. Employer Stock

Chao v. Air Transport Manufacturing Company (C.D. Cal.)

On April 26, 2007, the Secretary filed a complaint against Air Transport Manufacturing Company and its president, Kirn Kessen, alleging that, as fiduciaries, they failed to properly administer the company's Employee Stock Ownership Plan. They allegedly failed to obtain annual appraisals, make required distributions, and file required reports. On October 30, 2008, the court entered a partial default judgment, finding the fiduciaries liable. To determine the amount of liability, the partial judgment required them either to produce certain corporate financial records or to appoint an independent fiduciary, at their expense, to administer the plan. On March 19, 2009, the defendants retained an independent fiduciary. On September 2, 2010, the court entered judgment against the defendants, specifying values per share for plan years 2001-2007. Based on the Secretary's further motion, on December 9, 2010, the court entered a final accounting, perfecting the default judgment of \$601,736 against the defendants. On December 13, 2011, the court granted the Secretary's motion for relief from approving final accounting, giving the independent fiduciary some discretion in determining which filings should be made on behalf of the plan. Los Angeles Regional Office

Solis v. Bruister (S.D. Miss.)

On April 29, 2010, the Secretary filed a complaint against Herbert Bruister, Jonda Henry, Amy Smith and Michael Bruce, as trustees of the Bruister Employee Stock Ownership Plan, alleging that they breached their fiduciary duties in connection with the purchase of stock in Bruister & Associates, Inc. from Herbert Bruister. Bruister sold 100% of his shares to the company's employees in five transactions between December 2002 and December 2005 for more than \$24,000,000. Bruister & Associates was a Direct TV installer with more than 1,000 employees until it became defunct, making all shares owned by the ESOP worthless in 2007. The Secretary asserts that the employees paid more than fair market value for the stock. On July 1, 2011, as result of information learned during discovery, the Secretary amended her complaint to add a kickback claim as to the first of the five transactions. In September 2011, the Secretary participated in a court-ordered mediation, which included related cases (there is insurance coverage litigation and private ERISA litigation arising out of the same general set of facts and circumstances); this mediation did not result in the resolution of any of the three pending litigations. At the conclusion of 2011, numerous motions were pending before the court, including defendants' partial motion to dismiss, the Secretary's cross-motion for summary judgment, the Secretary's motion to strike one of defendants' expert opinions, and the Secretary's appeal from one of the magistrate's discovery orders. The close of discovery has been extended from June 2011 to March 20, 2012; trial is currently scheduled for September 2012. Atlanta Regional Office and Plan Benefits Security Division

Solis v. Caputo (N.D. Fla.)

On June 24, 2010, the Secretary filed a complaint against Robert S. Caputo; Robert S. Caputo, D.O., P.A.; Glenn Bankert; Oden and Thielking, CPAs; Stephen Thielking; and the Robert S.

Caputo D.O Employee Stock Ownership Plan (ESOP). Dr. Caputo, Dr. Bankert, and Caputo's practice are all fiduciaries. The complaint alleges that the fiduciaries failed to monitor the employer's operations and management and failed to take action on behalf of the ESOP with regard to inappropriate personal expenses being paid from the employer's general assets. The ESOP owns nearly all of the practice, so the inappropriate use of the practice's assets adversely affected the value of the ESOP's assets. Furthermore, the ESOP's accountant treated those expenses as accounts receivables, artificially inflating the company's stock valuation. As a result, the ESOP overpaid for shares that it purchased from participants leaving the plan. The court has ordered the parties to mediation. If the mediation is not successful, trial will be scheduled for a date later this year. Atlanta Regional Office

Dudenhoffer v. Fifth Third (6th Cir.)

This is an appeal from a district court decision holding that the Moench presumption (that an ESOP fiduciary is entitled to a presumption that it acted consistently with ERISA by investing in employer stock) adopted in the Sixth Circuit incorporates a "dire financial situation" test and that the defendant was not in such a situation because it was still financially viable. The district court also rejected the plaintiffs' claim that the fiduciaries had made misrepresentations to plan participants in SEC filings, which were incorporated in plan documents, about the company's subprime lending prices, which artificially inflated the stock price. The district court reasoned that the incorporation was not intentional and therefore not a fiduciary communication. Plaintiffs' opening brief was filed, on extension, on July 7, 2011, and the Secretary filed her brief on July 14, 2011, making similar arguments to those she has made in KeyCorp and other cases by arguing that the "dire financial situation" test deviates from the prudent man rule and that SEC filings incorporated in plan documents are also fiduciary communications. Plan Benefits Security Division

Fisch v. Suntrust Bank (11th Cir.)

This is an interlocutory appeal from a district court decision holding that ERISA barred the plaintiffs' claim that the plan fiduciaries were imprudently offering employer stock when they knew the stock was imprudent given the company's investments into subprime mortgages. The district court reasoned that the claims were in fact diversification claims and therefore barred by the diversification exemption for fiduciaries of ESOP plans that hold employer stock. The court also concluded that the Moench presumption (that an ESOP fiduciary is entitled to a presumption that it acted consistently with ERISA by investing in employer stock) contravened the statute because it would permit these claims despite the diversification exemption. Finally, the court declined to dismiss the plaintiffs' misrepresentation claims. The parties cross-petitioned for interlocutory review, which was granted. The Secretary filed a brief on the Moench issues on July 15, 2011 and on the disclosure issues on August 12, 2011. Plan Benefits Security Division

Gearren v. McGraw-Hill (2d Cir.)

On June 4, 2010, the Secretary filed an amicus brief in support of the plaintiffs-appellants, who allege that investment in McGraw-Hill stock was imprudent during the relevant period because the company, through its subsidiary Standard & Poor's, derived much of its profits from its significantly flawed mortgage-backed securities rating business. The brief argues, as does the

brief in the Citigroup case, that: (1) the district court erred in dismissing the claim based on a presumption that the fiduciaries acted imprudently in allowing the plan to purchase excessively risky employer stock at allegedly inflated prices; and (2) the fiduciaries had an obligation not to mislead plan participants and to disclose information necessary for the protection of their benefits. The brief argues that the plaintiffs' claims are not foreclosed by the existence of possible security claims based on the same wrongdoing. The court heard argument in the case together with Citigroup on September 28, 2010, and the Secretary participated in the argument. On October 19, 2011, the court issued an adverse decision, over a vigorous dissent, adopting a presumption of prudence and affirming the dismissal. The plaintiffs petitioned for panel and en banc rehearing on December 6, 2011, and the Secretary filed a brief supporting the petition on the same date. Plan Benefits Security Division

Gray v. Citigroup (2d Cir.)

On December 28, 2009, the Secretary filed an amicus brief in support of the plaintiffs who allege that investment in Citigroup stock by the company's 401(k) plan was imprudent during the class period because the company was invested heavily in subprime mortgages and kept these investments off the balance sheets. The Secretary's brief takes issue with nearly all of the district court's decision dismissing the case. Specifically, the brief argues that: (1) under ERISA § 404(a)(1)(D), the defendants had fiduciary duties with respect to the plan investment in employer stock despite plan terms mandating such investments; (2) the district court erred in dismissing the claim based on a presumption that the fiduciaries acted imprudently in allowing the plan to purchase excessively risky employer stock at allegedly inflated prices; and (3) the fiduciaries had an obligation not to mislead plan participants and to disclose information necessary for the protection of their benefits. The Secretary participated in the oral argument in the case (and in the Gearren case) on September 28, 2010. On October 19, 2011, the court issued an adverse decision, over a vigorous dissent, adopting a presumption of prudence and affirming the dismissal. The plaintiffs petitioned for panel and en banc rehearing on December 6, 2011, and the Secretary filed a brief supporting the petition on the same date. Plan Benefits Security Division

Griffin v. Flagstar Bancorp, Inc. (6th Cir.)

This is an appeal from a district court decision holding that the Moench presumption adopted in the Sixth Circuit incorporates a "dire financial situation" test and that the defendant was not in such a situation because it was still financially viable. The court alternatively relied on Twombly to dismiss the claims as not plausible. The district court also agreed with the plaintiff that misrepresentations to plan participants in SEC filings and incorporated in plan documents are fiduciary communications. However, the district court dismissed the claims because the plaintiffs failed to identify any misrepresentations under Twombly. The Secretary filed her brief on June 30, 2011, making similar arguments to those she made in KeyCorp and other cases by arguing that the "dire financial situation" test deviates from the prudent man rule and that SEC filings incorporated in plan documents are also fiduciary communications. Plan Benefits Security Division

Lanfear v. Home Depot (11th Cir.)

This case is similar to the ING case. The plaintiffs claim that the defendants failed to disclose practices that inflated the price of the employer Home Depot stock, but the district court dismissed the case for failure to state valid prudence or misrepresentation claims. On Nov. 22, 2010, the Secretary filed an amicus brief in the Eleventh Circuit arguing that the district court erred in treating the plaintiffs' prudence claims as diversification claims that do not state a violation in the employer stock context; that the fiduciaries are immune from liability for purchasing imprudent investments in company stock because the plan terms mandate continued investment; that the fiduciaries are entitled to the Moench presumption of prudence with respect to the Plan's purchase of employer stock; and that the misrepresentation claim should also be dismissed based on a finding that the fiduciaries were acting in their corporate capacity in transmitting false information to the participant. The Secretary participated in oral argument on October 7, 2011. Plan Benefits Security Division

In re Lehman Bros. ERISA Litig. (2d Cir.)

This is an appeal from a dismissal on the pleadings of an employer stock case against Lehman based on an application of a presumption of prudence. On January 11, 2012, the Secretary filed an amicus brief arguing that, in light of the Citigroup decision, Lehman's financial situation prior to its collapse constituted a sufficiently dire situation to overcome the presumption of prudence that now attaches to employer stock investments in the Second Circuit. Plan Benefits Security Division

Loomis v. Exelon Corp. (7th Cir.)

The case is on appeal from the district court's grant of defendants' motion to dismiss on the pleadings. The issues relate to the effect of Hecker v. Deere and the Iqbal/Twombly pleading standards on claims alleging that the fiduciaries caused the plan to pay excessive fees. On March 10, 2010, the Secretary filed an amicus brief in the Seventh Circuit in support of the plaintiffs, arguing that their amended complaint included sufficient factual allegations to meet the notice-pleading standard and that the district court erred in holding Deere to be controlling. The Department participated in oral argument on September 13, 2010. On September 6, 2011, the court issued an unfavorable decision disagreeing with the Secretary's attempt to distinguish Deere. Plan Benefits Security Division

Solis v. Mattingly (E.D. Ky.)

On December 4, 2009, the Secretary filed a complaint in connection with seven stock sale transactions between an interlocking group of six parties in interest (sellers of stock) and five Employee Stock Ownership Plans and two Individual Eligible Account Plans that purchased stock. The complaint alleged that in each transaction, the defendants failed to loyally and prudently value the stock sold to the plans, thereby causing them to pay far more than fair market value for the stock. The parties in interest, who also were alleged to be fiduciaries, included J. Basil Mattingly, Henry Block, Bernard Schafer, Woody Bilyeu, Mary Bilyeu and David Wallingford and their related family trusts. Also named as fiduciary defendants were Patrick Brian Shelton and Thomas Beaudreau. On June 7, 2011, the court entered six consent judgments fully resolving the Secretary's allegations against all of the fiduciary and service provider

defendants. The judgments provide for the recovery of approximately \$11.5 million (\$10.45 million in recoveries to participants and \$1.05 million in penalties). Each of the consent judgments also permanently bars defendants from acting as fiduciaries or service providers to any ERISA-covered plan that holds employer securities and imposes a 10-year bar as to any other ERISA plan except fully-insured welfare plans. Cleveland Regional Office and Plan Benefits Security Division

Pfiel v. State Street (6th Cir.)

This case is an appeal from a district court decision dismissing the participants' claims that the independent fiduciary, State Street, breached its fiduciary duties by waiting too long to sell employer stock in a 401(k) plan as GM teetered on the verge of bankruptcy, even though plan documents required State Street to sell if the viability of the company was in question. The court held that the claim failed on causation grounds because the complaint did not plausibly allege that the loss was caused by the fiduciaries' conduct rather than the conduct of the participants in holding onto the stock despite publicly available information about the company's condition. The Secretary filed a brief on February 15, 2010, arguing that the Sixth Circuit's Kuper standard, and not the contractual language, should apply when judging the prudence of State Street's conduct, but that, even under the contractual standard, the plaintiffs plausibly alleged that State Street breached its duty, as the district court held. Plaintiffs also adequately pled that State Street's imprudence caused the Plans to lose hundred of millions of dollars. The Secretary argued that the fact that the plans at issue here, like nearly all defined contribution 401(k) plans, allowed the participants to choose between different investment options, did not absolve State Street of its duty to ensure that the employer stock fund remained a prudent investment option for the plans or absolve State Street of its liability in failing to do so. Even in the limited circumstances where ERISA § 404(c) provides a fiduciary safe harbor for losses that result from a plan participant's exercise of control over his or her individual retirement account, plan fiduciaries must still select and maintain prudent investment options and, under the Secretary's regulation, plan fiduciaries are liable for any resulting plan losses if they do not. The court heard oral argument on October 7, 2011 but would not permit the Secretary to participate. Plan Benefits Security Division

Solis v. Reeder (S.D. Tex.)

On January 10, 2011, the Secretary obtained a consent judgment and order against ERISA plan fiduciaries Wayne Reeder and Reeder's Ceramic Tile, Inc. for violations that harmed the participants and beneficiaries of the company's ESOP. The complaint, filed on November 19, 2010, alleged that the defendants violated ERISA by not allocating stock to individual participants' accounts on an annual basis, by failing to obtain a valuation of the stock prior to terminating the ESOP, and by using a 2004 stock valuation to determine individual participants' benefits when terminating the plan. The consent judgment and order enjoins the fiduciaries from further ERISA violations and permanently enjoins them from serving as fiduciaries to any other ERISA-covered plan. Dallas Regional Office

Sewright v. ING Group NV (11th Cir.)

In this employer stock case, the district court dismissed the claim in part on a finding that the defendants had no discretion to stop investing in employer stock and thus were not acting in a fiduciary capacity; it was also based, in the alternative, on the Moench presumption of prudence. There also are duty to disclose issues in the case. On November 12, 2010, the Secretary filed an amicus brief arguing that the district court erred in holding that the defendant plan fiduciaries had no duty to override plan terms mandating investment in stock issued by ING, where it would be imprudent to continue to permit investment in employer stock at allegedly inflated prices; that the defendants were entitled to a presumption of prudence in continuing to allow the plan to purchase employer stock at inflated prices and that the plaintiffs failed to plausibly plead facts overcoming the presumption; and that the plaintiffs did not plausibly allege that the defendants breached their fiduciary duty to speak truthfully to plan participants by providing misleading information about the company's financial condition. Plan Benefits Security Division

Taylor v. Key Corp. (6th Cir.)

This is a case that survived the motion to dismiss stage because the district court held that the Moench presumption of prudence does not allow for dismissal at the pleading stage and does not require a showing of imminent collapse to rebut the presumption; the district court also held that the plaintiff stated a viable misrepresentation claim based on allegations that the fiduciaries knowingly incorporated by reference into plan documents misleading information that was included in SEC filings. (However, the district court later dismissed the case on constitutional standing grounds). The Secretary filed an amicus brief on the standing issue on January 12, 2011 (see Taylor v. Key Corp., Section E. Participants' Rights and Remedies). Key Corp's brief on the cross-appeal addressing the Moench and disclosure issues was filed on extension on April 13, 2011; the plaintiffs' response was filed on May 13, 2011, and the Secretary filed a brief on the cross-appeal issues on May 20, 2011, arguing against dismissals on the Moench presumption and disclosure issues. Plan Benefits Security Division

Solis v. Thomas (M.D. Pa.)

On February 17, 2011, the Secretary filed a complaint alleging that Stephen Thomas, president and director of Gagne Precast Concrete Products, Inc. and a trustee of its Employee Stock Ownership Plan (ESOP), caused the ESOP to pay more than fair market value for employer stock. Thomas approved the ESOP's purchase of 100% of the employer's common stock for approximately \$3.9 million, allegedly relying on a valuation based on stale and inaccurate data, unrealistic growth and risk assumptions, and other obvious flaws. Also, Thomas allegedly simultaneously represented the ESOP and his private equity company, which received numerous benefits in the deal, including equity instruments that directly reduced the ESOP's ownership interest in the company. In addition, the complaint alleges that Thomas failed to protect plan assets from dissipation. Thomas withdrew approximately \$1.1 million in corporate assets. As a fiduciary, he had a duty to evaluate whether it was in the ESOP's interest to file a derivative lawsuit to challenge his misappropriation of corporate assets, but he did not do so. Nor did he consider taking any other action to protect the ESOP's assets. On November 8, 2011, the court entered a consent judgment, finding that \$225,000 is due to the ESOP and enjoining Thomas from serving as a fiduciary to any ERISA-covered plan for ten years. The defendant does not

have sufficient funds to pay the judgment, so a payment plan is incorporated into the consent judgment. This judgment is also in conjunction with a settlement of issues relating to another ESOP that the defendant established in the same area, the Frank L. Woodworth, Inc. ESOP. Concurrent with the execution of the consent order in the Solis v. Thomas case, Thomas executed a settlement agreement in which he agreed to pay \$75,000 to the Frank L. Woodworth Inc. ESOP, for which he also was a trustee. Thomas further agreed to the appointment of an independent fiduciary for both plans and will be responsible for all costs associated with administering the ESOPs. The funds will be collected through a payment plan with interim payments to be held by the independent fiduciary until distribution to the ESOPs' participants. Settlements in the amount of \$10,000 and \$5,000, respectively, have been executed with two additional fiduciaries, Tchad Robinson and Brent Hartley. Boston Regional Office

In re Tribune Co. (Bankr. D. Del.)

On June 2, 2009, the Secretary filed proofs of claim in the Tribune's bankruptcy relating to losses suffered by the company's ESOP as a consequence of that bankruptcy. On November 16, 2010, the Secretary filed objections to four separate proposed Disclosure Statements for Joint Plans of Reorganization (the "Plans"). On December 9, 2010, the court issued an order approving all of the disclosure statements and establishing procedures for voting on them. Subsequently, two of the proposed Plans were withdrawn. The Secretary filed objections to the remaining two Plans on February 15, 2011 and a supplementary letter brief objecting to the Plans on May 11, 2011. The Secretary's objections generally focused on the Plans' improper attempts (a) to preclude the ESOP and its participants from pursuing their ERISA class action claims by releasing the ERISA defendants from their liability, (b) to subordinate the Secretary's ERISA claims to the claims of unsecured creditors, and (c) to insulate the Tribune, the ESOP's fiduciaries and its service providers from liability in connection with the post-petition operation of the ESOP.

On August 19, 2011, the Secretary executed a memorandum of understanding with the Tribune, GreatBanc Trust Company and others resolving the Secretary's proofs of claim. Thereafter, the Secretary executed a formal agreement with the same parties. On October 19, 2011, the Bankruptcy Court approved the agreement, which provides for payments totaling \$32 million to be made to ESOP participants, resolution of the DOL's claims through such payments, GreatBanc's and Tribune's commitment to provide mandatory ERISA training to appropriate personnel, and satisfaction of the Department's ERISA § 502(l) claim. On November 15, 2011, the Tribune paid \$7 million to the IRS, an amount sufficient to satisfy the ERISA § 502(l) claim. Final district court approval of the agreement in the related class action currently pending in the Northern District of Illinois is expected in the spring of 2012. Plan Benefits Security Division

Solis v. Ver Helst (S.D. Iowa)

On December 30, 2011, the Secretary filed a complaint against Kurt Ver Helst, D.C., P.C. and Kurt Ver Helst, seeking restoration of losses to the company's Employee Stock Ownership Plan (ESOP). The complaint alleges that when the ESOP terminated in 2009, the fiduciaries permitted unallocated ESOP shares valued at \$21,638 to revert to the company when those shares should have been allocated to participants. The complaint further alleges that at the time of ESOP termination, the fiduciaries failed to take any action to repay \$62,939 in improperly charged interest on ESOP loans. The complaint also names Mark Eldridge as a defendant,

alleging he was a knowing participant in the fiduciary breaches and seeks his removal as a service provider to the ESOP. Kansas City Regional Office

Solis v. Westra (E.D. Wis.)

On March 3, 2010, the Secretary filed a complaint against Steven Westra, a trustee of the Westra Construction, Inc. Employee Stock Ownership Plan (ESOP), and an officer and owner of the company. The complaint alleges that he allegedly failed to inform the ESOP's valuation experts that, just prior to the ESOP's October 7, 2003 purchase of stock, the company's surety provider had given the company notice of its intent to cancel the company's surety coverage. Therefore, the ESOP allegedly paid more than fair market value for the stock. On June 18, 2010, the complaint was amended to include co-fiduciary violations against the ESOP's two remaining trustees, Patrick Flynn and Thomas Thayer. On September 23, 2010, the court entered an order and decision denying Westra's motion to dismiss the Secretary's amended complaint. The court held that the Secretary's amended complaint provided sufficiently detailed allegations to give adequate notice of plausible claims, was not subject to any heightened pleading requirements under ERISA, and did not require the naming of additional parties because ERISA co-fiduciary liability is joint and several. On December 7, 2011, the court entered a consent order and judgment barring the defendants from acting as fiduciaries or service providers to any ERISA-covered plan. They previously had restored \$70,000 to the plan. Chicago Regional Office

2. Collection of Plan Contributions

Solis v. AC Engineering, Inc. (E.D. Cal.); Solis v. Barringer (In re Barringer) (Bankr. E.D. Cal.)

On February 2, 2011, the Secretary filed a complaint against AC General Engineering, Inc., Christopher Barringer and Atilano Alcala, fiduciaries of the company's 401(k) Profit Sharing Plan, alleging that they failed to ensure that employee and mandatory prevailing wage contributions were collected and remitted to the plan. The Secretary had filed an adversary complaint against Barringer on January 27, 2011, seeking to have his debt to the plan declared non-dischargeable. On February 14, 2011, the bankruptcy court entered a stipulated order that the debt in the amount of \$46,868.81 is non-dischargeable. On June 22, 2011, the district court entered a consent judgment and order, finding the defendants liable for \$46,868.81 in plan losses and enjoining Barringer and Alcala from future fiduciary service to any ERISA-covered plan. San Francisco Regional Office

Solis v. Adams (D. Neb.)

On August 22, 2011, the Secretary filed a complaint seeking to remove Marilyn K. Adams and Jeffrey L. Adams as fiduciaries to the AMS Healthcare Services, Inc. 401(k) Plan and appoint an independent fiduciary to terminate the plan and distribute plan assets. The Secretary also requests that the court permanently bar Marilyn and Jeffrey Adams from serving as fiduciaries to any ERISA-covered plan, based upon criminal indictments against them for embezzling \$111,136.79 in employee contributions from the plan. Kansas City Regional Office

Solis v. Allegra (S.D. Ind.)

On October 15, 2010, the Secretary filed a complaint against Allegra Print & Imaging and Sean Eagan, fiduciaries of the company's 401(k) Plan and Health Plan, alleging that they had failed to remit employee contributions to the plans. On July 18, 2011, the court entered a consent order and judgment requiring the defendants to pay \$11,000 to the plans with respect to the Secretary's current complaint and an additional \$55,000 owed to the same plans pursuant to a default judgment obtained by the Secretary in previous litigation. The defendants were also barred from serving as ERISA fiduciaries. Chicago Regional Office

Solis v. Andringa (D. Neb.)

On December 22, 2011, the Secretary filed a complaint against Paul W. Andringa and the Integrity Builders, Inc., 401(k) Safe Harbor Plan, alleging that the defendants failed to timely forward \$32,556.10 in employee contributions from November 2004 through May 2009, failed to forward \$28,536.18 in employee contributions from March 2009 through May 2009, and failed to forward \$14,180.64 in mandatory employer contributions for plan years 2005 through 2008. Lost earnings on the unforwarded employee and employer contributions, as well as on the late forwarded contributions, amount to \$8,439.75. On the same date as the filing, the court approved the parties' consent judgment, which offsets Andringa's account balance and requires Andringa to make not more than 12 monthly payments to restore amounts due after the offset. Defendants are also required to terminate the plan and take all necessary steps to locate the plan's participants/beneficiaries and disburse all account balances. Kansas City Regional Office

Solis v. Arciero (W.D. Okla.)

On February 14, 2011, the court entered an agreed consent judgment and order requiring Mark Arciero, as fiduciary of the Quartz Mountain Aerospace, Inc. (QMA) Welfare Plan, to restore all losses to the plan, permanently enjoining him from further ERISA violations, and barring him from serving as an ERISA fiduciary unless he obtains 12 hours of fiduciary education before January 31, 2012. The complaint, filed on November 8, 2010, alleged that Arciero, who formerly served as QMA's CEO and inside director, caused employee premiums of \$39,638.65 intended for health, dental, short-term disability and life insurance to be withheld from 87 participants but not forwarded to the plan. Dallas Regional Office

Solis v. Ayoub (E.D. Mich. and Bankr. E.D. Mich.)

On May 2, 2011, the Secretary filed a complaint alleging that from August 7, 2008 to December 25, 2008, Ted Ayoub was untimely in forwarding employee contributions to the Yamasaki Associates, Inc. 401(k) Savings and Investment Plan. Ayoub also allegedly failed to forward employee health premiums to the company's Group Health Plan from January to March 2009. The Secretary secured \$10,000 for the health plan through a consent order and judgment entered on August 11, 2011. The Secretary had filed an adversary complaint against Ayoub on October 22, 2010, seeking a determination that the debts resulting from his fiduciary breaches are non-dischargeable. The bankruptcy case was resolved on July 22, 2011 when the parties filed a stipulation deeming his debt non-dischargeable. Cleveland Regional Office

Solis v. B & K Builders, Inc. (W.D. Wis.)

On October 14, 2011, the Secretary filed a complaint against Kenneth Staab, Robert Aschenbrenner, and B & K Builders, Inc., fiduciaries of the company's 401(k) Plan, for failing to ensure that employee contributions were remitted and timely remitted to the 401(k) plan between June 2007 and June 2009. The complaint also alleges that Staab and B & K Builders, Inc., fiduciaries of the company's Prevailing Wage Plan, failed to ensure that employer contributions were remitted to that plan during the same time period. The Secretary seeks \$17,000 in unremitted employee contributions for the 401(k) Plan and \$97,000 in unremitted employer contributions for the Prevailing Wage Plan, plus lost opportunity costs. Chicago Regional Office

Solis v. Baldino (D. Wyo.)

On November 22, 2011, the Secretary filed a complaint against Guy J. Baldino and Nationwide Supply, Inc., seeking an order directing them to restore \$10,536.27 in employee contributions to the Nationwide Supply, Inc. SIMPLE IRA Plan that they failed to forward to the plan. From May 2, 2008 through December 31, 2009 defendants allegedly failed to forward \$17,285.20 of elective salary deferrals; \$6,748.93 of this amount was repaid to the plan during the investigation. The Secretary also seeks lost interest earnings of \$1,684.54 and post-judgment interest for the defendants' failure to timely forward contributions of \$19,930.33 during the period from February 8, 2008 through December 31, 2009. Kansas City Regional Office

Solis v. Belding Hausman Inc. (W.D.N.C.)

On July 27, 2011, the Secretary filed a complaint against Belding Hausman, Inc. and the company's president, Curtis Wilford Stowe, to restore employee contributions, employee loan repayments and lost earnings to the defunct company's deferred compensation plan. The lawsuit alleges that the company did not forward \$59,230 in employee contributions and \$72,703 in participant loan repayments to the plan. The complaint seeks a court order requiring the defendants to restore all losses, including any lost earnings, requiring that any of their claims to plan assets be offset against the losses, appointing an independent fiduciary, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

Solis v. Berkopec (E.D. Va. and Bankr. E.D. Va.)

On March 17, 2011, the Secretary filed an adversarial action in the bankruptcy proceeding of Robert Berkopec and a civil complaint against Berkopec, McIntrye Construction, Inc. and the McIntrye Construction, Inc. 401(k) Plan. The actions assert that Berkopec and McIntrye Construction failed to forward employee contributions to the plan from 2006 through 2009. On December 5, 2011, the district court granted the Secretary's motion for default judgment against McIntrye Construction. On July 14, 2011, the court entered a consent judgment against Robert Berkopec. Under these orders, the company and Berkopec are held jointly and severally liable for \$17,088.73, which represents full restitution to the 401(k) plan and are permanently enjoined from serving as fiduciaries to an ERISA-covered plan. On July 31, 2011, the debt to the plan was declared nondischargeable in Berkopec's Chapter 7 bankruptcy proceeding. Philadelphia Regional Office

Solis v. Biggerstaff (W.D. Wis. and Bankr. W.D. Wis.)

The Secretary filed a complaint in district court on January 26, 2011 against Premier Vending, Inc. and David Biggerstaff, president and former owner of the company, and an adversary complaint in bankruptcy court on December 17, 2010, against David Biggerstaff, fiduciary of the Premier Vending, Inc. 401(k) Plan. The complaint alleged that defendants failed to remit and timely remit employee salary contributions to the plan from September 1, 2006 through January 30, 2009. On April 11, 2011, the district court entered an order requiring the defendants to restore \$31,204.46 to the plan and barring the fiduciaries from acting as fiduciaries or service providers to any ERISA-covered plan. On March 21, 2011, the bankruptcy court entered an order precluding Biggerstaff from discharging the debt owed the plan. Chicago Regional Office

Solis v. Blackford (D. Minn.)

The Secretary filed a complaint on August 14, 2009, alleging that the defendants failed to remit \$14,000 in employee contributions to the employer's SEP/SAR Plan from 2003 to 2006. The court granted summary judgment against the defendants on January 4, 2011 and entered an order requiring the defendants to make the plan whole and appointing an independent fiduciary to terminate the plan. Chicago Regional Office

Solis v. Bordes Group, Inc. (M.D. Fla.)

On November 16, 2010, the Secretary filed a complaint against the Bordes Group, Inc. and the Estate of Roy Bordes, alleging that the fiduciaries failed to remit employee contributions to the company's 401(k) Plan for 10 months. The complaint also alleges that Roy Bordes, the now-deceased trustee and company owner, failed to repay an outstanding participant loan. Plan losses total approximately \$45,061.30, including interest. On February 20, 2011, the fiduciaries entered into a consent judgment and order, which subsequently was approved and entered by the court, resulting in full restitution and the appointment of an independent fiduciary to terminate the plan and make the necessary distributions. Atlanta Regional Office

Solis v. Botes (N.D. Ga.)

On December 1, 2008, the Secretary filed a complaint against Computer Consulting Services, Inc., sponsor of a 401(k) plan, and Andries Botes and Peter Steyn, plan fiduciaries, alleging failure to remit contributions and loan repayments for plan years 2005 and 2006. The suit seeks over \$18,000 in contributions and over \$3,000 in participant loan repayments, plus lost earnings, and asks the court to permanently enjoin defendants from serving as fiduciaries to any ERISA-covered plan. In a previous order, the court removed Botes as a fiduciary, barred him for at least 13 years from serving as a fiduciary as the result of a 2006 criminal conviction, and appointed an independent fiduciary to manage the plan. On February 2, 2010, the Secretary obtained an order denying Botes' motion for judgment on the pleadings. In his motion, Botes had alleged that the Secretary: (1) lacked standing to sue; (2) failed to prove jurisdiction; (3) failed to timely prosecute the claim; and (4) failed to state a claim on which relief could be granted. The court disagreed with each of Botes' contentions. On March 3, 2010, the Secretary filed a motion for summary judgment. On November 24, 2010, the court denied the motion without prejudice to allow the defendant, who is incarcerated and pro se, an additional 75 days to conduct discovery. The Secretary's case against Steyn was settled, with his agreement to pay the plan \$8,000. On

June 21, 2010, the payment was timely received by the plan's independent trustee. On June 28, 2011, the court granted the Secretary's motion for summary judgment with respect to the company, finding it liable to the plan in the amount of \$20,951.80, and denied the Secretary's motion with respect to defendant Stephan Botes. On September 21, 2011, the court issued an order denying Botes' motion for judgment on the pleadings. The court granted the Secretary's motion to stay the entire case until June 2, 2013, which is the scheduled date of Botes' release from federal prison. Atlanta Regional Office

Solis v. By Design Consulting Corporation (N.D. Ga.)

On February 1, 2012, the Secretary filed a complaint against By Design Consulting Corporation and plan trustee Randall Williamson Smith, for allegedly failing to remit employee contributions of \$23,737.50 and participant loan repayments of \$2,240.89 to the company's 401(k) Plan between August 2006 and April 2009 and failing to remit employee contributions to the plan in a timely manner since May 2005. Atlanta Regional Office

Solis v. Calypso Waterjet Systems, Inc. (N.D. Tex.)

On December 6, 2011, the court granted a consent judgment and order against Calypso Waterjet Systems, Inc. The complaint, filed on November 15, 2010, alleged that Calypso, Denis Lufkin (owner and president) and his wife, Johnnie Howard (CEO and chairman), failed to remit and untimely remitted \$36,243.12 in employee contributions and \$8,862.16 in participant loan repayments to the company's 401(k) Plan. The consent judgment and order requires the defendants to pay restitution of \$70,395.14 plus interest, enjoins them from further violations, and permanently enjoins them from serving as fiduciaries to any other ERISA-covered plan. Dallas Regional Office

Solis v. Chaney (D. Me.)

The Secretary filed a complaint on November 5, 2010, alleging that now-defunct CLRS Enterprises, doing business as Woodward Thomsen, the plan sponsor, and Larry Chaney, owner of CLRS and functional fiduciary of its SIMPLE IRA Plan, failed to remit approximately \$11,000 in withheld employee contributions to the plan from February 27, 2007 through November 27, 2007. Chaney also allegedly permitted plan assets to be used to satisfy the debts of the sponsor, an entity he owned and controlled. On April 5, 2011, the court entered a consent judgment and order requiring Chaney to remit approximately \$10,000 to the plan for the benefit of its non-fiduciary participants. In addition, Chaney is required to effect all distributions under the plan and terminate the plan. Following the termination of the plan, Chaney is permanently enjoined from serving as a fiduciary to any other ERISA-covered plan. Boston Regional Office

Solis v. Clifton (E.D.N.C.); In re Clifton (Bankr. E.D.N.C.)

On January 4, 2010, the Secretary filed a complaint alleging that fiduciaries Castleton Group, Inc. and Suzanne Clifton, the company's owner and former CEO, failed to forward employee contributions to the company's plans, resulting in 401(k) Plan losses totaling at least \$262,000 and losses to Group Health Plan participants totaling approximately \$77,000. On March 24, 2009, Clifton had filed for bankruptcy. On June 13, 2010, she filed a motion for sanctions and injunction, on the grounds that the Secretary's suit in district court violated the Bankruptcy

Code's automatic stay provision. On August 3, 2010, the bankruptcy court held that the Secretary's district court action does not violate the automatic stay provision, and that the Department may, therefore, continue with the court litigation. Although Clifton and Castleton Group are bankrupt, there was insurance coverage pursuant to a fiduciary liability insurance policy and fidelity bond. On January 19, 2011, the court entered a consent judgment and order. The insurance sources agreed to make restitution of all losses to the 401(k) Plan, Castleton Group agreed to recognize a priority claim in its bankruptcy for the amount owed to the Health Plan, and Clifton was barred from serving as a fiduciary to ERISA-covered plans. After the 30-day appeal period expired, the remaining settlement actions were taken, including payment of insurance proceeds; distribution of \$45,000 to the 401(k) Plan in the Castleton Group bankruptcy and subsequent reduction of the plan's proof of claim; withdrawal of the 401(k) Plan successor trustee's proof of claim in the Clifton bankruptcy; and recognition of a priority claim of \$66,705 on behalf of the Health Plan in the Castleton Group bankruptcy. Atlanta Regional Office

Solis v. Corinthian Custom Homes, Inc. (M.D. Tenn.)

On November 4, 2010, the Secretary filed a complaint against Corinthian Custom Homes, and individual fiduciaries Nicholas Psillas, Deborah Psillas, and Richard DePriest, alleging that between 2005 and 2007, the defendants withheld \$100,248.96 in employee contributions to the company's 401(k) Plan but failed to forward them to the plan in a timely manner, resulting in \$13,036.16 in lost earnings. The complaint seeks an order requiring defendants to restore all losses, requiring that any of their claims to plan assets be offset against the losses, permanently barring them from serving in a fiduciary capacity to any ERISA-covered plan, and appointing an independent fiduciary to oversee the plan at the defendants' expense. On October 4, 2011, the Secretary filed an application for entry of the clerk's default as to all defendants, except Richard DePriest. On November 16, 2011, the clerk entered default as to Nicholas Psillas and Deborah Psillas. Atlanta Regional Office

Solis v. Craftsmen Custom Cabinets Inc. (N.D. Ga.)

On July 12, 2011, the court approved a consent judgment between the Secretary and defendants Craftsmen Custom Cabinets, Inc., Barry Pugh, and Cynthia Pugh, resolving a complaint filed by the Secretary on April 7, 2011. The complaint alleged that the fiduciaries failed to remit employee contributions intended for the company's SIMPLE IRA Plan and failed to collect employer contributions due to the participants' accounts. Under the consent judgment, the defendants will restore \$16,047 to plan participants, agreed to allow any participant interest they may have in existing or future plan assets to be applied as an offset against the amounts due to the plan, and are permanently enjoined from serving as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

Solis v. CSG Group, Inc. (N.D. Ga.)

On April 4, 2011, the Secretary filed a complaint against CSG Group, Inc. and fiduciary Thomas Wimberly, alleging that during 2007 and 2008, approximately \$15,562.00 in withheld employee contributions were not forwarded to the company's Profit Sharing Plan and that during 2005, 2006 and 2007, many remittances and loan repayments were remitted late, resulting in additional lost earnings. The complaint seeks an order requiring defendants to restore all losses, requiring

that any of their claims to plan assets be offset against the losses, permanently barring them from serving in a fiduciary capacity to any ERISA-covered plan, and appointing an independent fiduciary to oversee the plan at the defendants' expense. Atlanta Regional Office

Solis v. Curry (Bankr. S.D. Ind.)

On December 9, 2010, the Secretary filed an adversary complaint seeking to have Karen Curry's debt to the Heartland Foods, Inc. 401(k) Profit Sharing Plan declared non-dischargeable. The complaint alleges that Curry engaged in defalcation by failing to remit \$85,232.08 in employee contributions and loan repayments to the plan from January 1, 2008 to December 31, 2010. The complaint further alleges that Curry engaged in defalcation when \$171,225.00 was transferred to Heartland Foods and when she distributed plan assets to participants in excess of the amount authorized in the plan document. Curry filed for bankruptcy on September 12, 2011. Cleveland Regional Office

Solis v. Custom Navigation Systems, Inc. (D. Conn.)

On November 15, 2011, the Secretary filed a complaint alleging that Steven Gill and Custom Navigation Systems, Inc, fiduciaries to the company's 401(k) Profit Sharing Plan, failed to forward in excess of \$74,000 in employee contributions and loan payments and diverted such money to the operations of the company. Boston Regional Office

Solis v. David Owen (D. Del.)

On October 29, 2010, the Secretary filed a complaint against David Owen and Owen Printing Dover, Inc. for failure to forward employee contributions to the asset custodian of the company's 401(k) Plan between May, 2003 and April, 2006. The complaint sought restoration of all losses to the plan and a permanent injunction barring David Owen from serving as a fiduciary. On April 6, 2011, court entered a consent judgment against Owen, ordering him to restore \$6,645.39 in losses, inclusive of interest, to the 401(k) Plan, permanently enjoining the defendants from serving as a trustees or fiduciaries to any ERISA-covered plan, and appointing an independent fiduciary to oversee the collection of payments with costs to be paid by Owen. Prior to this lawsuit, Owen was the subject of a subpoena enforcement action brought by the Department because of his refusal to respond to a Department subpoena. Philadelphia Regional Office

Solis v. Delta States Turf, Inc. (M.D. La.)

On November 11, 2011, the court entered a consent judgment and order against Delta States Turf, Inc., Jeffery Canady, company owner, and Kimball Robertson, one time president and CEO, confirming that the defendants caused the company's Profit Sharing 401(k) Plan to suffer losses of \$15,772.03. The order permanently enjoins defendants from violating ERISA and permanently bars them from serving as fiduciaries. Delta States ceased operations in 2008. The complaint, filed on December 30, 2010, alleged that the defendants failed to forward \$12,065 in employee contributions and untimely forwarded \$39,805 in employee contributions to the plan. Dallas Regional Office

Solis v. DeStefano (E.D. Mo.)

On November 9, 2011, the Secretary filed a complaint against Elisabeth DeStefano, seeking restoration of contributions not forwarded, plus lost earnings, for employees participating in The Display Center SIMPLE IRA Plan. DeStefano allegedly failed to forward employee payroll withholdings to participant accounts in 2006, 2007 and 2008. The complaint seeks to restore the withholdings not forwarded, plus lost earnings, and to bar future violations. Kansas City Regional Office

Solis v. DiFranco (N.D. Ohio and Bankr. N.D. Ohio)

On September 1, 2009, the Secretary filed a complaint in district court against Dominic DiFranco for his failure to remit \$19,083.63 to the Precision Funding Corporation 401(k) Retirement Plan from January 15, 2004 through December 30, 2006. On December 28, 2009, the Secretary filed an adversary complaint in the bankruptcy court against DiFranco, seeking an order finding that the debt DiFranco owes the plan is non-dischargeable. On June 21, 2010, the bankruptcy court entered an order finding that the debt owed the plan is non-dischargeable. On June 16, 2010, DiFranco filed a Chapter 13 bankruptcy petition, and on January 25, 2011, the court issued an order finding that the debt owed the plan is non-dischargeable. Chicago Regional Office

Solis v. D.L. Silva, Inc. (E.D. Cal.)

On August 31, 2010, the Secretary filed a complaint against D. L. Silva, Inc. dba Custom Air, fdba, Sunset Home and Hearth, Dennette Dores, Daniel Silva, and the Estate of Dennis L. Silva. The late Dennis Silva and Dennette Dores were owners and officers of Custom Air, while Daniel Silva was the trustee of the company's Employee Benefit Trust. The complaint alleges that the defendants failed to remit/collect \$104,513 in employee and mandatory prevailing wage contributions for time period from January 2006 to March 2007. On April 8, 2011, the court entered a consent judgment, finding the defendants jointly and severally liable for \$120,603.90 in losses which were paid in a lump sum by May 15, 2011, requiring the defendants to forfeit any monies they were due under the plan, and requiring them to pay the § 502(l) penalty. The court also enjoined them from future ERISA violations and from future fiduciary service to any ERISA-covered plan and appointed an independent fiduciary for the plan. San Francisco Regional Office

Solis v. DS3 Computing Solutions, Inc. (E.D. Tex.)

On November 15, 2011, the court entered a consent judgment and order against DS3 Computing Solutions, Inc., DS3 Computing Solutions, Inc. 401(k) Plan, and Sylvester Davis (owner and President), requiring defendants to restore all plan losses, enjoining them from further ERISA violations, and permanently barring them from serving as fiduciaries. The complaint, filed on October 7, 2011, alleged that DS3 and Davis failed to remit and untimely remitted employee contributions and loan repayments to the company's 401(k) Plan, resulting in plan losses, including lost opportunity costs of \$4,621.21. Dallas Regional Office

Solis v. Eanes (N.D. Ill and Bankr. N.D. Ill.)

On January 7, 2010, the Secretary filed a complaint in district court against Raullo and Gina Eanes, fiduciaries of the Jet Fastener Corporation Health Plan, for failing to remit \$10,000 in

employee contributions to the plan from April 1, 2008 through August 15, 2008. On June 16, 2010, the district court granted the Secretary's motion to strike defendants' jury demand. On February 16, 2011, the district court entered an order requiring the fiduciaries to restore \$5,325.20 to the plan. Previously, on December 28, 2009, the Secretary filed an adversary complaint in the bankruptcy court to preclude the debtors from discharging the debt that they owe to the plan. On March 19, 2010, the bankruptcy court denied defendants' motion to dismiss the adversary complaint. Defendants had argued that the complaint failed to state a claim for relief under Fed. R. Civ. P. 8(a) and did not comply with the special pleading requirements of Fed. R. Civ. P. 9(b) for fraud allegations. The bankruptcy court found that the Secretary's complaint met the pleading requirements of Fed. R. Civ. P. 8(a) and that the allegation of defalcation did not constitute an allegation of fraud. On March 16, 2011, the bankruptcy court ordered that the debt owed the plan is not dischargeable. Chicago Regional Office

Solis v. Embrenche LLC (M.D.N.C.)

On May 11, 2011, the Secretary filed a complaint against Embrenche LLC and its owners, Marty Hickman, Joe Parker and Avery Hairston, alleging that they failed to remit employee contributions to the company's 401(k) profit sharing plan and failed to administer the plan after the company ceased operating. The lawsuit seeks restitution of approximately \$7,255 in unremitted employee contributions, along with lost earnings, and an order requiring the setoff of individual plan accounts against the losses owed to the plan, appointing a successor fiduciary to administer the plan and distribute the remaining assets to the participants, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

Solis v. Explore General (E.D. Cal.)

On June 25, 2010, the Secretary filed a complaint against Jaime M. Gonzalez, Paul Gong and Explore General, Inc., fiduciaries to the company's 401(k) Profit Sharing Plan. The suit alleges that from, January 1, 2002 through at least March 2005, Explore General and Gonzalez failed to timely remit to the plan at least \$70,000 in employee contributions. The complaint further alleges that from December 1, 2002 through at least March 2005, Explore General and Gonzalez failed to timely collect mandatory prevailing-wage contributions of approximately \$200,000. Approximately \$118,000 in mandatory prevailing-wage contributions remained uncollected. The complaint further alleges that all three defendants failed to administer the plan in accordance with ERISA. On October 19, 2011, the Secretary filed a motion for summary judgment on all claims. On December 22, 2011, the court granted the Secretary's motion, finding that Explore General and Gonzales were liable for \$519,601.14 in losses to the plan. The court also enjoined them from future fiduciary service to any ERISA-covered plan and ordered that an independent fiduciary be appointed. San Francisco Regional Office

Secretary v. Family Mobile Medical Retirement Plan (N.D. Ind.)

On March 21, 2011, the Secretary filed a complaint against Ben Richmond and Family Mobile Medical Services, Inc, fiduciaries of the company's Retirement Plan, alleging that the fiduciaries failed to remit employee salary contributions to the plan between April 1, 2008 and December 31, 2008. The Secretary is seeking restoration of approximately \$9,000 to the plan and a

permanent injunction barring the defendants from serving as fiduciaries. Chicago Regional Office

Solis v. Federowicz (D. Conn.)

On December 12, 2011, a default judgment was entered against Scott Federowicz, principal owner of the now-defunct Partners Communication, Inc. and trustee of the company's Prevailing Wage & 401(k) Plan. The Secretary's complaint alleged that the defendant failed to collect the prevailing wage contributions due and owing from the company. The facts suggest a reasonable likelihood of success in collecting most of the unremitted contributions, had efforts been undertaken at the time to do so. Since the filing, Federowicz has been making intermittent payments to restore funds to the plan. The default judgment orders him to pay the total amount of \$78,780.00 and enjoins him from serving as a fiduciary to ERISA-covered plans. Boston Regional Office

In re FGC Liquidation, LLC (F/K/A Fletcher Granite Company, LLC) (Bankr. D. Mass.)

The Secretary filed a proof of claim seeking allowance of a claim against the estate in the amount of \$12,134.36 in salary deferrals that were withheld from employee wages for contribution to the Fletcher Granite Company, LLC 401(k) Plan but were not segregated from the debtor's general assets and transferred to the plan. On May 26, 2011, the court approved a stipulation for judgment whereby the debtor agreed to contribute \$12,134.36 from its general operating account to the plan and agreed to the appointment of an independent fiduciary to administer and terminate the plan and distribute the \$5,548,663.00 in plan assets to the 85 remaining participants. Boston Regional Office

Solis v. Fishleigh (N.D. Ohio)

On May 11, 2011, the Secretary filed a complaint against Harry Fishleigh, III, the trustee of the North Coast Wood Products Profit Sharing Plan, alleging that Fishleigh had improperly transferred \$96,837.63 in plan funds to his son, who was not a plan participant. On September 20, 2011, the U.S. Attorney filed an information charging Fishleigh with embezzlement for the improper transfer. Pursuant to a plea agreement with the Department of Justice, Fishleigh pled guilty and agreed to full restitution. Restitution was achieved when the Department of Labor and Fishleigh entered into a consent judgment, in which Fishleigh agreed to be removed as plan fiduciary, to be permanently enjoined from acting as an ERISA fiduciary or service provider, to restore \$96,837.63 in plan assets plus \$17,339.23 in lost opportunity costs, and to pay \$2,941.25 for an independent fiduciary to administer and terminate the plan. In the criminal matter, Fishleigh was sentenced to probation for two years. Cleveland Regional Office

Solis v. Flagship (N.D. Ill.)

On June 3, 2010, the Secretary filed a complaint against Flagship Integration Services, Inc. and Kim M. Flagstad, fiduciaries to the company's 401(k) Plan, alleging that defendants failed to remit and untimely remitted employee contributions to the plan from February 1, 2005 through May 1, 2007. On December 29, 2011, the parties filed a jointly executed consent order and judgment requiring the fiduciaries to restore \$5,000 to the plan, requiring Kim Flagstad to distribute the plans' assets to the participants by June 10, 2012 and terminate the plan, and

barring her from acting as fiduciary or service provider to any ERISA-covered plan for eighteen months. Chicago Regional Office

Solis v. Florida Family Magazine (M.D. Fla.)

On November 10, 2010, the Secretary filed a complaint against Florida Family Magazine, Inc. and its owner, Mary Elizabeth Winkle, for failing to remit employee and employer contributions to the company's SIMPLE IRA Plan. The fiduciaries made partial restitution payments after the Department's investigation commenced. The parties negotiated a consent judgment and order, providing for additional restitution of \$2,539.88, a waiver by Winkle of benefits to which she otherwise would have been entitled, and a permanent injunction barring Winkle from serving as a fiduciary or service provider to any ERISA-covered plan. On February 16, 2011, the consent judgment and order was submitted to the court, which indicated that the injunctive language was overbroad. The parties resubmitted a revised consent judgment and order, which was approved by the court on April 21, 2011. It requires full restitution and permanently enjoins Winkle from serving as a fiduciary or service provider to any ERISA-covered plan. Atlanta Regional Office

Secretary of Labor v. Fussner (S.D. Ohio); Solis v. Fussner (Bankr. S.D. Ohio)

On October 29, 2010, the Secretary filed a complaint in district court against John Fussner and Christopher Technologies, LLC, fiduciaries of the company's 401(k) Plan and Trust, alleging that they failed to remit and timely remit employee contributions to the plan from February 1, 2007 through November 1, 2008. On April 20, 2011 the court ordered the fiduciaries to restore \$37,000 in losses attributed to their fiduciary breaches and permanently barred them from serving as fiduciaries. On December 28, 2010, the Secretary filed an adversary complaint in bankruptcy court against Fussner, seeking to have his debt to the plan declared non-dischargeable. On May 19, 2011, the bankruptcy court entered a default judgment against Fussner, effectively precluding him from discharging the debt he owed the plan. Chicago Regional Office

Solis v. Garrison (W.D.N.C.)

On December 29, 2011, the Secretary filed a complaint against Cameron Garrison, the fiduciary of the Garrison Enterprises 401(k) Plan, for not remitting to the plan \$103,841 in withheld employee contributions. The lawsuit seeks restitution of all losses, along with lost earnings, removal of the fiduciary, and a permanent injunction preventing the defendant from serving as a fiduciary to any ERISA-covered plan. Atlanta Regional Office

Solis v. GBK & Associates, Inc. (S.D. Fla.)

On November 19, 2010, the Secretary filed a complaint against Deborah Burgess-Wyngate and George Kaminas, along with GB&K Associates, Inc., for failing to remit employee contributions into the company's 401(k) Plan for approximately 10 months. The total plan losses amount to approximately \$23, 537, including lost opportunity costs. Atlanta Regional Office

Solis v. Griffith (N.D.N.Y.)

On June 23, 2011, the Secretary filed a complaint against Herbert Griffith, seeking restitution of \$43,654.26 for employee elective contributions that Griffith withheld from employee paychecks

but failed to forward to the ITS Communications Corporation Simple IRA Plan between January 2004 and December 2008. On January 3, 2012, the court approved a consent judgment requiring Griffith to restore \$56,070.87 in delinquent employee contributions and lost interest to the plan over a three year period, after which he will be permanently enjoined from acting as a fiduciary for any ERISA-covered plan. New York Regional Office

Solis v. Hagstrom (D. Minn.)

On July 8, 2011, the Secretary filed a complaint against Jeff Hagstrom, Daniel Elofsom, and Mirror Factory, Inc., fiduciaries of the company's 401(k) Plan, alleging that the fiduciaries failed to remit employee salary contributions to the plan from January 1, 2006 through October 9, 2009. The Secretary is seeking restoration of approximately \$14,000 to the plan. Chicago Regional Office

Solis v. Hall (W.D. Wis.)

On December 23, 2011, the Secretary filed a complaint against George Hall, President of Stainless Steel Fabricating, Inc., and a fiduciary of the company's Salary Reduction Simplified Employee Pension Plan, alleging that from 2005 to 2010, Hall failed to remit \$32,730 in employee contributions and untimely remitted \$43,787 in employee contributions and that in 2009, Hall failed to remit employee contributions to the company's health plan or any health insurance carrier. The complaint seeks restoration of losses and a permanent injunction barring Hall from serving as a fiduciary. Chicago Regional Office

Solis v. Hardt (C.D. Cal.); Solis v. Hardt (In re Hardt) (Bankr. E.D. Cal.)

On September 21, 2010, the Secretary filed a complaint against Timothy John Hardt and Mark Dell Donne for failing to remit \$18,784.44 in employee contributions to the Journey Electrical Technologies, Inc. (JET) 401(k) Plan from November 2001 through October 2007 and failing to collect \$692,672.42 in mandatory prevailing wage contributions from November 2002 through February 2008. On August 31, 2010, the Secretary filed an adversary complaint in Hardt's bankruptcy case, seeking a determination that the debts, plus lost opportunity costs of \$55,838.05 and \$140,224.45, respectively, are non-dischargeable. On October 6, 2010, the Secretary filed a motion for withdrawal of reference and transfer of venue to the Central District of California. On November 8, 2010, the parties filed a stipulation to withdraw the bankruptcy reference. The Secretary subsequently withdrew the motion to transfer venue, and the district court case was transferred to the District Court for the Eastern District of California. On May 23, 2011, in related private litigation, the court issued an order, requesting that the Department file an amicus brief. In the private suit, defendant Dell Donne filed a motion to dismiss, arguing that the private case should be dismissed because JET's receiver and the Department are not named parties in the suit and such parties are indispensable. Based on that motion, the court posed the question: if the ERISA claims were to move forward in the private suit, would they in any way constitute contribution in contravention of Kim v. Fujikawa (holding that ERISA cannot be read as providing for an equitable remedy of contribution in favor of a breaching fiduciary). On July 19, 2011, the Secretary filed an amicus brief based on the court's request. On September 7, 2011, the court granted in part and denied in part the motion to dismiss in the private case, relying heavily on the Secretary's brief. While the court specifically found that the Department was not a necessary party to the private litigation and that a decision issued in the private litigation would

not be binding on the Department, the court also said that recovery in one suit would be considered in determining damages in a second suit. See also Donne v. Hardt, Section N. Miscellaneous. Los Angeles Regional Office

Solis v. Hartmann (N.D. Ill.)

On January 8, 2010, the Secretary filed a complaint against Bruce Hartmann, alleging that he failed to disclose to his employees that their medical bills were not likely to be paid by the health plan sponsored by Mid-States Express, Inc., even as the company continued to take deductions from their pay for medical coverage between June 1, 2007 and July 25, 2008. Although \$1.26 million in health plan contributions allegedly were withheld, \$3 million in medical claims allegedly were not paid. The complaint also alleges that the fiduciaries of the company's 401(k) plan, Bruce Hartmann and Terry Hartmann, failed to remit \$65,000 in contributions and loan repayments, and failed to timely remit over \$1.5 million in 401(k) plan participant contributions and loan repayments between January 1, 2009 and February 8, 2009. The complaint seeks a court order requiring the defendants to restore all plan losses and pay employees' unpaid medical claims, removing them as fiduciaries, and permanently barring them from serving as fiduciaries or service providers to any ERISA-covered plan. On November 10, 2011, the Secretary filed a motion for partial summary judgment. On November 29, 2011, defendants filed their response to the Secretary's motion and on December 19, 2011, the Secretary filed a reply brief. The Secretary's motion for partial summary judgment is pending. Chicago Regional Office

Solis v. HBMG, Inc. (W.D. Tex.)

On December 20, 2011, the Secretary filed a complaint against HBMG, Inc and Manuel Zarate, the company's president, for failing to forward employee contributions to the HBMG 401(k) Profit Sharing Plan. The complaint alleges that the defendants failed to timely and completely remit employee contributions and loan payments to the plan from January 15, 2006, through December 31, 2009, and January 15, 2010, through March 21, 2011. The complaint further alleges that they failed to properly administer the plan and used plan assets to benefit themselves. Dallas Regional Office

Solis v. Hensley Engineering Group, LLC (D.N.M.)

On November 15, 2010, the Secretary filed a complaint against defendants Hensley Engineering Group, LLC and Lisa Hensley, the firm's former president, for failing to forward employee contributions to the company's 401(k) Plan. Hensley was the trustee who allegedly directed the company's comptroller not to remit withheld employee contributions of \$48,528.30 from June 2007 through December 2007. Dallas Regional Office

Solis v. House Calls of Greater Chicago (N.D. Ill)

On June 2, 2010, the Secretary filed a complaint against Charles DeHaan and House Calls of Greater Chicago, the fiduciaries of the company's Simple IRA Plan, seeking restoration of \$26,622 to the plan for their failure to remit employee contributions to the plan from May 16, 2005 to December 15, 2008. On March 17, 2011, the court entered a default judgment requiring the defendants to restore \$35,017.50 to the plan immediately and permanently barring them from serving as fiduciaries or service providers to ERISA-covered plans. Chicago Regional Office

Solis v. Houston Telemessaging Group, Inc. (S.D. Tex.)

On January 13, 2011, the court authorized the appointment of an independent fiduciary to administer the Houston Telemessaging Group, Inc. 401(k) Plan and effect account distributions. The court had granted the Secretary's motion for default judgment against defendants Houston Telemessaging Group, Inc. a/k/a HTG Answering Services, Inc. and Michael Trueluck on November 5, 2010. The complaint, filed on June 30, 2009, alleged that HTG and Trueluck failed to timely remit participant contributions to the company's 401(k) Plan from February 2002 through March 2003 and failed to completely remit participant contributions from December 2003 through July 2006. Trueluck abandoned the plan in 2008 and spent significant time dodging the Secretary's attempts at service in 2009 and 2010 after returning from military service. The court enjoined the defendants from further violations and from serving as ERISA fiduciaries and ordered them to restore \$9,821.04 to the plan. Dallas Regional Office

Solis v. Howe (W.D. Wis. and Bankr. W.D. Wis.)

On January 26, 2011, the Secretary filed a complaint in district court against Allen Howe, fiduciary of the Allen Howe, Inc. SIMPLE IRA Plan, alleging that Howe failed to remit and untimely remitted employee contributions from January 1, 2006 through January 30, 2009. On June 7, 2011, the court entered a consent judgment ordering the defendants to restore \$64,239.44 to the plan and barring them from being fiduciaries or service providers to any ERISA-covered plan. On November 30, 2010, the Secretary filed an adversary complaint in bankruptcy court against Howe, seeking to have his debt declared non-dischargeable. On April 21, 2011, the bankruptcy court entered an order precluding Howe from discharging the debt he owes the plan. Chicago Regional Office

Solis v. Intricate Grinding & Machine Specialties, Inc. (W.D. Mich.)

On August 31, 2011, the Secretary filed a complaint against Intricate Grinding & Machine Specialties, Inc. and Brenda Amaya, fiduciaries of the company's 401(k) Plan, alleging that they failed to remit and timely remit employee salary contributions to the plan from January 5, 2009 to March 28, 2011. On December 2, 2011, the court entered a consent order and judgment requiring the defendants to restore \$23,366 in unremitted participant contributions and lost opportunity costs to the plan by reallocating funds in Amaya's individual account to the harmed participants. Chicago Regional Office

Solis v. Jeffreys Seed Company (E.D.N.C.)

On December 2, 2011, the Secretary filed a complaint against Jeffreys Seed Company, its president, Edward Taylor Jeffreys, and its secretary, James T. Jeffreys III, seeking restitution of \$20,324.08 in employee contributions to the former company's Group Health Plan and Profit Sharing Plan. The complaint alleges that the defendants failed to forward withheld employee contributions to the company's Profit Sharing Plan and failed to forward withheld employee health premiums to the company's health insurance provider. Since the business closed in 2009, the defendants have failed to distribute the retirement plan balance to the seven remaining retirement plan participants, which is believed to be approximately \$134,000. The complaint seeks the repayment of the unremitted contributions, lost earnings, and the appointment of an independent fiduciary to distribute the retirement plan's assets. Atlanta Regional Office

Solis v. Jendusa (E.D. Wis.)

On May 10, 2011, the Secretary filed a complaint against James and Carrie Jendusa, fiduciaries of the Jendusa Engineering 401(k) Plan, alleging that the defendants failed to remit and timely remit employee contributions to the plan between January 1, 2007 and February 15, 2008. On October 7, 2011, the court entered a consent order and judgment ordering the defendants to restore \$13,112.56 to the plan and barring them from serving as ERISA fiduciaries. Chicago Regional Office

Solis v. Jones (E.D. Mich.)

On September 8, 2011, the Secretary filed a complaint against Odell Jones, III and Cecily Hoagland, fiduciaries of the Jomar Building Company, Inc. 401(k) Plan, alleging that they failed to remit and timely remit employee salary contributions to the 401(k) Plan from January 6, 2006 to March 14, 2008. The complaint also alleges that Jones, as a fiduciary of the company's Benefit Plan, failed to remit employee health premium contributions to the Benefit Plan from January 4, 2008 through March 14, 2008. The complaint seeks the restoration of \$49,279, plus lost opportunity costs, to the 401(k) Plan and \$1,755.47, plus lost opportunity costs, to the Benefit Plan. On December 14, 2011, the court entered a consent judgment ordering Hoagland to waive all amounts she is owed and reallocate her individual account balance to restore 50 percent of the non-fiduciary losses to the 401(k) Plan and permanently enjoining her from serving as a fiduciary or service provider to any ERISA-covered plan. The matter against Odell Jones is still pending. Chicago Regional Office

Solis v. Joos (D. Minn. and Bankr. D. Minn.)

On October 21, 2010, the Secretary filed a complaint in district court against Susan Joos, the fiduciary of the Joos Electric Co. 401(k) Profit Sharing Plan and Trust, alleging that she failed to remit and failed to timely remit employee contributions and loan repayments to the plan from May 5, 2007 through April 23, 2010. On June 1, 2011, the district court entered a consent order and judgment requiring Joos to restore the losses to the plan, terminate the plan and distribute the assets to the participants. On July 11, 2011, Joos filed for Chapter 7 bankruptcy protection. On September 28, 2011, the Secretary filed an adversary complaint in the bankruptcy court against Joos, seeking to have her debt to the plan declared non-dischargeable. Chicago Regional Office

Solis v. Keating (S.D. Ohio and Bankr. S.D. Ohio)

On May 12, 2011, the Secretary filed a complaint in district court against Thomas Keating, Mitchellace, Inc., and the company's Employee Flexible Benefits Plan. The complaint alleges that from November 5, 2008 through June 10, 2009, the fiduciaries, Keating and Mitchellace, failed to forward \$14,615.94 in withheld employee health premium contributions to the plan. The complaint seeks recovery of the delinquent employee health premium contributions, removal of Keating as a fiduciary, and an injunction prohibiting Keating from serving as a fiduciary or service provider to any ERISA-covered plan. On September 30, 2010, the Secretary filed an adversary complaint in bankruptcy court against Keating, seeking to have his debt to the plan declared non-dischargeable. On February 25, 2011, the bankruptcy court entered an order precluding Keating from discharging the debt he owes the plan. Chicago Regional Office

Solis v. Kiernan (E.D. Wis. and Bankr. E.D. Wis.)

On April 27, 2011, the Secretary filed a complaint in district court against Brian Thomas Kiernan as fiduciary for the Kiernan Heating & Air Conditioning Simple Plan. The complaint alleges that during the period from March 1, 2008 through March 31, 2009, the defendant failed to remit \$21,116.66 in employee contributions to the plan. The complaint seeks recovery of the delinquent employee contributions and lost opportunity costs, the removal of Kiernan as a fiduciary, and an injunction prohibiting Kiernan from serving as a fiduciary or service provider to any ERISA-covered plan. On September 7, 2010, the Secretary filed an adversary complaint in bankruptcy court against Kiernan, seeking to have his debt owed the plan declared non-dischargeable. On April 11, 2011, the bankruptcy court entered an order providing that Kiernan's debt owed the plan is non-dischargeable. Chicago Regional Office

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

On November 15, 2010, the Secretary filed a district court complaint against Kineticsware, Inc., Jeffrey Sampson and Richard Barnett, alleging that the defendants failed to collect and remit to the company's 401(k) Plan \$222,316 in employer contributions for plan years 2007-2008. The Secretary had filed an adversary complaint on October 26, 2009 in the Chapter 7 bankruptcy case of Jeffrey Sampson, seeking a determination that his debt to the plan is non-dischargeable. On January 9, 2012, the court entered a consent judgment, finding that Sampson and Barnett are jointly and severally liable for \$200,610 in plan losses due non-fiduciary participants, permanently enjoining them from future fiduciary service to any ERISA-covered plan, and requiring them to pay for the costs of an independent fiduciary to administer the plan. Seattle Regional Office

Solis v. Kiser (E.D. Ky. and Bankr. M.D. Fla.)

On October 18, 2011, the Secretary filed a complaint against William H. Kiser, Mary Sue Kiser and their company, Irotas Manufacturing Company, LLC, the fiduciaries of the company's 401(k) Plan, alleging that they transferred \$487,138.08 in plan assets to their company or vendors from June through August 2008. On September 1, 2011, the Secretary filed adversary complaints in the Kisers' individual personal bankruptcy cases alleging that the Kisers' transfer of plan assets constitutes a defalcation and that the debt to the plan is non-dischargeable. Cleveland Regional Office

Solis v. Klein Construction Services, Inc. (N.D. Ill.)

On September 15, 2011, the Secretary filed a complaint against Klein Construction Services, Inc., Wayne Klein II, and the company's 401(k) Plan. The complaint alleges that during the period from January 19, 2007 through May 13, 2009, the fiduciaries failed to forward to the plan \$23,286.88 in withheld employee contributions and failed to timely forward \$48,208.75 in withheld employee contributions. The complaint seeks to recover the delinquent employee contributions and lost opportunity costs, as well as to remove defendants as fiduciaries, replacing them with an independent fiduciary. Chicago Regional Office

Solis v. Kvidera (D. Minn. and Bankr. D. Minn.)

On June 2, 2011, the Secretary filed a complaint in district court against Joseph R. Kvidera, seeking restoration of \$10,740 to the Procede, Inc. 401(k) Profit Sharing Plan in unremitted employee contributions and loan repayments as well as lost opportunity costs for the period March 30, 2007 through January 15, 2010. On October 27, 2011, the district court entered a consent order and judgment requiring Kvidera to restore all losses to the plan, to terminate the plan, and to distribute its assets to the participants and beneficiaries. On June 2, 2011, the Secretary filed an adversary complaint against Kvidera seeking to have his debt to the plan declared non-dischargeable. On October 29, 2011, the bankruptcy court entered an order approving a stipulation providing that Kvidera's debt to the plan is non-dischargeable. Chicago Regional Office

Solis v. Lauterbach (D. Minn. and Bankr. D. Minn.)

On April 22, 2010, the Secretary filed a complaint in district court against Larry Lauterbach, fiduciary of the Slate Cement, Inc. 401(k) Plan and Health and Dental Plan, for his failure to remit employee contributions to the plans. On October 15, 2010, the Secretary filed a motion for default judgment in district court against Lauterbach. On March 10, 2011, the district court entered a consent order and judgment requiring Lauterbach to restore \$18,020.38 to the plans. On June 15, 2010, Lauterbach filed for Chapter 7 bankruptcy protection. On September 9, 2010, the Secretary filed an adversary complaint in the bankruptcy court for an order holding that the debts owed to the plans are non-dischargeable. The Secretary filed a motion to strike affirmative defenses, and on December 8, 2010, the bankruptcy court struck a number of the debtor/defendant's affirmative defenses. On March 15, 2011, the bankruptcy court entered a stipulation and order which provides that the debts Lauterbach owes to the plans are non-dischargeable. Chicago Regional Office

Solis v. Ledford (S.D. Ind. and Bankr. S.D. Ind.)

On October 27, 2011, the Secretary filed a complaint in district court against Davis Equipment Sales and Service, Inc., and its president and owner, James T. Ledford, for their failure to timely remit \$42,285 in employee contributions to the company's Savings Incentive Match Plan for Employees IRA Plan from 2006 to 2008 and their failure to remit \$19,827 in employee contributions to the plan from 2008 to 2009. On April 21, 2011, the Secretary filed an adversary complaint in bankruptcy court against Ledford seeking to have his debt to the plan declared nondischargeable. On July 27, 2011, the bankruptcy court entered an order precluding Ledford from discharging the debt. Cincinnati Regional Office

Solis v. Lego Systems, LLC. (S.D. Tex.)

On March 10, 2011, the court entered a consent judgment and order requiring the defendants to restore \$23,133.44 to the Lego Systems, LLC d/b/a SSIP, LLC 401(k) Profit Sharing Plan, permanently enjoining them from violating ERISA, and ordering them to terminate the plan once all losses have been restored. The complaint, filed on February 22, 2011, alleged that beginning on January 2006, defendants Lego Systems, LLC and Victor P. Loreto failed to ensure that employee withholdings were remitted to the plan both timely and completely. Dallas Regional Office

In re Leslie James Hill and Sherry L. Hill (Bankr. D. W. Va.)

On October 13, 2009, the Secretary filed an adversary complaint, seeking to have a debt determined to be non-dischargeable, in a Chapter 7 bankruptcy proceeding involving two individuals who owned and operated Stinger Sheet Metal, Inc. The Secretary alleges that employee salary withholdings of \$31,766.20 were never forwarded to the company's SIMPLE IRA Plan and seeks to recover \$31,580.95 in required employer contributions. During the time when money was withheld from the plan, the defendant drew a salary totaling \$404,721 for calendar years 2007 and 2008. Opposing counsel agreed to a stipulated order providing that all ERISA funds sought are non-dischargeable. On March 22, 2011, the bankruptcy court entered an order providing that the total amount of employee and employer contributions constitute non-dischargeable debt. District court action will follow. Boston Regional Office

Solis v. Levy (N.D. Ind. and Bankr. N.D. Ind.)

The Secretary filed a complaint in district court on November 30, 2011 and an adversary complaint in bankruptcy court on November 21, 2011 against John Levy, a fiduciary of the Romaine, Inc. 401(k) Plan, alleging that he failed to remit and timely remit employee salary contributions and loan repayments to the plan from January 1, 2010 through April 29, 2011. The Secretary seeks to have the \$11,812 debt declared non-dischargeable and to require Levy to restore \$11,812 to the plan. Chicago Regional Office

Solis v. Life Care Hospice (N.D. Ala.)

On June 22, 2011, the Secretary filed a complaint against Life Care Hospice, Inc., the company's Retirement Trust, and plan trustee Todd Adkison, for untimely remitting approximately \$66,664.08 in participating employees' contributions and loan repayments to the plan from January 1, 2005 through December 31, 2008. The complaint also alleges that on or around April 12, 2008, Life Care completely ceased remitting participating employees' withheld contributions and loan repayments to the plan. Further, the complaint alleges that from April 12, 2008 through November 29, 2008, Life Care failed to remit to the plan approximately \$2,284.03 in participating employees' payroll contributions. As of January 6, 2011, lost earnings totaling \$3,172.62 are owed to the plan. On December 27, 2011, the clerk filed the entry of default as to Adkison. Atlanta Regional Office

Solis v. Mashali (D. Mass.)

On November 12, 2010, the Secretary filed a complaint in district court against Dr. Fathalla Mashali, the trustee of the Northern Rhode Island Anesthesia Associates, P.C., Retirement Plan and Trust, alleging that he failed to ensure that employee contributions were remitted to the plan and failed to take measures to collect employer contributions owed to the plan. The complaint alleges that contributions were not forwarded to the plan for the 2006, 2007 and 2008 plan years, totaling \$6,632,047.40, plus interest. Mashali filed for bankruptcy protection. The Secretary filed an adversary complaint in bankruptcy court in June 2010, seeking to have the debt to the plan declared non-dischargeable. On December 22, 2010, the district court granted the Department's motion to withdraw reference in the bankruptcy court and to have the adversary proceeding consolidated with the district court case. On October 17, 2011 the court granted the joint motion to appoint an independent fiduciary to administer the plan. The court also stayed

discovery deadlines to permit the parties to work out a settlement that will address the amount of money to be restored as well as a strategy for ensuring that the plan remains qualified under the Internal Revenue Code, in light of complicated and poorly administered plan provisions. Boston Regional Office

Solis v. McLaughlin (D. Mass.)

On June 29, 2009, the Secretary filed a complaint against Michael McLaughlin and William J. Frasier, trustees of three pension plans established for the benefit of employees of three now-defunct companies: McLaughlin Mechanical Services Inc., Pro-Fit Mechanical Insulation, and Integrated Energy Solutions. The complaint alleges that from September 1, 2004 to the present, defendants failed to ensure that the companies forwarded prevailing wage contributions totaling \$233,523.60 to the McLaughlin Mechanical/Pro-Fit Prevailing Wage Plan, which was established to provide pension benefits to employees of the three companies working on publicly funded projects subject to the Davis-Bacon Act. The complaint also alleges that \$77,750.74 was withdrawn from the bank account of the McLaughlin Mechanical Retirement Profit Sharing Plan, a plan established to provide pension benefits for employees of the three companies whose employment was not governed by collective bargaining agreements. Finally, the defendants are alleged to have allowed the companies to withhold \$1,281.37 in plan contributions from employee paychecks, without remitting those contributions to the McLaughlin Mechanical/Pro-Fit 401(k) Plan. A default judgment was entered against Frasier on March 16, 2010. On August 16, 2011, a consent judgment was filed requiring that McLaughlin to restore all monies due the non-fiduciary participants in the Retirement and 401(k) Plans, enjoining McLaughlin from serving as a fiduciary to ERISA-covered plans in the future (Frasier is also enjoined from serving as a fiduciary by virtue of his default), and appointing an independent fiduciary to administer and eventually terminate the plans. McLaughlin stipulated that the fiduciary breaches constitute defalcation in the event he files for bankruptcy protection. The Secretary has been coordinating efforts with the Massachusetts Attorney General's office in reaching a resolution; that office will address the matter of the monies due to the Prevailing Wage Plan. Boston Regional Office

Solis v. Metzler (W.D. Wis.)

On August 2, 2011, the Secretary filed a complaint against Christina Metzler, fiduciary of the Westside Cabinet & Millwork, Inc. SIMPLE IRA Plan, alleging that she failed to remit and timely remit employee contributions to the plan from May 18, 2007 to December 15, 2009. On November 7, 2011, the court entered a consent order and judgment, ordering Ms. Metzler to pay \$44,540 in unremitted participant contributions and lost opportunity costs to the plan over the next seven years based on her income and ability to pay, requiring her to provide annual financial statements to the Secretary, and permanently enjoining her from serving as an ERISA fiduciary or service provider. Chicago Regional Office

Solis v. Miles (D.S.C.)

On November 15, 2010, the Secretary filed a complaint against Perry Miles and Wappoo Service Heating & Air Conditioning for failing to remit approximately \$38,749.99 in employee contributions to the company's SIMPLE IRA Plan from 2007 to 2009. This caused the plan to incur \$5,500.35 (at the time of filing) in lost earnings. In addition to restitution, the complaint

seeks a permanent injunction barring the defendants from serving as fiduciaries to ERISA-covered plans and the appointment of an independent fiduciary at the defendants' expense. On July 27, 2011, the Secretary filed a motion for entry of clerk's default with respect to both defendants, which the clerk entered on July 28, 2011. On August 29, 2011, having discovered that the incorrect corporate entity had been named in the complaint, the Secretary filed an amended complaint against the correct corporate entity. Atlanta Regional Office

Solis v. The Mili Group Inc. (N.D. Cal.); Solis v. Cuong Viet Do (In re Do) (Bankr. N.D. Cal.)

On August 27, 2010, the Secretary filed a complaint against The Mili Group, Inc. and Cuong Viet Do, alleging that from September 11, 2006 through 2009, Cuong Viet Do withdrew or caused to be withdrawn at least \$297,040 from the company's Retirement Plan and that the proceeds were used for the company's or his benefit. The withdrawals were not authorized under the plan as permissible transfers or loans. He also allegedly caused the plan to purchase real property that generated rental income that was never deposited into the plan. The Secretary filed an adversary complaint on August 17, 2010, seeking to have the debt resulting from the transfers/loans and the property declared non-dischargeable. On September 1, 2010, the Secretary filed a motion for withdrawal of reference, seeking to remove the adversary complaint to district court. On November 17, 2010, the court granted the motion. On May 27, 2011, the district court entered a consent judgment and order, finding Cuong Viet Do liable for \$155,000 in plan losses, which was a non-dischargeable debt, and requiring restoration of the losses starting in 2016, with a payment plan thereafter. The judgment also required him to waive all of his interests in the plan, removed him as plan trustee, enjoined him from future fiduciary service to any ERISA-covered plan, and appointed two independent fiduciaries for the plan. The first independent fiduciary was required to liquidate/sell the plan's real property (a condominium in Florida) and transfer the proceeds to the second appointed independent fiduciary. Thereafter, the PBGC, rather than the second independent fiduciary, assumed responsibility for the administration and termination of the plan. Los Angeles Regional Office

Solis v. Mitacek (E.D. Cal.); Solis v. Mitacek (In re Mitacek) (Bankr. E.D. Cal.)

On January 10, 2011, the Secretary filed a complaint against Frank Mitacek III and Susan Mitacek, fiduciaries of the Frank's International, Inc. 401(k) Plan, alleging that, for the period January 31, 2009 through October 2009, the Mitaceks failed to remit to the plan \$21,000 in employee elective contributions. In addition, the complaint alleges that, from January 14, 2005 through September 30, 2008, the Mitaceks failed to timely remit employee contributions, resulting in over \$9,000 in lost opportunity costs. The Secretary had filed an adversary complaint on December 23, 2010, seeking a determination that unremitted contributions and lost opportunity costs are non-dischargeable. On January 25, 2011, the Secretary filed a motion for withdrawal of reference, seeking to remove the adversary complaint to the district court. The district court granted the Secretary's motion. On October 25, 2011, the district court entered the consent judgment, finding the Mitaceks jointly and severally liable for \$21,853.91 in plan losses to non-fiduciary participants and permanently enjoining them from future fiduciary service to any ERISA-covered plan. The defendants also waived the notice of assessment and service requirement with respect to the § 502(l) penalty. San Francisco Regional Office

Solis v. MJA Services, LLC (N.D. Ind.)

On November 30, 2011, the Secretary filed a complaint against MJA Services, LLC, David Banning, Matthew Mader, and the Mars Service Company, Inc. 401(k) Plan, alleging failure to remit \$16,603.18 in plan assets and lost income to the plan during the period January 1, 2006 through August 2, 2009. On November 30, 2011, the court entered a consent order and judgment requiring the defendants to restore all losses to the plan and appointing an independent fiduciary to handle termination of the plan and distribution of plan assets to participants and beneficiaries. Chicago Regional Office

Solis v. Modern Plumbing Co., Inc. (S.D. Tex.)

On July 26, 2011, the court entered a consent judgment and order against Modern Plumbing Co., Inc., Modern Plumbing Supply, Inc., Modern Air Conditioning, Inc. d/b/a A/C Plus, and Albert Lloyd Hollub, all fiduciaries to the Modern Plumbing 401(k) Plan. The court ordered the fiduciaries to make restitution of \$28,504.21, enjoined the fiduciaries from further violations, required the fiduciaries to appoint a successor independent fiduciary, and permanently barred them from serving in any fiduciary capacity once the successor was appointed. The complaint, filed on June 16, 2011, alleged that the fiduciaries made delinquent contributions and failed to remit \$18,526.49 in employee contributions to the plan. Dallas Regional Office

Solis v. Molitor (D. Mont. and Bankr. D. Mont.)

On August 27, 2010, the Secretary filed suit against Michael Molitor, a former owner and officer of dissolved companies M.S. Molitor Trucking, Inc. and MD Service, L.L.C., seeking restoration of employee withholdings which were either untimely forwarded or never forwarded to his companies' SIMPLE IRA Plans for the period September 1, 2004 through March 31, 2008. On February 3, 2011, the court entered a consent decree requiring Molitor to restore to the plans \$62,462.19 in withholdings plus lost interest and permanently enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan. Kansas City Regional Office

Solis v. Monocacyfabs, Inc. (E.D. Pa.)

On November 7, 2011, the Secretary filed a complaint against Monocacyfabs, Inc., Michael Poole, and Jean Shipley alleging that between January 2007 and June 2010, the company failed to remit employee contributions to the company's 401(k) Plan or remitted them late without interest and that Poole and Shipley, the co-trustees, failed to collect those contributions and amounts due the plan. On November 14, 2011, the Secretary filed a motion to approve a consent judgment which, when approved, will order the defendants to restore \$34,310.31 in unremitted employee contributions and interest to the plan. Philadelphia Regional Office

Solis v. Mt. Horeb Plumbing, Inc. (W.D. Wis.)

On November 16, 2010, the Secretary filed a complaint against Mt. Horeb Plumbing, Inc. and fiduciary Michael D. O'Connell for failing to remit \$30,120 in employee contributions and for failing to timely remit \$49,235 in employee contributions to the Mt. Horeb Plumbing, Inc. 401(k) Plan from January 3, 2006 through October 6, 2009. The complaint sought restoration of assets, lost opportunity costs, and an injunction removing and prohibiting the fiduciaries from serving as fiduciaries or service providers to any ERISA-covered plan. On August 3, 2011, the court

entered a default judgment requiring the defendants to restore all losses to the plan and appointing an independent fiduciary to handle termination of the plan and distribution of plan assets to participants and beneficiaries. Chicago Regional Office

Solis v. MWDay Group, Inc. (S.D. Tex.)

On October 6, 2011, the court entered a consent judgment and order against MWDay Group, Inc. and its owner, Michael Day, requiring them to pay lost opportunity costs to the Paradigm Machine Works SIMPLE IRA Plan, enjoining them from further violations, ordering them to terminate the plan, and permanently barring them from serving as ERISA plan fiduciaries. The complaint, filed on May 20, 2011, alleged that from October 20, 2006 through June 8, 2007, the defendants failed to ensure that over \$4,500 in employee contributions and an equal amount of mandatory employer contributions were remitted to the plan. Before the complaint filing and in the period after filing, the defendants restored most of the plan losses. Dallas Regional Office

Solis v. OLM, LLC (D. Conn.)

On December 22, 2011, the Secretary filed a consent judgment simultaneously with a complaint against OLM, LLC and George Devack, the company's principal owner and trustee of the company's Retirement Plan. The consent judgment orders that \$225,268.00, including interest, be restored to the plan on an installment payment basis over a two-year period. The plan provided for both employee deferred contributions to a 401(k) account and annual mandatory safe harbor employer contributions (Qualified Non-Elective Contributions, or QNECs). Based on the Department's investigation, it was found that the employer failed to collect QNECs for plan years 2005, 2006 and 2007 totaling \$218,321.59, without interest. Boston Regional Office

Solis v. OPT, Inc. (N.D. Cal.)

On September 28, 2010, the Secretary filed a complaint against OPT, Inc., Joycelyn Tran, Jonathan Jones, and the estate of Anthony Olszewski, the fiduciaries of the OPT, Inc. 401(k) Profit Sharing Plan, for failing to remit \$52,245.64 in employee contributions and \$1,512.90 in participant loan repayments to the plan from January 2003 to June 2006. The suit seeks restoration of all plan losses plus lost opportunity costs, among other relief. San Francisco Regional Office

Solis v. Owens (Bankr. S.D. Ohio)

On December 21, 2011, the Secretary filed an adversary complaint seeking to have David Scott Owens' debt to the Advetech, Inc. Group 401(k) Plan declared non-dischargeable. The complaint alleges that Owens, a trustee of the plan, engaged in defalcation by failing to remit employee contributions and loan repayments to the plan from January 10, 2007 to September 21, 2011. The defendant filed for bankruptcy on September 21, 2011. Cleveland Regional Office

Solis v. Paralegals Plus, Inc. (N.D. Tex.)

On November 30, 2011, the court entered a default judgment against Paralegals Plus, Inc., ordering it to make restitution \$9,376.43 to its SIMPLE IRA Plan, permanently enjoining it from prospective ERISA violations, barring it from serving as a fiduciary, and ordering it to pay all costs. On June 20, 2011, the court had entered a partial consent judgment and order against fiduciary Jerry Haden, ordering her to restore \$4,000 to the plan and holding her liable for any plan losses, enjoining her from further ERISA violations, barring her from serving as a fiduciary for three years, and requiring that she undertake fiduciary education training before again serving as a fiduciary. The complaint, filed on November 15, 2010, alleged that Paralegals Plus and Haden, as fiduciaries to the company's SIMPLE IRA Plan, failed to ensure that employee contributions were both timely and completely remitted to the plan. Dallas Regional Office

Chao v. Payea (E.D. Mich.); Solis v. Payea (6th Cir.)

On July 21, 2008, the Secretary filed a complaint against Dr. Richard Payea and his professional corporation, Richard P. Payea, M.D., P.C., the plan fiduciaries, and Independent Bank. The assets of the corporation's Money Purchase and Profit Sharing Plans were placed in separate accounts at Independent Bank. In March 2004, Independent Bank processed a tax levy for \$340,117 in federal taxes owed by the corporation against both of the plan accounts. Payea and the corporation took no action against the Bank. The Secretary's complaint sought an order requiring the defendants to restore to the plan the employee funds that were taken by the IRS levy. The complaint further requested that the fiduciaries pay mandatory contributions due one of the plans, that Payea and the corporation be removed as fiduciaries, and that an independent fiduciary be appointed. The Secretary received a favorable decision against the sponsoring doctor and his company but lost the case against the bank. On September 7, 2009, the Secretary appealed the district court's decision regarding the bank. The parties' settlement negotiations resulted in a consent order and judgment in which the bank agreed to pay the plans \$87,000 and to pay a § 502(l) penalty. The case was remanded to the district court, which entered the consent order and judgment on February 24, 2011. Independent Bank paid the settlement and 502(l) penalty amounts. The court of appeals dismissed the appeal on March 9, 2011. See also Chao v. Payea; Solis v. Payea, Section C. Prudence. Cleveland Regional Office (district court) and Plan Benefits Security Division (court of appeals)

Secretary v. Popoff Meat Company (W.D. Mich.)

On August 16, 2011, the court entered a consent order and judgment, settling charges against Popoff Meat Company and Timothy McCarthy, fiduciaries of the company's 401(k) Plan. The Secretary's complaint, filed December 29, 2009, alleged that from 2004 through 2007, the fiduciaries withheld funds from the paychecks of employees as elective salary deferrals for contribution to the plan but did not remit all of them to the plan. Cleveland Regional Office

Solis v. Porta (D. Del.)

On January 21, 2011, the Secretary filed a complaint against Arkion Life Sciences, LLC and Earnest Porta, Rick Stejskal, Harvey Weaver and Anthony Simej, who were members of the Corporate Plan Committee. The complaint alleges that during an approximately four year period, Arkion failed to remit employee contributions to its 401(k) Plan and remitted certain

contributions late without interest. Rather than answer the complaint, the defendants agreed to entry of a consent judgment. On February 3, 2011, the court entered a consent judgment requiring the defendants to restore \$43,680.40 to the plan, plus interest of \$150,114.20 and requiring Arkion, if it continues to sponsor the plan, to retain at its own expense an independent discretionary trustee to be approved by the Department. Philadelphia Regional Office

Solis v. Quality Tool & Machine (W.D. Wis.)

On November 15, 2010, the Secretary filed a complaint against Quality Tool & Machine and Jerry Freimuth, its owner. The complaint alleges that the defendants failed to remit \$9,672 in employee contributions to the company's plan between March 10, 2003 and December 30, 2008. On April 27, 2011, the court entered a consent order and judgment requiring the defendants to restore \$11,763 to the plan. Chicago Regional Office

Solis v. Reschke (W.D. Mich. and Bankr. W.D. Mich.)

On April 13, 2011, the Secretary filed a complaint in district court against Russel C. Reschke, fiduciary of the Metal Processors, Inc. 401(k) Plan, for failing to remit \$11,860.13 to the plan between June 18, 2009 and September 24, 2009. On December 14, 2011, the district court entered a consent order and judgment requiring the defendant to restore all remaining losses to the plan and appointing an independent fiduciary to handle termination of the plan and distribution of plan assets to its participants and beneficiaries. On March 28, 2011, the Secretary filed an adversary complaint in bankruptcy court against Reschke to have his debt to the plan declared non-dischargeable. On July 8, 2011, the bankruptcy court entered an order approving a stipulation that Reschke's debt to the plan is non-dischargeable. Chicago Regional Office

Solis v. Roberts Transportation, Inc. (W.D. Tex.)

On February 9, 2011, the Secretary obtained a consent judgment and order against Roberts Transportation and its owners, Farley and Joe Roberts, requiring restitution of \$62,147.94 in affecting 41 participants of the West Texas Express 401(k) Profit Sharing Plan. The consent judgment also permanently enjoins the defendants, all plan fiduciaries, from further ERISA violations and from serving as fiduciaries to any ERISA-covered plans. The complaint, filed on March 25, 2010, alleged that the defendants made delinquent contributions and loan repayments to the plan and failed completely to forward \$42,895.61 in employee contributions and loan repayments to the plan. Prior to the consent judgment, defendants had repaid \$45,000 to the plan. Dallas Regional Office

Solis v. Rogers Steel Company (D.S.C.)

On November 15, 2010, the Secretary filed a complaint against Rogers Steel Company and its sole owner and fiduciary, Joseph O. Rogers, III, alleging that they failed to remit employee contributions to the company's SIMPLE IRA Plan. On August 17, 2011, the court entered a consent order and judgment, requiring the defendants to pay to the plan \$8,973.45, which is the full amount of employee contributions and lost earnings, plus a civil penalty, appointing an independent fiduciary at defendants' expense, and permanently enjoining the defendants from acting as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

Solis v. Rushton (D. Utah)

On November 15, 2010, the Secretary filed a complaint against David Rushton and Fooptube, LLC, alleging that in 2007 and 2008, they failed to forward and failed to timely forward to the plan contributions withheld from participants' paychecks. The complaint requests that the court order Rushton and Fooptube to restore to the plan \$107,310.81 in contributions and \$7,497.22 in lost interest, remove them as plan fiduciaries, appoint an independent fiduciary, and permanently enjoin them from serving as fiduciaries for any ERISA-covered plan. On April 25, 2011, the court granted the Secretary's motion for default judgment and ordered defendants to immediately pay \$107,310.91 in unpaid employer contributions and \$7,497.22 in lost earnings. The court also appointed an independent fiduciary to administer the plan. Kansas City Regional Office

Solis v. Sardina (S.D.N.Y.)

On November 15, 2010, the Secretary filed a complaint against Robert Sardina, seeking restitution of \$9,605.29 for principal employee elective contributions that were not forwarded to the Finnegan's Moving and Warehouse SIMPLE IRA Plan, during the period April 4, 2008 to December 26, 2008, when the plan sponsor had the apparent ability to pay the contributions. The complaint also seeks injunctive relief. The case was dismissed because the parties reached a settlement out of court. New York Regional Office

Solis v. SEI Environmental, Inc. (M.D. Tenn.)

On July 27, 2011, the Secretary filed a complaint against SEI Environmental Inc. and its president, Wiley McAllen Finley, for failure to remit \$10,717 in withheld employee contributions and for untimely remitting approximately \$117,274 in employee contributions to the plan between January 2007 and December 2008. The complaint seeks a court order requiring the defendants to restore all losses, including any lost earnings, requiring that the individual defendant's claim to plan assets be offset against the losses, appointing an independent fiduciary at the defendants' expense, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

Solis v. Sellner (D. Minn. and Bankr. D. Minn.)

On October 26, 2011, the Secretary filed a complaint in district court against Tovah Sellner and Erin Sellner, alleging that, as fiduciaries of the Sellner Manufacturing Company, Inc., 401(k) Plan, they failed to timely remit to the plan \$47,780 in employee contributions from 2008 to 2010 and failed to remit to the plan \$34,755 in employee contributions from 2008 to 2009. The complaint also alleges that, as fiduciaries of the Health Plan, they failed to remit \$13,190 in employee contributions and a \$122 COBRA payment to the Health Plan or an insurance carrier in 2010. On September 2, 2011, the Secretary filed an adversary complaint in bankruptcy court against Erin Sellner seeking to have her debts to the plans declared non-dischargeable. On December 19, 2011, the Secretary filed a motion for default judgment with the bankruptcy court. Chicago Regional Office

Solis v. Shohamy (W.D. Tex.)

On July 14, 2011, the court entered a consent judgment and order against Tal Shohamy, ordering him to pay restitution of \$6,964.61 to the TLS Vets, P.A. 401(k) Profit Sharing Plan &

Trust and requiring him to take eight hours of fiduciary education training. The complaint, filed on November 15, 2010, alleged that Shohamy, as the company's chief financial officer and plan trustee, failed to remit employee contributions to the plan. Dallas Regional Office

Solis v. Singley and Associates, Inc. (E.D. Pa.)

On August 15, 2011, the Secretary filed a complaint against J.M. Singley & Associates Inc., J. Brant Singley and Bradley Weiss for failing to remit in excess of \$20,000.00 in employee contributions to the company's 401(k) Plan. Singley and Weiss were trustees of the plan and J.M. Singley & Associates Inc. is the plan sponsor and administrator. The lawsuit alleges that from January 2007 to December 2008, the defendants failed to remit employee contributions to the plan or remitted certain contributions late and without interest. The complaint seeks restoration of all losses to the plan, the appointment of an independent fiduciary for the plans and a permanent injunction barring the defendants from serving in a fiduciary capacity to any ERISA-covered plan. Philadelphia Regional Office

Solis v. Slocum (M.D. Pa.)

On May 12, 2011, the court entered a consent judgment against Scott Slocum, ordering him to restore \$41,093.44 in losses to the Dalton Mechanical Services, Inc. SIMPLE IRA Plan and permanently enjoining him from serving as a trustee or fiduciary to any ERISA-covered plan. The court also entered a default judgment against Dalton Mechanical for the plan losses. The Secretary's complaint, filed on December 17, 2009, alleged that the company and Slocum, its co-owner and president, failed to forward employee contributions to the company's SIMPLE IRA Plan between June 2006 and June 2007. The complaint also alleged that Slocum directed that employee contributions be withheld from employees' wages and that he was responsible for the failure to deposit them into the plan account. On February 26, 2010, Slocum filed a motion to dismiss, asserting that the Secretary was time-barred from re-litigating the matter because the company had been prosecuted criminally. On March 11, 2010, the defendant withdrew the motion to dismiss and instead filed an answer asserting 11 affirmative defenses. On March 30, 2010, the Secretary filed a motion to strike all affirmative defenses. The court granted the Secretary's motion as to 10 of the affirmative defenses, leaving only the statute of limitations defense available to the defendant. On June 15, 2010, a settlement conference was held before a magistrate judge. The matter was not resolved. Following the conference, Scott Slocum filed a motion to join Mark Slocum, who is his brother and the company's co-owner. The court granted the motion, and Scott Slocum filed a complaint against his brother for negligence, contribution and indemnity. Philadelphia Regional Office

Solis v. Sophisticated Technologies, Inc. (C.D. Cal.)

On November 15, 2010, the Secretary filed a complaint against Moshe Klein and Sophisticated Technologies, Inc., alleging that, between January 2001 and 2003, Klein and the company failed to segregate and remit to the SophTech 401(k) Plan some salary deferrals deducted from employees' paychecks. The discrepancies between amounts withheld from payroll and amounts deposited in plan accounts totaled \$26,825. The Department's suit seeks the unremitted contributions plus lost opportunity costs, among other relief. San Francisco Regional Office

Solis v. Sujansky (W.D. Pa.)

The Secretary filed a complaint against James V. Sujansky, Pioneer, Inc. d/b/a Super City Sports, and Super City Sports, Inc. on November 16, 2010. The complaint alleges that from 2002 through 2006, the defendants failed to remit approximately \$10,688 in employee contributions to the Super City Sports Sales, Inc. 401(k) Profit Sharing Plan. The complaint further alleges that Sujansky, the plan trustee, withdrew \$10,479 from the plan and deposited that money into Pioneer, Inc.'s corporate account. On November 7, 2011, the court approved an amended consent judgment that orders the defendants to restore the monies owed to the plan, removes the fiduciaries from their fiduciary roles, bars the fiduciaries from serving in that capacity in the future, appoints an independent fiduciary for the plan, and orders the defendants to pay the independent fiduciary's fee. Philadelphia Regional Office

Solis v. Sylvestre Franc, Inc. (D. Mass.)

On September 27, 2010, the Secretary contemporaneously filed a consent judgment and order along with a complaint against Sylvestre Franc, Inc. and Frank and Sharon McDonnell, the company's owner and the plan's trustee, respectively. The defendants allegedly failed to remit approximately \$73,050 in employee contributions to the company's 401(k) Plan from October 1, 1998 through December 31, 2008. Pursuant to the consent judgment and order, entered on December 28, 2010, defendants agreed to remit all outstanding contributions less the amounts owed to the breaching fiduciaries and agreed to be permanently enjoined from acting as fiduciaries to any ERISA-covered plan. They also agreed to pay a § 502(l) penalty, subject to potential application for financial hardship. In a collateral private lawsuit, the defendants reached a settlement with one plan participant. On or about August 19, 2011, a writ of attachment was filed against the fiduciaries' home to secure overdue payments. The payments were brought up to date and the writ was withdrawn. Boston Regional Office

Solis v. Themescapes, Inc. (D. Minn.)

On October 26, 2011, the Secretary filed a complaint against Themescapes, Inc. and its owners, Peter Nasvick, Anthony Nasvik, Margaret Nasvik and Peter O. Nasvick, fiduciaries of the company's 401(k) Plan, alleging that they failed to remit \$57,146.51 in employee contributions to the plan from August 15, 2008 through April 23, 2010. The complaint seeks restoration of losses to the plan and appointment of an independent fiduciary. Chicago Regional Office

Solis v. Thommes & Thomas Land Clearing, Inc. (D. Minn.)

On January 7, 2011, the Secretary filed a complaint alleging that Thommes & Thomas Land Clearing, Inc., Thomas Benick and John Thommes, fiduciaries of the company's Simple IRA Plan, failed to remit \$24,676 in employee contributions and lost opportunity costs to the plan from January 7, 2005 through December 31, 2008. On September 6, 2011, the court entered a consent order and judgment requiring the defendants to restore all losses to the plan and to terminate the plan and distribute its assets to its participants and beneficiaries. Chicago Regional Office

Solis v. Tricad (N.D. Ind.)

On December 21, 2011, the Secretary filed a complaint alleging that from January 6, 2006 through May 31, 2008, John Smith II, fiduciary of the Tricad, Inc. 401(k) Plan, failed to remit contributions to the plan and untimely remitted at least \$134,969 in employee contributions. The complaint seeks restoration of all funds owed to the plan, removal of the fiduciary, and appointment of an independent fiduciary to terminate the plan and distribute its assets to the plan's participants and beneficiaries. Chicago Regional Office

Solis v. Trotter (S.D. Ind.)

On June 29, 2011, the Secretary filed a complaint against James H. Trotter, Sr., Sylvia Trotter, Trotter Construction Company, Inc. and the Trotter Development Group, NC, LLC, fiduciaries of the Trotter Construction Company 401(k) Plan and the Trotter Group Health Plans, for failure to remit a total of \$38,856 in employee contributions and lost opportunity costs for unremitted and untimely remitted employee contributions to the plans from January 1, 2004 through May 15, 2009. The Secretary's complaint seeks restoration of the losses to the plan and appointment of an independent fiduciary. Chicago Regional Office

Solis v. Truck It, Inc. (W.D. Ky. and Bankr. W.D. Ky.)

On November 15, 2010, the Secretary filed a complaint in district court alleging that Truck It, Inc. and Steven R. Ligon, fiduciaries of the company's Employee Benefits Plan, failed to remit \$26,287.76 in employee contributions and lost opportunity costs to the plan from January 3, 2005 through August 11, 2008. On November 30, 2011, the district court entered a default judgment requiring the defendants to restore all remaining losses to the plan and to allocate these funds directly to the individual participants in amounts equal to the unremitted contributions and lost opportunity costs owed to each participant. The default judgment also bars the defendants from serving as fiduciaries or service providers to any ERISA-covered plan. On June 4, 2010, the Secretary filed an adversary complaint in bankruptcy court against Steven Ligon to declare his debts to the plan non-dischargeable. On December 8, 2010, the bankruptcy court entered an order approving a stipulation that Ligon's debt to the plan is non-dischargeable. Chicago Regional Office

Solis v. USA Star Healthcare Group–East Los Angeles, Inc. dba ElaStar Community Hospital (C.D. Cal.)

On February 23, 2011, the Secretary filed a complaint against USA Star Healthcare Group–East Los Angeles, Inc. dba ElaStar Community Hospital, Andrea Kofl, and Richard Yardley. The complaint alleges the fiduciaries breached their fiduciary duty when they failed to remit employee contributions to the ElaStar Community Hospital Retirement Savings Plan from 2002 through 2004, causing the plan principal losses in the amount of \$412, 886.63 plus lost opportunity costs. On October 17, 2011, the court entered a consent judgment and order, finding the defendants liable to the plan in the amount of \$600,692.32. The court enjoined both defendants from future fiduciary service to any ERISA-covered plan and appointed an independent fiduciary to administer the plan at the defendants' expense. Los Angeles Regional Office

Solis v. Vance-Warren Comprehensive Health Plan, Inc. (M.D.N.C.)

On November 13, 2008, the Secretary filed a complaint against the Vance-Warren Comprehensive Health Plan, Inc. and four former members of its board, alleging that the company failed to make approximately \$82,047.70 in required employer contributions to the Healthco, Inc. Money Purchase Plan. Lost earnings owed to the plan totaled \$99,674.87. The complaint also alleges that the company's funds were commingled with those of the plan, resulting in earned interest income of \$6,088.70 that the company did not pay the plan. The company also failed to collect interest earned on plan assets. In sum, the company owed restitution of approximately \$200,000, plus accrued lost earnings. By agreement dated November 10, 2009, an independent fiduciary was appointed with authority to terminate the plan and to distribute its assets of approximately \$545,000 to participants. On January 28, 2010, the company filed a Chapter 7 bankruptcy petition with the U.S. Bankruptcy Court, Eastern District of North Carolina. On March 5, 2010, the Secretary filed a proof of claim in the unsecured amount of \$203,157.54. As of December 15, 2010, the independent fiduciary had made distributions totaling \$407,503.52 to 33 of 64 plan participants; \$137,410.64 remains to be distributed to 31 plan participants. On January 26, 2011, Charles Worth, one of the defendants, filed a motion to dismiss the complaint as to himself. The parties have agreed to extensions of time to respond to the motion pending the resolution of ongoing settlement discussions. Atlanta Regional Office

Solis v. Verrisimo (N.D. Ill. and Bankr. N.D. Ill.)

On May 4, 2010, the Secretary filed a complaint in district court against Carlo A. Verissimo, fiduciary of the Pyramid Stone Manufacturing, Inc. Health Plan, for failing to remit \$39,880.25 in employee health premium contributions and COBRA payments to the plan. On June 13, 2011, the court entered a consent order and judgment requiring the defendant to restore all losses to the plan and appointing an independent fiduciary to terminate the plan and distribute its assets to its participants and beneficiaries. On April 7, 2009, the Secretary filed an adversary complaint in bankruptcy court against Verissimo to have his debts to the plan declared non-dischargeable. On February 10, 2010, the bankruptcy court entered an order approving a stipulation that Verissimo's debt to the plan is non-dischargeable. Chicago Regional Office

Solis v. Vincent's Apartment Washer Service, Inc. (W.D. Wash.); Solis v. Vincent (In re Vincent) (Bankr. W.D. Wash.)

On April 29, 2010, the Secretary filed a complaint against Vincent's Apartment Washer Service, Inc. and Keith D. Vincent, alleging that from October 2004 through August 2005, employee contributions were deducted from employees' paychecks but were not remitted or were untimely remitted to the company's SIMPLE Plan, and mandatory employer matching contributions were not remitted to the plan. On April 19, 2010, the Secretary filed an adversary complaint in Keith Vincent's Chapter 7 bankruptcy, seeking an order of non-dischargeability of debt and alleging that the plan suffered losses of \$16,938.59. Upon application of the Secretary, on March 2, 2011, the court entered a default judgment, finding that the defendants' fiduciary breaches caused \$16,938.59 in plan losses. The court found that the debt is nondischargeable against Keith D. Vincent and that interest will accrue on that debt until such time as the debt is fully paid to the plan. Seattle Regional Office

Solis v. Wagner (N.D. Ill.)

On June 21, 2011, the Secretary filed a complaint against Joseph Wagner and Thomas Eppers, fiduciaries of Dowe and Wagner, Inc. 401(k) Plan, alleging that the fiduciaries failed to remit and timely remit employee salary contributions to the plan between October 2006 and July 2009. The Secretary is seeking restoration of approximately \$31,000 to the plan. Chicago Regional Office

Solis v. Wallis (N.D. Ill. and Bankr. N.D. Ill.)

On May 6, 2011, the Secretary filed a complaint against Scott Wallis, Ronald Eriksen, and USA Baby, Inc., the fiduciaries of the company's 401(k) Plan and Health Plan. The complaint alleges that the fiduciaries failed to ensure that employee contributions and loan repayments were remitted and timely remitted to the 401(k) Plan and also failed to ensure that participant contributions were remitted to the Health Plan. Subsequent to the Secretary's complaint being filed, Ronald Eriksen filed for personal bankruptcy, and the court dismissed him from the litigation on August 28, 2011 based on the automatic stay. On September 9, 2011, the Secretary filed a motion for reconsideration with respect to the court's dismissal of Eriksen. On September 13, 2011, Wallis filed a motion to dismiss the Secretary's action. On October 18, 2011, the Secretary filed an opposition brief in response to Wallis' motion to dismiss. On October 14, 2011, the Secretary filed an adversary complaint to have the amounts owed to the 401(k) plan deemed non-dischargeable in Erikson's bankruptcy proceedings. Chicago Regional Office

Solis v. Walsh (S.D. Fla.)

On November 10, 2010, the Secretary filed a complaint against Daniel Walsh, David Harris, Stephen Pallister, and Windjammer Barefoot Cruises, Ltd., as plan fiduciaries, for failure to remit employee contributions and employee loan payments to the company's 401(k) Plan. They allegedly failed to remit approximately \$19,180.70 in employee contributions and \$4,696.99 in employee loan payments to the plan in 2006 and 2007, causing \$778.08 in lost earnings and lost opportunity costs through September 2009. In addition to restitution, the complaint seeks a permanent injunction barring the defendants from serving as fiduciaries and the appointment of an independent fiduciary at the defendants' expense. On August 9, 2011, the Secretary filed a motion for clerk's default against Daniel Walsh and Windjammer, which the clerk entered on August 22, 2011. On August 24, 2011, Daniel Walsh filed a late answer. On September 13, 2011, the Secretary filed a motion to strike the late answer and for a final default judgment. On September 29, 2011, Walsh responded with a motion to vacate default. On November 28, 2011, the court denied the Secretary's motion to strike the late answer and for a final judgment against Walsh but granted the motion for final judgment against Windjammer, an inactive Florida corporation. Atlanta Regional Office

Solis v. Weaver (E.D. Mich.)

On January 13, 2011 the Secretary filed a complaint against Ronald David Weaver, Jr. and Management Systems, Inc., as fiduciaries of the company's Retirement Plan, alleging that from January 6, 2006 through March 13, 2009, employee contributions and loan repayments were not remitted to the plan and those that were remitted were not timely. On July 14, 2011, the court entered a default judgment, removing defendants as fiduciaries of the plan, enjoining defendants

from serving as ERISA fiduciaries or service providers, appointing an independent fiduciary to administer and terminate the plan, and ordering that Weaver's plan account be offset to restore \$16,648.27 in plan assets plus \$3,179.67 in lost opportunity costs. Cleveland Regional Office

Solis v. Weir (W.D. Pa.)

On February 3, 2011, the Secretary filed a complaint against Kevin T. Weir and Liberty-Pittsburgh Systems, Inc. for failure to deposit certain employee contributions and employee loan repayments into the company's 401(k) plan during the period January 2007 to December 2009. Weir is a former officer of the company and a plan fiduciary. The company sponsored the plan and served as the plan administrator. In August 2011, the parties entered into a consent judgment which required that the defendants make full restitution of \$67,137.67 through a series of six payments, permanently enjoined the defendants from acting as fiduciaries, and provided for the plan to be terminated. An independent fiduciary is serving as the plan administrator for the purposes of terminating the plan and distributing the recovered assets. As of December 31, 2011, the company and Weir failed to fulfill their obligations under the agreement to pay restitution. The Secretary filed a motion for adjudication of contempt on December 21, 2011. The court issued a show cause order to the defendants and a hearing was scheduled for January 23, 2012. See also Solis v. Weir, Section M. Contempt and Subpoena Enforcement. Philadelphia Regional Office

Solis v. White (Bankr. N.D. Ind.)

On January 6, 2010, the Secretary filed an adversary complaint seeking to have the defendant's debt to the employer's 401(k) plan declared non-dischargeable. The complaint alleges that defendant engaged in defalcation by failing to remit \$46,000 in employee contributions to the plan in 2008. The defendant filed for bankruptcy on July 17, 2009. The plan obtained a partial payment from an insurance policy, and the defendants paid the remaining amount of employee contributions owed to the plan. The parties agreed to a stipulation of dismissal, entered by the court on May 11, 2011. Chicago Regional Office

Solis v. Wong (D. Mass.)

The Secretary filed a complaint on October 6, 2010, alleging that now-defunct Wong's Motors, doing business as Athol Ford and Mercury, the plan sponsor, and Christopher Wong, the president of Wong's Motors and functional fiduciary of the company's 401(k) Plan, failed to remit withheld employee contributions to the plan from January 5, 2007 through October 12, 2007. Wong also allegedly permitted plan assets to be used to satisfy the debts of the sponsor, an entity he owned and controlled. On June 28, 2011, the court entered a consent judgment and order requiring Wong to remit over \$16,000 to the plan for the benefit of its non-fiduciary participants and to effect all distributions and terminate the plan. It also provides that following the termination of the plan, Wong is permanently enjoined from serving as a fiduciary to any other ERISA-covered plan. Boston Regional Office

Solis v. Zucker (N.D. Ohio)

On October 6, 2011, the Secretary filed a complaint against Glen Zucker and Truprint Services, Inc. d.b.a. Grant Saint John, fiduciaries of the Grant Saint John 401(k) Profit Sharing Plan,

alleging that from January 10, 2007 to June 10, 2008, they failed to remit, or untimely remitted, employee contributions and loan repayments to the plan. Cleveland Regional Office

3. Insurance Rebates

None

4. Miscellaneous

Compass Capital Partners, Ltd. Defined Benefit Retirement Plan (E.D. Pa.)

On July 15, 2011 the Secretary filed a complaint against Harris DeWese, Compass Capital Partners, Ltd., and the company's Defined Benefit Retirement Plan alleging that from October 2006 to October 2007, DeWese, as plan trustee and an owner and chief executive officer and chairman of Compass Capital Partners, transferred over \$500,000.00 from the plan to himself, Compass Capital Partners and to another company in which he had an interest. The complaint seeks restoration of all losses to the plan and a permanent injunction barring DeWese from serving as a fiduciary to any ERISA-covered plan. The complaint also seeks the appointment of an independent fiduciary for the plan. On November 3, 2011, the clerk of the court entered default against the defendants. Philadelphia Regional Office

Solis v. Dampman (E.D. Pa.)

The Secretary filed suit on August 13, 2010 against Wayne Hall, Mark Dampman, Reneuxit, Inc., and Reneuxit, Inc. Defined Benefit Pension Plan. During the period from February 15, 2006 through June 26, 2006, Dampman, as president of Reneuxit and trustee of the plan, illegally transferred \$280,000 from the plan to himself, an employee, and Reneuxit. In August 2006, Hall assumed control of the plan and Reneuxit but made no efforts to recover the plan's losses. In January 2007, Hall sold the corporation's assets but made no provision for the plan as a creditor of the corporation, while all other creditors were paid in full. The complaint seeks damages in excess of \$280,000 to make the plan whole for the illegally transferred funds and lost opportunity costs, and injunctive relief. After the complaint was filed, the new plan actuary discovered that the plan was underfunded. Defendants filed answers to the complaint and cross claims against each other. On March 28, 2011, the court entered a consent order in which Dampman forfeited his interest in the plan to cover the \$230,000 he transferred to Reneuxit and to himself from the plan, plus opportunity costs of \$90,532.82, for a total of \$320,532.82. In addition, he was assessed a § 502(1) penalty of \$64,106.56. Hall agreed to pay for a third party administrator to terminate the plan and to ensure the plan was fully funded. The funding shortfall was estimated at \$15,546 and a § 502(1) penalty of \$3,109.20 was assessed. Dampman, Hall and Reneuxit also agreed to be barred from serving as fiduciaries to ERISA-covered plans. Philadelphia Regional Office

Solis v. Davis (N.D. Ill.)

On October 4, 2011, the Secretary filed a complaint against Keith Davis and A.B.D. Tank & Pump Co., fiduciaries of the company's 401(k) & Profit Sharing Plan & Trust, alleging that between December 2006 and November 2010 they misappropriated in excess of \$1.9 million from the plan. The complaint requests that the court order the fiduciaries to restore all plan assets, plus lost opportunity costs. The complaint also seeks removal of the defendants as fiduciaries, an injunction prohibiting them from serving as fiduciaries or service providers to any ERISA-covered plan, and appointment of an independent fiduciary to administer and terminate the plan. Chicago Regional Office

Solis v. Eichholz Law Firm, P.C. (S.D. Ga.)

On July 14, 2010, the Secretary filed a complaint against the Eichholz Law Firm, P.C. and Benjamin Eichholz to recover losses to the Eichholz & Associates, P.C. Retirement Plan and Employees Pension Plan arising from numerous prohibited transactions and imprudent investments of the plans' assets in highly speculative stocks. Eichholz allegedly moved plan assets to his law firm accounts and lent or transferred the funds to others, including former clients and employees, his girlfriend (now wife), and businesses he owned or in which he personally invested. As a result of a concurrent criminal investigation, Eichholz pled guilty to one count of obstructing the Department's investigation and was sentenced to 21 months in prison. On September 27, 2010, the defendants filed a motion to dismiss, which the court denied, followed by a motion for reconsideration, which the court also denied. The defendants filed their answer on March 31, 2011. The parties participated in voluntary mediation before the magistrate judge on June 22, 2011 and reached a favorable resolution that will be incorporated into a consent judgment. The settlement will result in restoration of all losses to the plans. The settlement amount of \$266,073 will be adjusted for distributions made to some participants and will be further reduced once plan assets at banks and the restitution from the criminal case are marshaled. Eichholz and his mother will waive their right to these benefits and be allowed to keep any remaining assets in the plan (e.g., penny stocks and china). The defendants will pay for an independent fiduciary and fully cooperate to bring the plans to a close, will be permanently enjoined from violating ERISA, and will be permanently barred from serving in any role outlined in ERISA § 411. Defendants have asked to pay restitution over time. The parties are negotiating the temporal terms of the repayment to the plan. Atlanta Regional Office

Solis v. Farrell (D. Conn.)

On July 29, 2008, the Secretary filed a complaint alleging that James T. Farrell III, a trustee of the James T. Farrell III Money Purchase Pension Plan, withdrew assets of the plan in excess of \$960,000 and used the money for business operations of the plan sponsor and for personal use. The action also alleges that Nancy Farrell, also a trustee, is liable for failing to monitor plan assets and liable as a co-fiduciary for the withdrawal of assets. The Secretary alleged fraud and concealment, asserting that the trustees provided false benefit statements to the participants and fabricated information on Forms 5500. The plan has four participants. On March 1, 2010, the Secretary filed a motion for summary judgment on all issues of liability. On February 8, 2011, summary judgment was granted in favor of the Secretary regarding Nancy Farrell's liability. The court rejected the defendants' argument that Nancy Farrell was a trustee "in name only", that she

had never had discretionary authority or control of the plan assets, that she had never exercised authority or control, and that, alternatively, she had resigned before the looting occurred. The remaining issue is the amount of losses to the plan. A consent judgment was filed on August 22, 2011, requiring that \$770,000 be remitted to the plan and barring the defendants from serving as fiduciaries and service providers to ERISA-covered plans. In light of the fact that the defendants had insufficient funds to pay the judgment, a payment plan has been established and a lien has been placed on defendants' home. Boston Regional Office

Solis v. Gobeyn (N.D. Ill. and Bankr. N.D. Ill.)

On March 17, 2010, the Secretary filed a complaint in district court against Jason S. Gobeyn and Michele L. Gobeyn, fiduciaries of the Modo Exhibits 401(k) Plan, alleging that they failed to remit and timely remit employee contributions to the plan from August 17, 2007 through July 3, 2008. On December 1, 2011, the court ordered the fiduciaries to restore \$21,544.85 in losses attributed to their fiduciary breaches and permanently barred them from serving as fiduciaries. On November 23, 2009, the Secretary had filed an adversary complaint in bankruptcy court against the Gobeyns, seeking to have their debts to the plan declared non-dischargeable. On November 7, 2011, the bankruptcy court entered an order approving a stipulation providing that the Gobeyns' debt to the plan could not be discharged. Chicago Regional Office

Solis v. Harbolt (D. Or. and Bankr. D. Or.)

On August 5, 2011, the Secretary filed a complaint in district court against Timothy Ray Harbolt and the Family Dental Group, the fiduciaries of the company's 401(k) Profit Sharing Plan, alleging that they failed to remit, and untimely remitted, employee contributions to the plan and that Harbolt improperly transferred \$207,000 from the plan. On August 10, 2011, the district court entered the consent judgment, finding that the defendants were jointly and severally liable for \$143,270.17 in plan losses due non-fiduciary participants, permanently enjoining Harbolt from future fiduciary service to any ERISA-covered plan, and appointing an independent fiduciary to administer the plan at the defendants' expense. Previously, on December 10, 2010, the Secretary had obtained an amended order of nondischargeability against Harbolt. The bankruptcy court found that \$142,066.55 is a non-dischargeable debt, required payment of a § 502(l) penalty and ordered that interest continue to accrue until the debt is paid. Seattle Regional Office

Solis v. Kreeger (W.D. Wis.)

On February 28, 2011, the Secretary filed a complaint against Joseph Kreeger and Coin Builders LLC, fiduciaries of the company's Profit Sharing Plan and Trust, alleging that they engaged in prohibited transactions when they used plan assets for non-plan purposes. In July and August 2004, Kreeger withdrew a total of \$1.3 million from the plan account and deposited it into the company's account. Kreeger claimed that the monies were loans to plan participants who purchased real property in Las Vegas. Kreeger held interests in both pieces of property prior to the alleged loans to the plan participants. On August 24, 2011, the court entered a default judgment against the defendants ordering the restoration of \$1.5 million to the plan and the barring the defendants from serving as fiduciaries or service providers to ERISA-covered plans. Chicago Regional Office

Solis v. Metzen Realty, Inc. (D. Minn.)

On May 27, 2010, the Secretary filed a complaint against Thomas F. Metzen and his company, Metzen Realty, Inc., fiduciaries of the company's Money Purchase Pension Plan, alleging that they used plan assets for non-plan purposes. In or around 2001, Metzen used plan assets to purchase real property that was held in the name of Metzen Realty, Inc. On July 29, 2010, the court entered a judgment requiring defendants to restore \$103,447.51 to the plan over the course of twelve months. On October 14, 2011, the court entered an amended consent judgment allowing the defendant additional time to continue its consecutive monthly restoration of losses owed the plan. Chicago Regional Office

Solis v. Mordo (S.D.N.Y.)

On November 23, 2010, the Secretary filed a complaint against Colette Mordo, the trustee of the Sadimara Knitwear, Inc. and the Stallion Knits, Ltd. Defined Benefit Pension Plans, alleging breach of fiduciary duty and prohibited transactions in connection with the unexplained transfer of over \$4 million to parties in interest, including members of the Mordo family and companies owned by them. Despite a commitment on the record to enter into a consent judgment substantially resolving the issues in the case, defendant ultimately refused to sign the proposed consent judgment and opted to continue the litigation, moving for a jury trial. The jury trial request was defeated by the Secretary's opposition brief, which argued that Cigna v. Amara had strengthened existing precedents denying jury trials for equitable ERISA claims seeking equitable relief. New York Regional Office

Solis v. N.C. Caro, M.D. (N.D. Ill. and Bankr.N.D. Ill.)

On September 30, 2011, the Secretary filed a complaint in district court against Nicholas C. Caro, N.C. Caro M.D., S.C., and the company's Defined Benefit Plan. The complaint alleges that from April 27, 2006, through February 29, 2008, Caro liquidated in excess of \$263,951 from the plan's investment accounts and transferred those funds to various accounts held by Caro, his wife's company, and others. The complaint seeks the restoration of losses to the plan and the appointment of an independent fiduciary to distribute the restored assets and terminate the plan. On October 13, 2011, the Secretary filed an adversary complaint against Caro, seeking a determination that the debts to the plan are non-dischargeable. Chicago Regional Office

Solis v. Novotny (E.D. Wis. and Bankr. E.D. Wis.)

On August 23, 2010, the Secretary filed a complaint against fiduciaries Thomas Novotny and Marcia Schlosser alleging that the fiduciaries failed to remit \$14,862.27 in employee contributions to the Pulse Communications, LLC 401(k) Plan from January 1, 2008 through March 31, 2009 and instead used the plan assets to pay corporate expenses. The complaint seeks restitution of the unremitted employee contributions, lost opportunity costs, and an injunction prohibiting Novotny and Schlosser from serving as fiduciaries or service providers to any ERISA-covered plan. On August 5, 2011, the district court entered a default judgment against Thomas Novotny ordering him to restore the full amount owed to the plan and barring him from serving as a fiduciary or service provider to any ERISA-covered plan. The case against Schlosser remains pending. The Secretary had filed an adversary complaint against Novotny on November 18, 2009 in his Chapter 7 bankruptcy, seeking to have his debt to the plan declared

non-dischargeable. On March 10, 2010, the bankruptcy court approved a stipulation of non-dischargeability of debt and entered an order providing that Novotny's total debt to the plan of \$17,471.35, including interest, is non-dischargeable. Chicago Regional Office

Solis v. Phelan (N.D. Ill. and Bankr. N.D. Ill.)

On May 3, 2010, the Secretary filed a complaint against fiduciary Joseph M. Phelan for failing to remit \$10,470 in employee contributions to the Phezer Enterprises, Inc. Health Plan from May 3, 2008 through July 12, 2008. On August 30, 2011, the district court entered a consent order and judgment requiring the defendant to restore all losses to the plan and barring him from serving as a fiduciary or service provider to any ERISA-covered plan. The Secretary had filed an adversary complaint on November 30, 2009, against Phelan in his Chapter 7 bankruptcy, alleging that he had committed defalcation by failing to remit employee health premium contributions to the plan. On May 19, 2010, the court approved a stipulation of non-dischargeability of debt and entered an order providing that Phelan's debt to the plan is non-dischargeable. Chicago Regional Office

Solis v. Republic Drill/APT Corp. (S.D. Fla.)

On March 30, 2010, the Secretary filed a complaint against Republic Drill/APT Corporation, the sponsor of the Michigan Drill Corp. Profit Sharing Plan and Hyman Ash, who is the owner of Republic Drill and the plan trustee, alleging various prohibited transactions involving the plan. In 1990, the company extended a line of credit to an unrelated entity called TESC. In 2006, Republic Drill acquired TESC and its associated debts, but failed to extinguish the \$500,000 line of credit. In addition, Republic Drill allegedly violated plan documents by failing to obtain independent appraisals of several plan assets, including investments in artwork portfolios and real estate partnerships in central Florida. The complaint sought to have the prohibited loan reversed, to have the assets properly appraised, and to determine if the distributions to plan participants over the years were adversely affected by the lack of valuation of plan assets. On December 20, 2010, the Department reached an agreement on settlement terms at a mandatory mediation. The defendants agreed to restore all losses to the plan. Ash agreed to waive his interest in \$163,000 that would have been due his account, and an additional \$107,000 will be credited to the accounts of non-breaching participants. Ash also agreed to an injunction barring him from violating ERISA and to enroll in annual fiduciary training classes. Ash plans to terminate the plan by the end of 2011. A consent judgment and order reflecting these settlement terms was approved by the court on January 20, 2011. Atlanta Regional Office

Solis v. Sisti (D.R.I.)

On March 3, 2011, the Secretary filed a complaint against David Sisti, a fiduciary of the Equity Concepts, Inc. Profit Sharing and 401(k) Plan, for failure to transmit approximately \$6,000 in employee contributions to the plan. The defendant entered into a consent judgment, filed on October 12, 2011, for the full amount owed and is barred from serving as a fiduciary for five years. An eighteen month payment plan has been established, and the state receiver is terminating the plan. Boston Regional Office

In re Ty J. Glasgow; Solis v. Glasgow (Bankr. D.N.H.)

On October 7, 2011, the Secretary filed an adversary complaint seeking to have a \$39,942.53 debt determined to be non-dischargeable in a Chapter 7 bankruptcy proceeding involving an individual who served as the president of the plan sponsor and is the named trustee to the plan sponsor's 401(k) pension plan. The Secretary alleges that employee salary withholdings were never forwarded to the plan. Boston Regional Office

Solis v. Vinyl-Mark Products, Inc. (N.D. Ala.)

On August 13, 2009, the Secretary filed a complaint against a defunct Alabama company, formerly known as First Alabama Supply, Inc., and its owners, Jessie and Willard Bailey, who also served as trustees to the company's defined benefit and profit sharing plans, alleging that the parties used almost \$900,000 of plan assets to fund the company's operating expenses. The defined benefit plan has been taken over by the Pension Benefit Guaranty Corporation. On January 3, 2011, the court approved a consent judgment and order permanently enjoining Jessie and Willard Bailey from serving as fiduciaries to any ERISA-covered plan and from violating ERISA. They agreed to pay \$39,017.19 in restitution to the profit sharing plan in monthly installments of \$400, to submit a financial affidavit and their tax returns annually, and to waive all benefits to which they would otherwise be entitled under both plans. Atlanta Regional Office

Solis v. Western Mixers (C.D. Cal.)

On August 31, 2011, the Secretary filed a complaint against Frank Rudy, David H. Bolstad, Robert Fischer and Western Mixers alleging that the fiduciaries caused \$565,000 in prohibited transfers and failed to collect approximately \$546,000 in mandatory employer contributions from 2001 through 2004. On November 17, 2011, over the Department's objection, the court consolidated the Secretary's complaint with existing private litigation initiated by Frank Rudy. Los Angeles Regional Office

B. Financing the Union

Solis v. Craftsman Independent Union (E.D. Mo.)

On May 20, 2011, the Secretary filed a complaint against the trustees and administrator of the Craftsman Independent Union Local #1 Training Fund and Health, Welfare and Hospitalization Fund. The complaint also named the Craftsman unions and a service provider attorney as defendants, alleging knowing participation violations. With respect to the Training Plan, the complaint alleges that plan assets were used to make cash transfers of nearly \$200,000 to the unions, pay rent to the unions for training space, and pay a legal retainer for minimal services provided to the plan. With respect to the Health and Welfare Plan, the complaint alleges that plan assets were wasted through the operation of a plan-owned clinic, which provided discounted services to union members and the general public and which suffered operating losses in excess of \$315,000. The complaint also alleges that the administrator used plan assets to pay himself, his wife and nephew salaries from the plans and that plan assets were used to purchase Town Cars for the administrator's wife and nephew. On June 20, 2011, the court entered a consent judgment requiring the fiduciaries to restore \$200,000 to the plans, removing the trustees and administrator from their positions, appointing an independent fiduciary, and permanently enjoining the fiduciaries and attorney from violating ERISA and from providing services to any

ERISA-covered plans in the future. See also Solis v. Craftsman Independent Union, Section K. Service Provider Cases. Kansas City Regional Office

C. Prudence

Solis v. Beacon Associates Management Corp. (S.D.N.Y.)

On March 8, 2011, the Secretary filed an amended complaint in her suit against three firms in connection with imprudent investments with Bernard L. Madoff Investment Securities LLC made with the assets of more than 100 ERISA-covered plans. The lawsuit stems from the unraveling of the Madoff Ponzi scheme. The defendants are the investment companies Beacon Associates Management Corp. and Andover Associates Management Corp. and their principals, Joel Danziger and Harris Markhoff; investment advisor Ivy Asset Management LLC and its principals, Lawrence Simon and Howard Wohl; and the investment management and advisory company J.P. Jeanneret Associates, Inc. and its principals, John P. Jeanneret and Paul Perry. The original complaint, filed on October 21, 2010, alleges, among other things, that the defendants, as plan fiduciaries, breached their fiduciary duties by recommending, making, and maintaining investments with Madoff, losing hundreds of millions of dollars of ERISA plan assets while collecting tens of millions of dollars in fees for themselves. The amended complaint alleges that the defendants' fraudulent material misrepresentations and failures to disclose material facts about Madoff constitute "fraud or concealment" under ERISA's statute of limitations, thereby enabling the Department to recover losses to the plans for breaches that occurred more than six years prior to the time that the complaint was filed. The amended complaint also contains additional factual allegations to address the Ivy defendants' contention that Ivy was not a fiduciary with respect to certain investments.

On May 6, 2011, the Secretary moved to strike several defenses from the Defendants' Answers. On August 10, 2011, the court granted the motion to strike the equitable defenses: laches, unclean hands, and equitable estoppel. While the court did not strike the rest of the challenged defenses, the court, for the most part, agreed with the Secretary with respect to the legal standards for each defense, including, for example, fraudulent intent is not an element of an ERISA fiduciary breach claim and ERISA fiduciaries cannot reduce liability based on the conduct of co-fiduciaries. Because of the hotly contested nature of this litigation, the magistrate judge supervising discovery has referred the parties' discovery disputes to a special master. See also In re Beacon Associates and In re Jeanneret Associates, Section K. Service Provider Cases. Plan Benefits Security Division

Solis v. Clark Graphics (S.D. Ohio)

On September 30, 2011, the Secretary filed a complaint against Clark Graphics, Inc., Mary Clark, James Clark, Stephen Clark and Marcia Dowdell, fiduciaries of the two employee benefit plans sponsored by Clark Graphics. The complaint alleges that Dowdell, the plans' third party administrator, failed to account for approximately \$500,000 of the plans' assets between May 2000 and August 2009 and failed to prudently administer the plans. The complaint also alleges that the remaining fiduciaries failed to monitor the actions of Dowdell. The complaint seeks restoration of the plans' assets, appointment of an independent fiduciary, and a permanent injunction as to all of the defendants. Chicago Regional Office

Solis v. DeHeer (S.D. Ind.)

On January 19, 2010 the Secretary filed a complaint against Dr. Patrick DeHeer and Hoosier Foot & Ankle, LLC, fiduciaries of the company's 401(k) Plan, alleging that they acted imprudently in choosing Lafferty & Partners as a plan service provider when establishing the plan in December, 2005. Jeffrey Lafferty, owner of Lafferty & Partners, allegedly stole \$17,123.84 in plan assets. The Secretary's complaint sought to recover the missing assets and \$4,100 in lost opportunity costs. Pursuant to the consent judgment entered by the court on March 25, 2011, defendants are enjoined from violating ERISA, are to restore \$17,123.84 in plan assets plus \$876.16 in lost opportunity costs, and agreed not to contest the § 502(l) penalty. Cleveland Regional Office

Solis v. J.W. Buckholz Traffic Engineering, Inc. (M.D. Fla.)

On March 15, 2011, the Secretary filed a complaint against J.W. Buckholz Traffic Engineering, Inc. and Jeffery William Buckholz and Burita Hillyard, fiduciaries of the J.W. Buckholz Traffic Engineering, Inc. Profit Sharing Plan. The complaint alleges misappropriation of plan assets, including imprudent loans made by the plan administrator. The complaint also alleges that the plan rented property owned by the plan for less than appropriate market rental rate. On December 7, 2011, the court entered a consent judgment requiring Buckholz to restore losses of \$13,147.24 to the plan. The independent fiduciary has reported that the plan participants will be paid amounts due to them and that the plan should successfully be closed within six months from entry of the consent judgment. The Secretary will file a motion for default judgment with the court as to Hillyard; the clerk's default as to Hillyard has already been entered. Atlanta Regional Office

Solis v. Parnell & Co., LLC (D.S.C.)

On December 29, 2010, the Secretary filed a complaint alleging that Christopher L. Parnell and Parnell & Company, LLC, the fiduciaries of the company's 401(k) Profit Sharing Plan & Trust, knowingly made imprudent investments in a real estate transaction using plan assets. While Christopher Parnell received proceeds from the real estate transaction, he allegedly never restored to the plan the initial investment from the transaction or proceeds, resulting in the loss of \$49,875 and approximately \$20,178 in lost earnings. The complaint also alleges that Parnell made withdrawals from the plan for his personal use and failed to distribute benefits to terminated employees. The Secretary seeks, among other things, restitution, a permanent injunction barring Parnell from serving as a plan fiduciary and the appointment of a successor fiduciary or administrator at defendants' expense. On June 29, 2011, the defendants filed their answer and a counterclaim. Parnell admits he was a fiduciary and party in interest but alleges he was physically and mentally unable to serve in such a capacity and that, therefore, plan participants actually served as fiduciaries because of their awareness of Parnell's alleged illness. Atlanta Regional Office

Chao v. Payea (E.D. Mich.); Solis v. Payea (6th Cir.)

On July 21, 2008, the Secretary filed a complaint against Dr. Richard Payea, and his professional corporation, Richard P. Payea, M.D., P.C., the plan fiduciaries, and Independent Bank. The assets of the company's Money Purchase Plan and Profit Sharing Plan were in separate accounts

at Independent Bank. In March 2004, Independent Bank processed a tax levy for \$340,117 in federal taxes owed by the corporation against both plan accounts. Payea and the corporation took no action against the Bank. The Secretary's complaint sought an order requiring that Payea, his corporation, and Independent Bank restore to the plan the employee funds that were taken by the IRS levy. The complaint further requested that the fiduciaries pay mandatory contributions due one of the plans, that Payea and the corporation be removed as fiduciaries, and that an independent fiduciary be appointed. The Secretary received a favorable decision against the sponsoring doctor and his company but lost the case against the bank. On September 7, 2009, the Secretary appealed the district court's decision regarding the bank. The Secretary and the bank engaged in negotiations, which resulted in a consent order and judgment in which the bank agreed to pay the plans \$87,000 and to pay a § 502(l) penalty. The matter was remanded to the district court, which entered the consent order and judgment on February 24, 2011. Independent Bank paid the settlement and § 502(l) penalty amounts. The Sixth Circuit dismissed the appeal on March 9, 2011. See also Chao v. Payea; Solis v. Payea, Section A.2. Collection of Plan Contributions. Cleveland Regional Office (district court) and Plan Benefits Security Division (court of appeals)

Solis v. Seibert (M.D. Fla.)

On August 24, 2009, the Secretary filed a complaint against Floyd Seibert, who was criminally convicted in 2006 for causing his company's pension plan, for which he served as trustee, to purchase worthless bonds in excess of \$3.5 million from a shell company that Seibert controlled. Seibert has been ordered to pay the \$3.5 million as part of his criminal restitution, but this did not include interest or other lost opportunity costs. Additionally, he is a plan participant with an account balance, which the criminal court did not order to be offset against his debt to the plan. The Secretary's complaint sought an order for Seibert to restore to the plan the approximately \$1.5 million in lost opportunity costs and an order permitting Seibert's account balance to be offset against the amount he owes the plan. On February 4, 2011, the court granted summary judgment in the Secretary's favor, ordering the defendant to restore \$1,253,661.64 in lost opportunity costs and further ordering that his plan account balance of approximately \$600,000 be offset against this loss. The court rejected the defendant's argument that Federal Rules of Evidence 403, 404(b), and 410 prevented the court from considering the defendant's admissions in his criminal plea agreement on the embezzlement charges. (The substance of those admissions was corroborated by the affidavit of the Department's investigator.) The court also rejected the defendant's statute of limitations and collateral estoppel defenses. Seibert appealed this decision to the Eleventh Circuit of Appeals; the Eleventh Circuit's decision is pending. The Secretary's brief, filed on October 28, 2011, argues that the district court properly granted summary judgment based on the overwhelming record of fiduciary misconduct that had already resulted in a criminal conviction following Seibert's guilty pleas, and also properly exercised its discretion in making discovery and evidentiary rulings prior to the summary judgment. Atlanta Regional Office (district court) and Plan Benefits Security Division (court of appeals)

Solis v. Stuart (C.D. Cal.); Solis v. Schmitz (In re Schmitz) (Bankr. E.D. Cal.)

On October 20, 2010, the Secretary filed a complaint against Shannon Stuart and Steven John Schmitz, trustees of the SJ Burkhardt Employees' Profit Sharing Plan, alleging that they imprudently invested \$200,000 of the plan's assets in exchange for a 2/3 interest in a real estate

note that was never secured by a recorded deed of trust. The complaint alleged that they failed to prudently monitor the investment and collect the amounts due under the loan and imprudently approved a \$125,000 loan from the plan without memorializing the loan in writing or obtaining any security. The Secretary filed an adversary complaint on October 12, 2010 in Schmitz's bankruptcy, seeking an order of non-dischargeability of debt. On October 27, 2010, the Secretary filed a motion for withdrawal of reference and transfer of venue, seeking to remove the bankruptcy reference and transferring the bankruptcy case to the Central District of California. On February 11, 2011, the bankruptcy court in the Eastern District of California granted the motion for withdrawal of reference and transfer of venue. Subsequently, the bankruptcy case was transferred to the Central District of California. On April 28, 2011, the court granted the Secretary's motion for consolidation of the ERISA case and the bankruptcy proceeding. On May 11, 2011, the Secretary filed a first amended complaint, responding to the court's April 28, 2011 consolidation order. On August 26, 2011, the Secretary obtained a consent judgment and order against Schmitz, finding that his debt to the plan was non-dischargeable, requiring him to restore \$86,421.14 to the plan, and permanently enjoining him from future service as a fiduciary or service provider to any ERISA-covered plan. On October 7, 2011, the Secretary filed a motion for summary judgment against Stuart, seeking a court order that Stuart's account be offset and that he pay for an independent fiduciary. The summary judgment motion is pending. Los Angeles Regional Office

Solis v. Stuart (C.D. Cal.)

On August 5, 2011, the Secretary filed a complaint against Shannon Stuart, S.J. Burkhardt, Inc., SJB Group, Inc. and the SJB 401(k) Plan, alleging that the fiduciaries failed to exercise their authority to appoint someone with the responsibility to collect outstanding mandatory employer/prevaling wage contributions or to take any action that would result in the collection of approximately \$291,236 in mandatory employer/prevaling wage contributions due the plan for the period beginning September 2007 and ending September 2008. Los Angeles Regional Office

D. Preemption

ALPA v. United Airlines (California Court of Appeals)

This appeal is from an order of the state Superior Court in San Francisco holding that ERISA does not preempt application of a California "kin care" law under which employers who offer paid sick leave to their employees must allow them to take this leave to care for specified relatives. The Airline Pilots Association brought suit in this case against United for denying its pilots use of their sick leave for the kind of care specified by the California statute. United contended, among other things, that ERISA preempts application of the state law, but the court found, as ALPA argued, that the sick leave policy was a "payroll practice" under the Secretary's regulation and advisory opinions and not an ERISA plan. The Secretary filed an opening brief on October 3, 2011 and a reply brief on November 2, 2011. The briefs argue that the sick leave policy is not an ERISA-covered plan under applicable advisory opinions, and that the California law is not preempted as applied to the United sick leave plan because it is not an ERISA-covered plan (i.e., it is an excluded payroll practice), and because, even if it is covered by ERISA, ERISA does not preempt state laws that do not require or assume the establishment of an ERISA plan

and can be met through a non-ERISA plan. The "kin care" law, which explicitly excluded ERISA plans, is not preempted for this reason (even though the ERISA exclusion is not effective under Mackey). Plan Benefits Security Division

Fossen v. BC/BS of Montana (9th Cir.)

This was an appeal from a district court decision holding that ERISA preempts a Montana health insurance rate regulation that prohibits insurers in the state from requiring individuals to pay a premium greater than the premiums of similarly-situated individuals based on the health status of the individual. Although the court held that the Montana law was an insurance regulation that ERISA saves from preemption in § 514, it held that because the law was duplicative of a HIPAA provision, ERISA § 702, it is preempted because it duplicates an ERISA civil enforcement remedy. The court did not discuss ERISA § 731, which provides that the part of ERISA setting forth the HIPAA provisions "shall not be construed to supersede any provision of State law which established, implements, or continues in effect any standard or requirement solely relating to health insurance issuers in connection with group health insurance coverage except to the extent such standard or requirement prevents application of a requirement of this part." Nor did the court address the regulation at 29 C.F.R. § 2590.731(a) or the preamble to that regulation, which reiterates the Conference Report statement that "State laws with regard to health insurance issuers that are broader than federal requirements in certain areas, would not 'prevent the application of'" that part of ERISA. The plaintiff's brief was due on February 9, 2011. The Secretary filed a brief on extension on March 18, 2011, and participated in the oral argument on August 4, 2011. On October 18, 2011, the court issued an adverse decision, holding that ERISA preempts the little HIPAA provision but saves the state unfair insurance practice claim. Although the plaintiffs decided not to petition for rehearing, Blue Cross petitioned for panel rehearing with regard to the unfair insurance practices law. Rehearing was denied on December 23, 2011. Plan Benefits Security Division

Sherfel v. Gassman (S.D. Ohio)

In this case, Wisconsin officials who administer and enforce the Wisconsin Family and Medical Leave Act (WFLMA) were sued by Nationwide Insurance, which seeks declaratory and injunctive relief preventing Wisconsin, on ERISA preemption grounds, from enforcing the WFLMA in a way that requires Nationwide to permit its employees to substitute paid short-term disability benefits for unpaid maternity leave, as an ALJ has held is required in a case that Nationwide settled. The case involves the same WFLMA substitution provision that was briefed in the Wisconsin Supreme Court in Aurora Med. Group v. Dept. of Workforce Dev. (2000), which held, as argued, that ERISA does not preempt the state law's application to paid sick leave because it is saved under the proviso (ERISA § 514(d)) saving other federal law from being "impaired" by ERISA insofar as federal FMLA encourages states to adopt more protective leave provisions. On December 7, 2010, the Secretary filed an amicus brief in the district court that makes a similar "impairment" argument under the federal saving clause, and also argues that the WFLMA does not impermissibly augment ERISA remedies supplemental to the civil enforcement provisions of ERISA § 502(a)(2). Plan Benefits Security Division

E. Participants' Rights and Remedies

Barboza v. California Assoc. of Firefighters (9th Cir.)

On June 15, 2010, the Secretary filed an amicus brief in support of a plan participant, who appealed from a dismissal of his disability benefits claim. The Secretary's brief argues that because the claims administrator did not meet the applicable 45-day deadline for deciding a denied claim on administrative review, it did not provide the claimant with full and fair review under ERISA, and consequently he was entitled to immediately file his suit for benefits in the district court without the need for further exhaustion of any process before the administrator. The Department presented oral argument in the case on January 10, 2010. On June 30, 2011, the court issued a favorable decision holding that the Secretary's interpretation of the Department's regulation as restricting the quarterly meeting rule to multiemployer plans was entitled to deference. Plan Benefits Security Division

Boyd v. Metropolitan Life Insurance Co. (4th Cir.)

This case presents the same issue that the Department briefed and argued in Matschiner v. Hartford Life: whether the absence of a formal disclaimer procedure in the plan permits or requires a plan administrator to distribute benefits in a manner inconsistent with a properly executed beneficiary designation on file with the administrator at the time of the benefits decision. The district court here (unlike in Matschiner) applied the Kennedy "plan documents rule" in favor of the insurer and designated beneficiary (the "ex" (separated) spouse). On September 14, 2010, the Secretary filed an amicus brief in the Fourth Circuit arguing that, notwithstanding the absence of a formal disclaimer provision, the insurer acted properly under the holding of Kennedy v. DuPont, 129 S. Ct. 865 (2009), by distributing benefits to the most recently named designated beneficiary on file rather than recognizing a common law waiver by such beneficiary that was inconsistent with the plan designation. The Secretary participated in oral argument on January 27, 2011. On March 31, 2011, the court issued a favorable decision in the case. Plan Benefits Security Division

CIGNA Corp. v. Amara (S. Ct.)

On March 8, 2010, the Supreme Court asked for the government's views on whether to grant certiorari in this case, which involves a conversion from a defined benefit to a "cash balance" plan. The issue raised by the CIGNA plan defendants is whether a showing of "likely harm" is sufficient to entitle participants and beneficiaries to recover benefits based on an alleged inconsistency between the explanation of benefits in the summary plan description (SPD) and the terms of the plan itself. On May 26, 2010, the Solicitor General filed a brief opposing cert. The Court granted cert. on June 28, 2010 on the CIGNA petition, and the Solicitor General filed a brief on behalf of the Secretary on October 22, 2010. The brief argues that participants who show likely harm from a failure to abide by an SPD are entitled to the benefits promised in the SPD unless the plan defendants establish that not adhering to the SPD was harmless; that a detrimental reliance requirement would be inconsistent with ERISA's text, origins, and purposes; and that participants may sue under ERISA § 502(a)(1)(b) to recover benefits based on an SPD, and are not limited to suits for "appropriate equitable relief" under § 502(a)(3). The Solicitor General participated in oral argument on November 30, 2010. On May 16, 2011, the Court remanded the case. The Court held that there is no remedy under ERISA § 502(a)(1)(B), but

then held that there is a remedy under § 502(a)(3) and that "equitable" relief includes a "surcharge" loss remedy. On September 22, 2011, the Secretary filed a brief in the district court on remand arguing that, under the Supreme Court's decision in the case, the court could award the same A+B remedy as a matter of reformation or surcharge. The Secretary participated in the oral argument on December 9, 2011. Plan Benefits Security Division

Cyr v. Reliance Standard (9th Cir.)

On November 10, 2008, the Secretary filed an amicus brief in support of hearing en banc in this appeal from a denial of an ERISA claim for disability benefits. The Secretary's brief argued that the plaintiff properly sued the insurer under ERISA § 502(a)(1)(B) even though the insurance company was not named in the plan documents as the plan administrator. A panel of the Ninth Circuit heard oral argument on October 6, 2009. On December 2, 2010, the court granted en banc review. On August 26, 2011, the en banc court issued a favorable decision agreeing with the position of the Secretary and holding that ERISA § 502(a)(1)(B) does not limit the universe of possible defendants and therefore permits suit against the insurer/decision maker. Plan Benefits Security Division

David v. Alphin (4th Cir.)

The plaintiffs appealed the dismissal of their class action suit arguing that the fiduciaries to their 401(k) plan breached their fiduciary duties of prudence and loyalty and engaged in prohibited transactions by allowing the plan to continue to invest in Bank of America stock and in bank-affiliated mutual funds. The court dismissed the case in its entirety based on its conclusion that the plaintiffs lacked Article III standing to bring the defined benefit claims, and that the defined contribution claims were untimely because the initial decision to invest in the challenged investments was made more than six years before the suit was filed. On extension, the plaintiffs' brief was filed on December 21, 2011, and the Secretary's brief was filed on December 28, 2011. The Secretary's brief argues that constitutional standing exists based on (1) the increased risk of loss even if the plan is "overfunded," (2) the harm caused to the plan by the alleged fiduciary breach, and (3) the invasion of a statutory right caused by the alleged breach. The Secretary also argues that fiduciaries are under a continuing duty to ensure the prudence of the plan's investment and to refrain from engaging in prohibited transactions and that the statute runs from each instance in which the fiduciaries fail to live up to these duties. Plan Benefits Security Division

Faber v. MetLife (2d Cir.)

This case involves a putative class action brought by the beneficiaries of two ERISA-covered life insurance plans sponsored by the Eastman Kodak Company and General Motors Corporation, respectively. These plans were funded by group life insurance policies that were insured and administered by MetLife. The suit alleges that MetLife breached its fiduciary duties under ERISA by using plan assets to earn a return that it mostly pocketed. Specifically, the plaintiffs complain about MetLife's use of a device called a "total control account" (TCA), whereby upon a plan participants' death, life insurance proceeds are not simply paid out to the beneficiary, but are instead made available through a check book issued to the beneficiary, upon which the beneficiary can draw some or all of the total proceeds. Although MetLife pays 1.5% annually on

the proceeds, the plaintiffs allege that it makes more than this amount by investing these proceeds, and in doing so, breaches its fiduciary duties. The case is on appeal to the Second Circuit from an order of the district court dismissing the case on the pleadings, holding that the plaintiffs lacked constitutional and statutory standing, had not pled a breach of fiduciary duty, and sought damages not cognizable under ERISA. On December 1, 2010, after full briefing and oral argument by the parties, the Second Circuit invited the Department to file a brief addressing the following issues: (1) to what extent, if any, does the "guaranteed benefit policy exception" apply in this case; (2) does MetLife discharge its ERISA fiduciary duty by establishing a beneficiary's TCA; and (3) when MetLife establishes a beneficiary's TCA, to what extent, if any, does MetLife "retain" his or her benefits? The Secretary filed a brief on February 17, 2011, supporting MetLife on the three issues the Department was asked to brief, essentially on the grounds that the plaintiffs are receiving what they had been promised and are free to cash in their benefits on demand at any time, and that the returns on investments above the promised interest rate are not plan assets. On August 9, 2011, the court issued a favorable decision adopting the Secretary's view of the case. Plan Benefits Security Division

Kenseth v. Dean Health Plan (W.D. Wis.)

On April 15, 2010, the Secretary filed an amicus brief in this case on remand from a decision of the Seventh Circuit concerning what remedies are appropriate under ERISA § 502(a)(3). The case involves a participant who was told by the customer representative for her health plan that she would be covered for gastric bypass surgery, but was forced to pay out of pocket when the plan determined, post-surgery, that the surgery was not covered by her plan. The Secretary's brief argued that Supreme Court and Seventh Circuit precedents, consistent with traditional equity principles, provide for make-whole monetary relief and disgorgement of ill-gotten gains in § 502(a)(3) actions against breaching fiduciaries. On February 14, 2011, the district court issued an adverse decision. The court decided that the remedies sought by the participant – "make whole" relief reimbursing the medical expenses or restitution of ill-gotten gains stemming from the denial – are not "appropriate equitable relief" under § 502(a)(3) of ERISA. The court held that reimbursing the participant for the medical expenses would be a form of compensatory relief barred by the Supreme Court's Mertens v. Hewitt Associates decision, thus rejecting the Secretary's reading of that decision as permitting a "surcharge" against a fiduciary for a fiduciary breach as was awarded by equity courts in the days of the divided bench. Even if it were "equitable," the court held that the remedy would not be "appropriate" because the participant could have brought an action for benefits under § 502(a)(1)(B) instead, even though such action could probably not succeed under a deferential standard of review and given the terms of the plan; it was also not "appropriate" because there was no evidence the participant would have acted differently (i.e., not undergone the surgery) even if she had not been told the surgery was a covered procedure. The court also held that a restitution remedy was not available because, among other things, there was no evidence that Dean is holding money or property belonging to the participant. Addressing issues not briefed by the Secretary, the court also held that the participant lacked standing to seek other injunctive relief because she is no longer a participant in the plan (i.e., Dean no longer insures her employer's plan); and the court denied attorney's fees, holding that the participant did not achieve even "partial success" (despite securing a remand to district court) and rejecting a catalyst theory for recovery (despite changes the plan made to its policies and practices allegedly in response to this lawsuit). The plaintiff appealed the decision

to the Seventh Circuit. The Secretary filed a brief on June 13, 2011, arguing that the plaintiff is entitled to make-whole relief under the intervening Cigna v. Amara Supreme Court decision. By invitation of the court, the Secretary participated in oral argument on December 8, 2011. Plan Benefits Security Division

McCrary v. MetLife (4th Cir.)

On April 28, 2010, the Secretary filed an amicus brief in support of the plaintiff, a participant in an employer-sponsored life insurance plan who claimed that she would have been entitled to life insurance proceeds after her daughter was murdered if not for breaches of fiduciary duty by MetLife in accepting premiums for many years, misinforming her about coverage, and failing to inform her about her rights to convert to an individual policy after her daughter reached the age of 19. The Secretary's brief argues that the make-whole monetary relief that the plaintiff seeks is available as equitable relief under ERISA. The court heard argument in the case, in which the Department participated, on January 27, 2011. On May 16, 2011, the same date that the Supreme Court issued its decision in CIGNA, the Fourth Circuit issued an adverse decision, holding that the relief sought does not qualify as equitable relief under ERISA § 502(a)(3). The plaintiff immediately petitioned for panel and en banc rehearing based on the CIGNA decision's recognition of an equitable surcharge remedy. The panel granted rehearing and ordered more briefing. On September 28, 2011, the Secretary filed a supplemental brief discussing the effect of the CIGNA decision. A second argument in the case was scheduled for March 2012. Plan Benefits Security Division

Renfro v. Unisys (3d Cir.)

On September 16, 2010, the Secretary filed an amicus brief in support of the plaintiffs-appellants, plan participants in a 401(k) retirement plan who claim that the plan fiduciaries breached their duties by allowing the plan to pay excessive fees for its investments. The Secretary's brief argues that the plaintiffs plausibly plead a claim for breach of fiduciary duty and that ERISA § 404(c) does not excuse fiduciaries from their duty to select and maintain prudent investment options for ERISA pension plans or enable them to avoid liability if they fail to do so. On August 19, 2011, the court issued an adverse decision relying on the same analysis the Seventh Circuit applied in Hecker v. Deere to conclude that the plaintiffs failed to plead a plausible claim for fiduciary breach given the number of investment options offered under the plan and the range of fees. The court expressly declined to address the § 404(c) issue. Plan Benefits Security Division

Santomenno v. John Hancock Life Ins. Co. (3d Cir.)

This is an appeal from a dismissal of a private ERISA claim brought by plan participants challenging certain investment fees. The district court held that the participants were required to make a demand on the trustees before they could file suit. The Secretary filed a brief in support of the plaintiff on extension on September 30, 2011, arguing that the district court's holding on the demand issue is entirely without merit. The Secretary moved to participate in oral argument, which was scheduled for February 10, 2011. Plan Benefits Security Division

Schultz v. Prudential (7th Cir.)

The plaintiff in this benefit denial case appealed to the Seventh Circuit and, additionally, sought initial en banc consideration of the district court's decision dismissing the benefit claim against Prudential on the grounds that, under Seventh Circuit law, a plan participant may sue only the plan itself or in some instances the plan administrator but not the insurer in an ERISA suit for benefits. This is the issue that the Secretary successfully briefed and won in Cyr in the Ninth Circuit. The Secretary filed a brief on November 18, 2011 in support of the en banc petition on the same basis. The en banc court denied the petition but a panel of the Seventh Circuit was scheduled to hear argument in the case on January 17, 2012. Plan Benefits Security Division

Taylor v. Key Corp. (6th Cir.)

This is a Moench presumption case that survived a motion to dismiss (see Taylor v. Key Corp., Section A.1. Employer Stock), but was later dismissed on constitutional standing grounds, with the court concluding that there was no constitutional injury based on a netting of profits and losses from the stock purchases. (The Moench presumption is that an ESOP fiduciary is entitled to a presumption that it acted consistently with ERISA by investing in employer stock.) Because the named plaintiff had earned more from the company stock as a result of the artificial inflation than she lost, the court found no actual "injury-in-fact." The plaintiff appealed on the constitutional standing issue and the defendants cross-appealed on the Moench and misrepresentation issues. The plaintiff filed its opening brief on the standing issue on January 5, 2011, and the Secretary filed an amicus brief on that issue on January 12, 2011, arguing that the plaintiff incurred an "injury in fact" sufficient to support her constitutional standing to bring the claim based on allegations that she purchased some employer stock and sold it at a loss, regardless of whether she separately profited from other, earlier stock sales; and that, even if it were proper, at this threshold stage, to net plaintiff's gains on some transactions against losses on others, the invasion of her statutory right to faithful fiduciary conduct would be enough to establish constitutional standing, and more fundamentally, the relevant loss for "injury-in-fact" analysis is the loss to the plan in this kind of representative action, not the loss to the individual plaintiff. KeyCorp's brief on the cross-appeal addressing the Moench and disclosure issues was filed on extension on April 13, 2011; the plaintiffs' response was filed May 13, 2011, and the Secretary filed a brief on the cross-appeal issues on May 20, 2011. Plan Benefits Security Division

Tibble v. Edison (9th Cir.)

This is an appeal from a summary judgment and trial on the merits in an excessive fee case in which the plaintiffs lost. The Secretary filed an amicus brief on May 25, 2011 arguing that: (1) the district court's factual findings supported its conclusion that the fiduciaries did not act with the requisite level of care in choosing mutual funds that were available with lower, institutional level fees; (2) the court erred in finding most of the plaintiffs' claims barred by the statute of limitations because, contrary to the court's conclusion, the fiduciaries operated under a continuing obligation to manage the plan's assets prudently; (3) the court correctly held that ERISA § 404(c) did not immunize the fiduciaries from liability with regard to the selection of plan investments; and (4) ERISA § 406(b)(3) prohibits fiduciaries from making investment decisions that result in the company they serve as directors and officers receiving an economic

benefit from a third party, and the court erred in holding to the contrary. Plan Benefits Security Division

Tullis v. UMB Bank (6th Cir.)

On April 15, 2010, the Secretary filed an amicus brief in this case in which the Sixth Circuit granted summary judgment to the Bank, holding that ERISA § 404(c) protected it from fiduciary liability for failure to inform the participants of the true value of their individual accounts and knowledge it had concerning fraudulent conduct by their investment advisor. The question presented on appeal is whether the district court erred in relieving defendant UMB Bank of fiduciary liability under the § 404(c) safe harbor provision, when UMB: failed to disclose to plan participants that their investment advisor had previously embezzled funds from the pension account of another ERISA plan participant for whom UMB also served as a trustee; continued to take investment directions from the investment advisor and to process forged instruments from the advisor, although UMB had previously been a plaintiff in litigation against the investment advisor for embezzling plan assets; and failed to correctly state the value of the assets held in the participants' individual accounts or to question the advisor's representations as to the value of those accounts. The Secretary's brief argued that the court erred in upholding the Bank's § 404(c) defense because the alleged losses did not result from any actions taken by the plaintiffs but were caused by the Bank's independent acts or failures to act. The court denied our request to participate in oral argument, and on May 18, 2011, it affirmed the district court's decision, determining that UMB was entitled to the § 404(c) safe harbor defense because plaintiffs failed to produce enough evidence to establish that UMB concealed material, non-public information from them or to overcome the conclusion that the losses were "the direct and necessary result" of the doctors' individual control over their investments. Plan Benefits Security Division

F. Section 510

George v. Junior Achievement of Central Indiana (7th Cir.)

This case involves a claim by an ERISA plan participant that he was fired from his job in retaliation for unsolicited complaints that he made to his supervisors about funding problems with regard to his 401(k) plan. The district court held that ERISA does not protect informal, unsolicited internal complaints, an issue which has divided the circuits. The Secretary has filed briefs twice previously addressing this issue advocating for the protection of unsolicited complaints. An SG memo recommending participation was sent November 22, 2011. The plaintiff filed his brief on December 9, 2011, and the Secretary filed a brief on December 16, 2011 arguing that the internal complaint here constituted an "inquiry" within the meaning of ERISA § 510 and is protected from retaliation. Plan Benefits Security Division

G. Defensive Litigation

None

H. Participant Loans

Solis v. Fensler (N.D. Ill.)

On August 30, 2011, the Secretary filed a complaint against David Fensler and Anthony Monaco, trustees for the United Employee Benefit Fund, alleging that the trustees engaged in prohibited transactions by issuing distributions of the plan's assets under the guise of "loans." Since the plan's inception, approximately 200 "loans" have been issued totaling over \$1 million, but almost none have received a single payment and none have been paid back. The defendants filed their joint answer on November 28, 2011. Chicago Regional Office

Solis vs. Milton Pate and Associates, Inc. (N.D. Ga.)

On April 29, 2011, the Secretary filed a complaint against Milton Pate and Associates, Inc, and fiduciaries, Milton Pate, Sr. and Milton Pate Jr., alleging that the individual defendants have taken participant loans that are in default and violate the terms of the company's 401(k) Retirement Plan. As of September 2008, Milton Pate, Sr. had an outstanding balance of \$94,778.91 and Milton Pate, Jr. had an outstanding balance of \$38,938.54 on their participant loans. The complaint also alleges that employee contributions were not forwarded to the plan on a timely basis from January 2007 until August 15, 2008. The complaint seeks full restitution of losses to the plan, as well as an order that requiring that any of the defendants' claims to plan assets be offset against the losses. The suit further seeks a permanent injunction barring the defendants from serving in a fiduciary capacity to any ERISA-covered plan and the appointment of an independent fiduciary at the defendants' expense. On September 22, 2011, the clerk entered an order of default against all defendants. On November 7, 2011, the judge granted the Secretary's motion for default judgment, ordering all relief sought in the Secretary's complaint. Atlanta Regional Office

I. MEWAs

Solis v. Doyle (D.N.J.); Solis v. Doyle (3d Cir.)

On April 28, 2005, the Secretary filed a complaint against the trustees of the Professional Industrial & Trade Workers Union (PITWU) Health and Welfare Fund, the marketer of the plan's health benefits, and the owners of two professional employer organizations for diverting plan assets. In order to obtain the fund's health benefits for their employees, employers were required to join a professional employer organization and the employees were required to join an alleged union. They were required to pay union dues, fees to the professional employer organization, and administrative fees to the marketer. The professional organizations retained large sums that were nominally the employer's health premiums. In total, about \$4,582,264 in plan assets was diverted. The fund collapsed with more than \$7 million of unpaid health claims. The Secretary's motion for summary judgment was denied. A bench trial was held from October 19, 2009 through October 26, 2009. Following the trial, one defendant 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 in excess of \$195,000 to the plan. On June 30, 2010, the district court issued an adverse decision granting judgment in favor of the remaining defendants, a former trustee and a party that marketed the plan, on the basis that the Secretary failed to conclusively establish that the plan was underfunded or that the marketing fees charged were

unreasonable. The Secretary filed an appeal in the Third Circuit on August 27, 2010, with an opening brief filed on December 13, 2010 and a reply brief on March 4, 2011. The Secretary's briefs argue that the fiduciaries of the abusive and now-defunct MEWA breached their fiduciary duties when they collected more than \$7.4 million from employers and their employees for health benefits, and only \$2.7 million was used for that purpose, leaving millions in unpaid claims when the welfare fund was terminated. The briefs contend that the district court erred in holding that the 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. The briefs also argue that substantial evidence was presented that the district court failed to address that the other defendant 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. New York Regional Office (district court) and Plan Benefits Security Division (court of appeals)

Solis v. Manufacturing and Industrial Workers Union Benefit Fund (N.D. Ga.); Solis v. Raymond Palombo (Bankr. C.D. Cal.)

On July 13, 2008, the Secretary filed an action alleging imprudence by Palumbo and other fiduciaries of the Texas-based Manufacturing and Industrial Workers Union (MIWU) Benefit Fund. Marketed nationwide, the Benefit Fund covered employees in two affiliated unions, the Industrial Workers and the International Union of Industrial and Independent Workers (IUIIW) and the International Union of Public and Industrial Workers (IUPIW), in California, Georgia, Illinois, Texas, and Arizona. In addition to the fiduciaries' failure to properly underwrite the self-funded Benefit Fund, the Secretary alleges that the fiduciaries created the MIWU fund to accept the claims liabilities of the IUIIW and IUPIW funds when they knew or should have known that the Benefit Fund was insolvent from its inception. The complaint seeks the restoration of losses and injunctive relief against the MIWU fund's fiduciaries barring them from acting as a fiduciaries or service providers to any ERISA-covered plan. The Secretary previously obtained a consent judgment against additional fiduciaries for their role in creating the MIWU fund in which the court appointed an independent fiduciary to terminate the abandoned fund and pay its health claims. The Secretary obtained default judgments against the individual fiduciaries as well as a finding of losses. The Secretary then filed a motion with the bankruptcy court for the Central District of California where Palombo had filed for relief, seeking to have his ERISA violations deemed defalcations and non-dischargeable. At a hearing on December 29, 2010, the Court orally granted the Secretary's motion on two grounds. First, the Court found that because Palombo had not litigated the case in the district court even after the bankruptcy court lifted the stay, and because he had not responded to pleadings even though he had been served, the default in the district court precluded him from contesting his liability. Second, the court found that defalcation does not require intent; merely a misaccounting of assets is enough to make the debt non-dischargeable. On March 23, 2011, the bankruptcy court ruled that Palombo's failure to make actuarially sufficient projections determining claims liability, both existing and prospective, resulted in insufficient funds to pay claims and arose from a defalcation under the Bankruptcy Code, stating that the failure to pay promised benefits is itself the ultimate defalcation. On this basis, it refused to discharge the Northern District of Georgia's \$2,958,681 ERISA judgment against Palombo. Plan Benefits Security Division

Solis v. Marks (E.D.N.Y.); In re Nieves (Bankr. D. Md.)

In 2001, the Secretary filed a complaint against Walter Nieves and others, including Mari Elena Marks and Timothy Marks, regarding the "U.S. Alliance" MEWA, alleging improper transfers of over \$900,000, mismanagement of the plans, and abandonment of the plans and their participants. The Secretary litigated an emergent relief action and in 2003 obtained consent judgments. Nieves subsequently filed for bankruptcy. After protracted litigation that reached the Fourth Circuit and involved transfers of real estate owned by Nieves, the bankruptcy trustee successfully secured \$234,848.23 for the plans. On December 28, 2011, the court granted the Secretary's motion for the deposit of the funds into a court registry account. The Secretary is now preparing to request the appointment of an independent fiduciary to manage the newly acquired funds, as the previous independent fiduciary is deceased. New York Regional Office

Solis v. W.I.N. Association, LLC (S.D. Tex.)

On March 10, 2011, the court entered a consent judgment and order against W.I.N Association, LLC, Michael Ray Bianchi, and the W.I.N. Association Health Plan, affirming the complaint's allegations, permanently enjoining the defendants from acting as fiduciaries and from violating ERISA, and giving the Secretary the right to bring a collection action for the plan losses \$579,597.70 in the future if defendants are found to have assets to effect restitution. The complaint, filed on February 22, 2011, alleged that from April 2006 through April 2008, the defendants failed to pay approximately \$341,214.70 in health care claims and withdrew approximately \$238,383.00 from the plan without authorization. Dallas Regional Office

J. Conflicts Involving Financial Institutions

Solis v. Amtren, Inc. (M.D. Ala.); Solis v. Otorhinolaryngology Associates, P.C. (M.D. Ala.)

On June 14, 2011 and September 30, 2011, the Secretary filed complaints seeking injunctive relief against Amtren and Charles Lamberth and against Otorhinolaryngology and Dr. Rick Love, the fiduciaries of the Amtren Corporation Profit Sharing Plan and the Otorhinolaryngology Associates, P.C., Profit Sharing Plan ("OTO Plan"), respectively. In 2006, Lamberth allegedly directed his Merrill Lynch financial advisor, Gilbert Meadows, to liquidate approximately 98% of the Amtren Plan's assets, and transfer these assets totaling \$139,000.00, as a "loan" back to the employer. Although Lamberth indicated that these transfers were a loan, no repayments were made and no loan documents were ever executed. Between 2007 and 2008, Love allegedly directed Meadows to liquidate and transfer over 92% of the OTO Plan's assets as a "loan" to that employer. Again, no repayments were made and no loan documents were ever executed. The Secretary's position was that Merrill Lynch and Meadows knowingly participated in the violations of their co-fiduciaries and/or failed to take reasonable efforts to remedy the known breaches of their co-fiduciaries.

On October 21, 2011, the Department finalized a settlement with Merrill Lynch and Meadows, in which Merrill Lynch voluntarily restored all losses to both plans. Merrill Lynch agreed to institute extensive, enterprise-wide modifications to its current training regimen for its investment advisors whose conduct might implicate ERISA and also modified its handbook to more thoroughly describe and provide guidance regarding ERISA prohibited transactions. In addition, Merrill Lynch agreed that Meadows will be subject to the heightened supervision (in

which approval would be required before any trades involving plans managed by him) for two years. Meadows also agreed to complete extensive training regarding ERISA prior to acting as a financial advisor to any ERISA-covered plan. On October 25, 2011, acting upon the parties' proposed consent judgment, the court entered a final judgment against Otorhinolaryngology and Dr. Love, removing them as fiduciaries, barring them from acting as fiduciaries of any ERISA-covered plan, requiring that any of Love's claims to plan assets be offset against the losses, and appointing an independent fiduciary at defendants' expense. On December 5, 2011, acting upon the Secretary's motion, the court entered a final judgment against Amtren and Lamberth, providing for similar relief as to those defendants. Atlanta Regional Office

K. Service Provider Cases

In re Beacon Associates (S.D.N.Y.)

The defendants in this private ERISA litigation involving investments in Madoff funds filed a motion to dismiss which raised, among other things, certain aspects of the Secretary's investment advisor for a fee regulation. Because the Department had an investigation and was about to file a complaint against the same entities based on the same transactions, there was a strong interest in the proper resolution of legal issues in this case. On October 1, 2010, the Secretary moved to file an amicus brief addressing the proper interpretation and application of our investment advisor for a fee regulation. The court issued a favorable decision on October 5, 2010, and then denied, on mootness grounds, the motion to file the amicus brief. Defendant Ivy filed a motion for reconsideration on one aspect of the investment advisor regulation, and pursuant to a request from the court, the Secretary filed a slightly reworked amicus brief on October 29, 2010 and presented argument on the motion on December 6, 2010. The court issued a favorable decision the following day affirming its previous holding that Ivy was a fiduciary.

The defendants also contested class certification on the ground that the Secretary's parallel litigation makes class treatment unnecessary under the "superiority" prong of Rule 23(b)(3); the Secretary's suit, in their view, already "represents" and seeks a full recovery for the named and absent class members (plans who lost money as a result of investments that their investment managers (Beacon, Jeanneret) placed with Bernard Madoff). In opposition to class certification, the Ivy Defendants also argue that they were not ERISA fiduciaries because their client was Beacon, not the plans who invested through Beacon. On January 9, 2012, we filed an amicus brief arguing that the Secretary's parallel suit should not be considered as a reason to deny class certification, and that the Ivy Defendants argument should be rejected under the "law of the case" doctrine (because the court previously rejected the argument in ruling on Ivy's motion to dismiss), as a merits question that is not properly addressed as part of a class certification determination, and because it lacks merit under ERISA's "investment advisor as fiduciary" definition and under the plan assets regulation and regulatory five-party investment advisor test. See also Solis v. Beacon Associates Management Corp., Section C. Prudence and In re Jeanneret Associates, Section K. Service Provider Cases. Plan Benefits Security Division

Solis v. Craftsman Independent Union (E.D. Mo.)

On May 20, 2011, the Secretary filed a complaint against the trustees and administrator of the Craftsman Independent Union Local #1 Training Fund and Health, Welfare and Hospitalization Fund. The complaint also named the Craftsman unions and a service provider attorney as

defendants, alleging knowing participation violations. With respect to the Training Plan, the complaint alleges that plan assets were used to make cash transfers of nearly \$200,000 to the unions, pay rent to the unions for training space, and pay a legal retainer for minimal services provided to the plan. With respect to the Health and Welfare Plan, the complaint alleges that plan assets were wasted through the operation of a plan-owned clinic, which provided discounted services to union members and the general public and which suffered operating losses in excess of \$315,000. The complaint also alleges that the administrator used plan assets to pay himself, his wife and nephew salaries from the plans and that plan assets were used to purchase Town Cars for the administrator's wife and nephew. On June 20, 2011, the court entered a consent judgment requiring the fiduciaries to restore \$200,000 to the plans, removing the trustees and administrator from their positions, appointing an independent fiduciary, and permanently enjoining the fiduciaries and attorney from violating ERISA and from providing services to any ERISA-covered plans in the future. See also Solis v. Craftsman Independent Union, Section B. Financing the Union. Kansas City Regional Office

Solis v. J & T Utility Construction Inc. (W.D. N.C.); Solis v. Diversified Printing Techniques Inc. (W.D.N.C.)

On April 27, 2011, the Secretary filed a complaint against Terry King, Jerry King, Richard German, and J & T Utility Construction, Inc., formerly known as Floyd King & Sons, Inc. with respect to alleged fiduciary violations involving the J & T Utility Construction Inc. Profit Sharing Plan. Also, on April 27, 2011, the Secretary filed a complaint involving similar facts and allegations against Toney Chaney Sr. and Diversified Printing Techniques Inc., alleging fiduciary violations concerning the Diversified Printing Techniques Inc. Profit Sharing Plan. The complaints alleged that the defendants in both of these cases breached their fiduciary responsibilities when the plans issued loans to a fund wholly operated and owned by an investment advisor to the plans. The Secretary contended that the loans were high-risk promissory notes, and because the profit sharing plans were not considered accredited investors as defined by the fund's private placement memorandum, the plans were not qualified to issue the loans. According to the complaints, the loans resulted in losses to the plans due to reductions in interest rates paid and improper calculation of interest. Further, the plans also invested in an entity that the Secretary contended constituted a prohibited transaction, and further, that the subsequent liquidation of this investment at a value determined without the use of an independent appraiser was imprudent. Through a settlement agreement, the investment advisor and his firm agreed to restore \$242,975.78 to these plans; the agreement provided that if such restitution was not paid, the Secretary could initiate legal action directly against the investment firm and advisor. In separate consent judgments and orders, entered by the court on April 28 and May 18, 2011, the defendants agreed to restore losses to their respective plans to the extent such losses were not otherwise restored by the investment firm and advisor. Further, in both consent judgments, the defendants agreed to be permanently barred from acting as fiduciaries to any ERISA-covered plan. Atlanta Regional Office

In re Jeanneret Associates (S.D.N.Y.)

This case is closely related to the Beacon litigation, raised the same issue as to Ivy's fiduciary status, and involves some of the same parties. On October 18, 2010, the Department filed much the same brief as in Beacon, addressing the meaning and application of our investment advisor

for a fee regulation. The Department presented its views at a December 14, 2010 court hearing. On December 22, 2010, and January 4, 2011, the court issued orders transferring and consolidating the ERISA claims in Jeanneret before Judge Sand, who is overseeing the ERISA claims in Beacon. The Jeanneret court's January 4 order also adopted Judge Sand's reasoning in denying dismissal of claims against Ivy. See also Solis v. Beacon Associates Management Corp., Section C. Prudence and In re Beacon Associates, Section K. Service Provider Cases. Plan Benefits Security Division

Solis v. Results One (N.D. Ill.)

On March 8, 2011, the Secretary filed a complaint against Results One Financial, LLC, a firm that provided investment management services to employee benefit plans, and Steven Salutric, an owner and director of the company, seeking restoration of approximately \$1.2 million in losses to the accounts of five ERISA plans. The complaint alleges that between March 2005 and September 2009, Results One and Salutric impermissibly used plan assets for the benefit of six entities related to Salutric. In January 2010, the U.S. Securities and Exchange Commission sued Results One for violations of the Investment Advisors Act. As a result of that litigation, control of Results One was placed in the hands of a court-appointed receiver. In December 2011, the Department of Justice indicted Salutric for embezzling plan assets. Chicago Regional Office

Solis v. Zenith Capital (N.D. Cal.)

On October 23, 2008, the Secretary filed suit against Zenith Capital LLC, a registered investment advisor, and Rick Tasker, Martel Cooper and Michael Smith, owners of and investment advisers with Zenith Capital. The complaint alleges that defendants served as fiduciaries to 14 ERISA-covered plans, providing discretionary investment advice and asset management services for a fee. The complaint also alleges that the ERISA plans relied on defendants to make all investment decisions and that defendants were the sole investment advisors for each plan.

Defendants allegedly recommended that the plans invest in Global Money Management, L.P. (GMM), a hedge fund, and the plans all invested in GMM, relying on defendants' advice. When GMM failed in 2004, all but four of the plans lost their total investments. The complaint also alleges that LF Global Investments, LLC, the investment manager and General Partner of GMM, paid Zenith Capital half of all incentive fees LF Global received from GMM that derived from funds invested with GMM on behalf of Zenith Capital clients, including the plans, which were not told of the LF Global arrangement prior to their investing in GMM. The complaint seeks equitable remedies, including restitution of losses and lost opportunity costs, rescission of the prohibited transactions, and injunctions barring defendants from serving as fiduciaries or service providers to ERISA-covered plans. In May 2009, the court granted the Secretary's motion to strike defendants' affirmative defenses, striking all seven affirmative defenses, six with prejudice (waiver, release, estoppel, laches, accord and satisfaction, and as yet "unstated" affirmative defenses), and allowing defendants leave to amend their answer to add additional facts to support only their statute of limitations defense. Settlement negotiations are underway, but no settlement has been reached yet. Trial is set for September 19, 2012. Plan Benefits Security Division

L. Orphan Plans

Solis v Accurate Paving, Inc. (D. Mass.)

On August 10, 2010, the Secretary filed a complaint alleging that Accurate Paving, Inc., a now-defunct company, failed to properly manage plan assets and administer its plan. The plan's custodian, ING North America Insurance Corporation, declined to participate in the Department's Qualified Termination Administrator (QTA) program and would not process participant distributions without fiduciary direction. Pursuant to a consent judgment and order which was entered on March 21, 2011, an independent fiduciary was appointed to administer the plan and distribute the approximately \$6,874 in assets to the five remaining participants. Boston Regional Office

Solis v. Alliance (S.D. Ohio)

On April 25, 2011, the Secretary filed a complaint against Alliance Excavating, Inc. and James Sowers, fiduciaries to the Alliance Excavating, Inc. 401(k) Profit Sharing Plan & Trust, alleging that the fiduciaries failed to administer and terminate the plan when the company ceased operations. On August 29, 2011, the court entered a consent order and judgment providing for removal of the defendants as fiduciaries, a permanent bar enjoining the defendants from serving as fiduciaries or service providers to any ERISA-covered plan, and appointment of an independent fiduciary to administer and terminate the plan. Chicago Regional Office

Solis v. Beach Services 401(k) Profit Sharing Plan (D. Mass.)

On September 22, 2011 the Secretary filed a complaint alleging that the fiduciaries of the Beach Services 401(k) Profit Sharing Plan failed to properly manage plan assets and administer the plan. The complaint named as a defendant Beach Services and Engineering, Inc., a now defunct company that was the plan sponsor and plan administrator, and sought to have an independent fiduciary appointed by the court to administer this abandoned plan. Pursuant to a consent judgment and order entered on November 21, 2011, an independent fiduciary was appointed to administer the plan and distribute the approximately \$25,838.20 in assets to the two remaining participants. Boston Regional Office

Solis v. B.I.T. Computers, Inc. 401(K) Profit Sharing Plan, f/k/a BIT Consulting Group, Inc. 401(K) (E.D.N.Y.)

On November 3, 2011, the Secretary filed a complaint seeking the appointment of an independent fiduciary for the B.I.T. Computers, Inc. 401(K) Profit Sharing Plan, which was orphaned in 2008 when the plan sponsor company went out of business. Since that time, the plan's only named trustee has failed to administer the plan or make requested plan distributions. The Secretary's complaint sought the distribution of \$179, 376.96 in plan assets. New York Regional Office

Solis v. Blodgett (E.D. Mich.)

On August 26, 2011, the Secretary filed a complaint against Robert Blodgett, a fiduciary of the Blodgett Construction & Home Improvement Co. 401(k) Plan. The company ceased operations in September 2005. The complaint alleges that Blodgett failed to distribute the plan's assets to

the remaining participants in the plan. The complaint seeks the appointment of an independent fiduciary to distribute the assets of the plan. Chicago Regional Office

Solis v. BlueSky Brands, Inc. (D.R.I.)

On January 11, 2011, the court approved a consent judgment, filed on December 30, 2010 contemporaneously with a complaint against BlueSky Brands, Inc., a now-defunct company that was the plan sponsor and administrator of its 401(k) Savings Plan. The plan custodian declined to participate in the Department's Qualified Termination Administrator (QTA) program and would not process participant distributions without fiduciary direction. The only authorized signatory denied all responsibility for the plan and ignored the Department's requests to administer the plan. Pursuant to the consent judgment, the court appointed an independent fiduciary to administer the plan and distribute the approximately \$1,055,136.89 in assets to the 77 remaining participants. Boston Regional Office

Solis v. Cardio Fitness Center 401(k) Plan (S.D.N.Y)

On November 14, 2011, the Secretary filed a complaint against Cardio Fitness Center 401(k) Plan and one of its trustees, Gina Alleva aka Gina Gromelski, to have an independent fiduciary appointed so that approximately \$96,000 in assets may be distributed to 24 participants. This plan was abandoned when its two trustees and signatories stopped performing their duties and the plan sponsor ceased operations. New York Regional Office

Solis v. CEA Systems Inc. (D. Mass.)

On January 11, 2011, the court approved a consent judgment, filed on September 29, 2010 contemporaneously with a complaint against CEA Systems Inc., a now-defunct company that was the plan sponsor and administrator of its 401(k) Plan. The plan custodian declined to participate in the Department's Qualified Termination Administrator (QTA) program and would not process participant distributions without fiduciary direction. The only authorized signatory of the plan died in 2001. Pursuant to the consent judgment, the court appointed an independent fiduciary to administer the plan and distribute the approximately \$31,804 in assets to the 17 remaining participants. Boston Regional Office

Solis v. Eclipse Retirement Savings Plan (S.D. Fla.)

On June 9, 2011, the Secretary obtained a consent judgment against James J. Martin, a trustee of the Eclipse Retirement Plan, which represents a complete settlement of all claims asserted in the complaint filed on July 23, 2010. Martin failed to terminate the plan and distribute its assets after the company, Certified HR Services, ceased operations. The plan has approximately seven participants and assets of approximately \$115,000. As part of the consent judgment, an independent fiduciary will be appointed to administer the plan's assets and distribute monies to participants. Atlanta Regional Office

Solis v. Empire Business Systems (N.D. Cal.)

On January 21, 2011, the court entered default judgment against Empire Business Systems, which went out of business around 2003. The complaint, filed on May 26, 2010, sought the removal of Empire Business Systems as the named fiduciary and the appointment of an

independent fiduciary to wind down the company's abandoned 401(k) Plan. As of November 4, 2009, the plan had ten participants and \$12,879 in plan assets. The Secretary's motion for default judgment, seeking the appointment of an independent fiduciary, was filed on August 23, 2010. San Francisco Regional Office

Solis v. Family Care Management (N.D. Ill.)

On April 13, 2011 the Secretary filed a complaint against Family Care Management, Robert Kaplan, Arnold Kaplan and Michael Kaplan alleging that the fiduciaries failed to administer and terminate the Family Care Management 401(k) Plan when the company ceased operations. On November 10, 2011, a consent order and judgment was entered providing that Michael Kaplan would administer and terminate the plan. Chicago Regional Office

Solis v. Globalfon, Inc. (E.D. Va.)

On October 4, 2011, the Secretary filed a complaint against Globalfon, Inc. alleging that Globalfon failed to appoint a fiduciary to manage and oversee the company's 401(k) retirement plan after the company ceased operations in 2009. The complaint seeks the removal of the company as the administrator of the plan and an order appointing an independent fiduciary to administer the plan and make distributions to plan participants. As of June 2010, the plan had 13 participants and over \$350,000 in plan assets. On December 19, 2011, the Secretary filed a motion for default judgment against Globalfon, and the court held a hearing on that motion on January 6, 2012. Philadelphia Regional Office

Solis v. Ichiban, Inc. (E.D. Va.)

On December 1, 2010, the Secretary filed a complaint against Ichiban, Inc., as fiduciary of a related 401(k) plan, alleging that the company failed to administer and terminate the plan when it ceased operations in 2006. As of June 2010, there were three participants in the plan and \$17,703 in assets. The complaint asked the court to remove Ichiban from its position as fiduciary and appoint an independent fiduciary to administer the plan in order to effectuate its termination and the distribution of its assets. On June 27, 2011, the court entered a default judgment providing the requested relief and appointing an independent fiduciary for the plan. Philadelphia Regional Office

Solis v. Janbridge, Inc. (E.D. Pa.)

On December 12, 2010, the Secretary filed a complaint against Janbridge Inc., as fiduciary of a related 401(k) plan, alleging that the company failed to administer and terminate the plan when it ceased operations in 2005. As of September 2010, the plan had 16 participants and \$24,549 in assets. The complaint asked the court to remove Janbridge from its position as fiduciary and appoint an independent fiduciary to administer the plan in order to effectuate its termination and the distribution of its assets. On March 24, 2011, the court entered a default judgment providing the requested relief and appointing an independent fiduciary for the plan. Philadelphia Regional Office

Solis v. JMN Consulting, Inc. (D. Minn.)

On June 30, 2011, the Secretary filed a complaint against JMN Consulting, Inc., fiduciary of the JMN Consulting, Inc. 401(k) P/S Plan, alleging that the company failed to administer and terminate the plan when it ceased operations in May 2010. On November 8, 2011, the court entered a default judgment ordering that an independent fiduciary be appointed to terminate the plan and distribute its \$54,094 in assets. Chicago Regional Office

Solis v. J.P. Maguire Company, Inc. Salary Savings Plan (E.D.N.Y.)

On November 30, 2011, the Secretary filed a motion for default judgment and appointment of an independent fiduciary to assume control of the J.P. Maguire Company, Inc. Salary Savings Plan. Due to criminal convictions, the plan's only named fiduciary has been barred under ERISA § 411 from administering or operating the plan since around 2002. The Secretary's complaint, filed on June 15, 2011 sought the distribution of \$60,833.25 in plan assets. New York Regional Office

Solis v. Local 911 Annuity Defined Contribution Fund (D.N.J.)

On October 24, 2011, the Secretary filed a complaint against the Local 911 Annuity Defined Contribution Fund seeking the appointment of an independent fiduciary for the plan, which was orphaned in 2007 when the only named fiduciary was barred from administering any union or benefit fund pursuant to a criminal plea agreement. The Secretary's complaint seeks the distribution of \$369,061.16 in plan assets. New York Regional Office

Solis v. The Media Ink 401(k) Plan (S.D. Tex.)

On November 15, 2010, the Secretary filed a petition seeking the appointment of an independent fiduciary to administer the Media Ink 401(k) Plan and distribute its assets. The plan became an abandoned plan when Media Ink, the plan's sponsor, closed its business in either 1999 or 2000 without formally terminating the plan. As of June 5, 2009, three participants had a combined account balance of approximately \$14,739.85. On October 13, 2011, the court issued an order granting the Secretary's petition and appointed an independent fiduciary to administer the plan. Dallas Regional Office

Solis v. Mondor (D. Minn.)

On April 13, 2011, the Secretary filed a complaint against Scott Mondor, a fiduciary of the Greeder Mondor Electric Co. 401(k) Profit Sharing Plan, alleging that he failed to administer the plan after the company ceased operations in September 2008. On June 2, 2011, the court ordered Mondor to issue distributions to the plan participants, terminate the plan, and thereafter be barred from serving as a fiduciary or service provider to any ERISA-covered plan. Chicago Regional Office

Solis v. Morris (N.D. Ill.)

On August 23, 2011, the Secretary filed a complaint against Paul Morris and the Notability Solutions, LLC 401(k) Plan, alleging that Morris, the fiduciary of the plan, failed to terminate the plan or distribute the plan's remaining assets when the company ceased doing business in 2002.

As of September 30, 2009, the plan had seven participants with vested account balances valued at \$95,000. The complaint seeks the appointment of an independent fiduciary to distribute the plan's assets. Chicago Regional Office

Solis v. Neubauer & Assoc. (N.D. Ill.)

On January 11, 2011, the Secretary filed a complaint against Neubauer & Associates and the company's 401(k) Plan. The company has gone out of business and there are no points of contacts for the owners or potential fiduciaries. The complaint seeks to have an independent fiduciary appointed to administer and terminate the plan. The court entered an order of default judgment against the company and appointed an independent fiduciary to terminate the plan on June 27, 2011. Chicago Regional Office

Solis v. NSC Companies, Inc. (S.D. Tex.)

On August 1, 2011, the court entered an order approving the appointment of an independent fiduciary to handle plan termination and account distribution for the NSC Companies, Inc. 401(k) Plan. The Secretary had moved for an order appointing an independent fiduciary after being unable to effect service on Patricia A. Thompson, the company's owner. The complaint, filed on November 15, 2010, sought \$20,359 in employee contributions that the defendants allegedly failed to remit to the company's 401(k) plan, plus lost opportunity costs. Dallas Regional Office

Solis v. Openwebs, Inc. (W.D. Pa.)

On January 19, 2011, the Secretary filed a complaint against Openwebs, Inc., as fiduciary of a related 401(k) plan. As of December 10, 2009, there were nine participants in the plan and \$46,048 in assets. Openwebs ceased operations in 2003. The complaint asked the court to remove Openwebs from its position as fiduciary and appoint an independent fiduciary to administer the plan in order to effectuate its termination and the distribution of its assets. On May 25, 2011, the court entered a default judgment providing the requested relief and appointing an independent fiduciary for the plan. Philadelphia Regional Office

Solis v. Parkland (D. Minn.)

On March 13, 2011, the Secretary filed a complaint against Parkland Hotel Investors Limited Partnership, fiduciary of the Northland Inn 401(k) Plan, alleging that the fiduciary failed to administer and terminate the plan when the company ceased operations. On October 13, 2011, the court entered a default judgment removing the defendant as a fiduciary, permanently enjoining the defendant from serving as a fiduciary or service provider to any ERISA-covered plan, and ordering appointment of an independent fiduciary to administer and terminate the plan, which had \$1,200,000 in assets. Chicago Regional Office

Solis v. Proto Craft, Inc. (E.D. Mich.)

On May 10, 2011, the Secretary filed a complaint against Proto Craft, Inc., fiduciary Brenda Duncan, and the company's 401(k) Plan, alleging the failure to distribute \$39,901.44 to nine participants and to terminate the plan when Proto Craft ceased operations in 2005. On August 24, 2011, the court entered a consent order and judgment removing Proto Craft and Duncan as

fiduciaries, permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to distribute plan assets and terminate the plan. Cleveland Regional Office

Solis v. Roberts (W.D. Pa.)

On July 28, 2011, the Secretary filed a complaint against John Louis Roberts, Mara Scanlon Roberts and Sterling Printing and Graphics, Inc. alleging that from January 2004 to July 2006, the defendants failed to forward and/or failed to timely forward employee contributions to the company's 401(k) Plan. Sterling Printing and Graphics ceased operations in 2006. The defendants have not taken fiduciary responsibility for the operation and administration of the plan and its assets, nor have they appointed anyone to assume that responsibility. As of June 14, 2011, there were 12 participants in the plan and over \$82,000 in assets. The complaint seeks restoration of all losses to the plan, a permanent injunction barring defendants from serving as ERISA fiduciaries, and the appointment of an independent fiduciary to administer the plan in order to terminate it and the distribute its assets. Philadelphia Regional Office

Solis v. Shawnee Hills, Inc. (S.D. W. Va.); In re Shawnee Hills, Inc. (Bankr. S.D. W. Va.)

On January 28, 2011, the court entered a consent judgment resolving claims in the Secretary's complaint, filed on October 20, 2009, alleging that Shawnee Hills, Inc., the plan administrator, breached its fiduciary duties when it ceased operations and filed for bankruptcy in 2002, leaving its Retirement Savings Plan without fiduciaries to oversee and administer it. The consent judgment provides for the removal of Shawnee Hills as a fiduciary to the plan, a permanent injunction barring Shawnee Hills from serving as a fiduciary to any ERISA-covered plan, and the appointment of an independent fiduciary to terminate the plan and distribute the plan's assets to participants. Also on January 18, 2011, the bankruptcy court overseeing the Shawnee Hills Chapter 7 bankruptcy issued an order directing the bankruptcy trustee to transfer from the Shawnee Hills bankruptcy estate to the plan \$355,090.84 in plan assets that had been swept into the bankruptcy estate, namely, the proceeds of a demutualization of the insurance company that issued a policy to the plan. Philadelphia Regional Office

Solis v. Skills-Plus Home Health Care Ltd. (W.D. Mich.)

On July 26, 2010, the Secretary filed a complaint against Skills-Plus Home Health Care, LTD and the company's 401(k) Plan, alleging that the company failed to distribute \$2,682.72 to ten participants and failed to terminate the plan when it ceased operations in 1999. On April 14, 2011, the court entered a consent order and judgment removing Skills-Plus as a fiduciary, permanently enjoining it from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to distribute plan assets and terminate the plan. Cleveland Regional Office

Solis v. Sonora Environmental, L.L.C. (D. Ariz.)

On November 15, 2010, the Secretary filed a complaint against Sonora Environmental, L.L.C. and Lee Jolley, alleging that Jolley, the trustee of the company's 401(K) Plan, failed to remit employee contributions and loan repayments to the plan of at least \$3,075.07 from January 2005 through at least October 2008. The complaint also alleges that starting in approximately January

2005, Jolley and the company effectively abandoned the plan when they ceased administering it. On October 19, 2011 the Secretary filed an application for clerk's entry of default against Sonora Environmental, LLC for failure to retain corporate counsel as ordered by the court, and default was entered by the clerk on December 15, 2011. On January 4, 2012, the court issued an order against Jolley, requiring him to show cause within 30 days why he should not be defaulted for his repeated failures to appear in this action and for his failure to provide a current address to the court. Los Angeles Regional Office

Solis v. Triple T Construction, Inc. (M.D. Fla.)

On November 15, 2010, the Secretary filed a complaint against Triple T. Construction, Inc. and George Thompson III, seeking restoration of losses arising from approximately \$1,400 in employee contributions not remitted and \$13,300 in employee contributions not timely forwarded to the company's 401(k) Plan. The complaint further alleges violations of ERISA's plan administration provisions that resulted in the abandonment of an employee benefit plan and its participants. The plan currently has approximately 26 participants and assets of approximately \$18,004. The Secretary seeks an order restoring all plan losses, permanently enjoining defendants from serving as fiduciaries, and appointing an independent fiduciary to terminate the plan and distribute its assets. Atlanta Regional Office

Solis v. Wahlco Fabricators, Inc. (N.D. Okla.)

On August 17, 2011, the Secretary filed an action against Wahlco Fabricators, Inc. and its owner Cynthia Wahl, for failing to forward employee contributions totaling \$6,183.41 and making delinquent contributions totaling \$31,806.31 to the Wahlco Fabricators, Inc. SIMPLE IRA Plan. The complaint alleges that the fiduciaries failed to properly administer the plan and used plan assets to benefit themselves. Wahlco Fabricators ceased operations in 2009. The company and Ms. Wahl have failed to respond to repeated requests for information and compliance. Dallas Regional Office

Solis v. Weinberger (N.D. Ind.)

On April 8, 2011, the Secretary filed a complaint against Mark S. Weinberger and Subspecialty Centers of America, L.L.C., fiduciaries of the Subspecialty Centers of America 401(k) Plan. On August 19, 2011, the court entered a judgment, removing the fiduciaries and appointing an independent fiduciary to terminate the plan. Chicago Regional Office

M. Contempt and Subpoena Enforcement

Solis v. Buckingham (D. Md.)

On December 13, 2010, the Secretary filed a petition to enforce administrative subpoenas against Thomas Buckingham, Sun Control Systems, Inc., and the company's 401(k) Plan and Trust, Profit Sharing Plan I, and Profit Sharing Plan II. Defendants failed to respond to subpoenas issued on August 9, 2010. The Secretary and the defendants entered into a consent agreement stating that defendants would fully respond to the subpoenas by February 18, 2011, but defendants did not so respond. At the contempt hearing held on February 28, 2011, the court granted defendants an additional thirty days to respond. The defendants ultimately responded.

The Secretary moved for, and was granted, attorney's fees and costs as a result of defendants' failure to timely respond. Philadelphia Regional Office

Solis v. BW Manufacturing Co., Inc. (D. Conn.)

On August 1, 2011, the Secretary filed a petition for enforcement of two administrative subpoenas issued on May 13, 2010 and September 16, 2010 to BW Manufacturing, the plan sponsor and plan administrator of the company's 401(k) Plan and Health and Welfare Plan. Defendant Gary Weed, sole operator and owner of the company, indicated that he would be able to produce the documents. After repeated failures, the Secretary filed the petition, and following a show cause hearing, the court issued an order for compliance on November 3, 2011. Boston Regional Office

Solis v. Cascio (W.D. Mo.)

On January 5, 2011, the court entered a consent order enforcing an EBSA subpoena issued to Ben Cascio, the former owner of Solution Pros, Inc. and administrator of that company's 401(k) Plan. The order requires Mr. Cascio to produce the subpoenaed documents by February 6, 2012. Kansas City Regional Office

Solis v. Denker (S.D. Tex.)

On March 23, 2011, the Secretary filed a petition to enforce an administrative subpoena issued to Charles Denker in his capacity as custodian of records for Seisquest Data Management, L.P. Before the scheduled hearing, the respondent provided the subpoenaed documents. On June 10, 2011, the court granted the parties' agreed motion to dismiss the petition. Dallas Regional Office

Secretary v. Earmold Design, Inc. (D. Minn.)

On May 20, 2011, the Secretary filed a subpoena enforcement action against the fiduciary of Earmold Design, Inc. for the production of documents. The fiduciary produced the documents and the Secretary dismissed the action on or about August 31, 2011. Chicago Regional Office

Solis v. FELRA (4th Cir.)

This is an appeal by defendants of a subpoena enforcement order in a Madoff-related case. The Secretary's brief, which was filed on October 18, 2010, argues that the district court correctly held that the information sought by the Secretary under her administrative subpoena was covered by the fiduciary exception to the attorney-client privilege. The brief also argues that the Secretary was also entitled to obtain information purported to be attorney work product. The court heard argument on March 22, 2011, in which the Department participated. The court issued a favorable decision on May 4, 2011, agreeing with the Secretary that the fiduciary exception was applicable. Plan Benefits Security Division

Solis v. Hannah Marine Corp. (N.D. Ill.)

On April 18, 2011, the Secretary filed a subpoena enforcement action against the fiduciary of Hannah Marine Corp. Employees 401(k) Plan. Chicago Regional Office

Solis v. Hathaway (D. Md.)

On October 14, 2011, the Secretary filed a petition to enforce administrative subpoenas against William K. Hathaway, Baltimore Behavioral Health, Inc., and BBH Retirement Plan. Defendants failed to respond to subpoenas issued on May 16, 2011. Prior to the show cause hearing, the Secretary and the defendants agreed to a consent order, which was entered on December 2, 2011, stating that the defendants would fully respond to the subpoenas by December 10, 2011. The defendants responded with the requested documents. Philadelphia Regional Office

Solis v. Kenneth Owen (C.D. Cal.) Solis v. Kenneth Owen (In re Kenneth Owen) (Bankr. C.D. Cal.)

On May 13, 2010, the Secretary filed a petition for prosecution of civil contempt against Kenneth Owen because he failed to make payments to the Communications 2000, Inc. 401(k) Health and Welfare Plans pursuant to a consent judgment entered on October 19, 2006. The consent judgment required Owen to restore \$15,021.19 to the 401(k) plan and \$7,707.85 to the health and welfare plan and pay \$5,500 for the services of a court-appointed independent fiduciary. After failing to respond to the petition and the judge's order to show cause, on June 17, 2010, the court issued an order finding Owen in civil contempt and directing that he purge himself of the contempt by paying \$28,229.04 to the appointed independent fiduciary by July 16, 2010. Owen failed to purge himself of the contempt order. On December 22, 2010, the Secretary filed a second petition for prosecution of civil contempt requesting that the court order Owen to purge himself of contempt immediately or assess daily fines until such time as Owen purges himself of the contempt. Following the March 7, 2011 hearing on the Secretary's motion, the court issued an order granting the petition and imposed a fine of \$500.00 per day until such time as he purged himself of contempt. The Secretary later learned that Owen had filed for bankruptcy protection. Thereafter, the Secretary obtained a stipulation and order, finding that the \$28,229.04 debt to the plan is nondischargeable. Los Angeles Regional Office

Chao v. Lunsford Architects & Engineers Safe Harbor 401(k) Plan (S.D. Ill.)

On October 9, 2009, the Secretary filed a subpoena enforcement action against the fiduciary of the Lunsford Architects & Engineers Safe Harbor 401(k) Plan. After the Department received all responsive documents, the court dismissed the action on August 9, 2011. Chicago Regional Office

Solis v. Moore (C.D. Cal.)

On February 10, 2011, the Secretary filed a motion for contempt against Hezekiah N. Moore and his company, Hezekiah N. Moore M.D., P.C., for failing to comply with any of the terms in a 2009 judgment, and on February 11, 2011, the Secretary filed a request for an order to show cause. On March 28, 2011, the Secretary appeared at a hearing and on March 31, 2011, the court issued a minute order, recognizing its authority to enforce the judgment it issued through contempt proceedings and noting that the judgment was restitutionary against the defendants for breaches of fiduciary duty under ERISA. The court gave the defendants 60 days to purge themselves of the contempt order. On April 12, 2011, the court issued another order stating that the court would not impose sanctions on the defendants' former attorney for her failure to attend

the March 2011 hearing, that the attorney would be removed as counsel of record, that the attorney would serve her former client with this order, and that Moore should file a notice of appearance as a pro se defendant within 10 days. This case arose from the Secretary's complaint, filed on July 18, 2008, concerning the company's Profit Sharing Plan, its Money Purchase Pension Plan, and its Profit Sharing Plan and Money Purchase Pension Plan. The complaint alleged that Moore failed to prudently invest about \$150,000 in plan assets on or around October 2000 to November 2001 and failed to distribute the assets to two participants when they terminated their service. The Secretary also filed an amended complaint, alleging that Moore transferred \$40,000 in plan assets to the company in September 2007. On August 6, 2009, the court granted the Secretary's motion for summary judgment on all counts, ordered restitution, and appointed an independent fiduciary. Los Angeles Regional Office

Solis v. Oral & Maxillofacial Surgery Associates of Greater New Haven, PC (D. Conn.)

On June 1, 2010, the Secretary filed a subpoena enforcement action against Oral & Maxillofacial Surgery Associates of Greater New Haven, PC and Leonard Skope. A show cause hearing was held on July 12, 2010. The respondents did not appear. On July 14, 2010, the court issued an order for compliance, imposing a penalty of \$1,000 per day until compliance is achieved. A contempt hearing was scheduled for July 11, 2011. Again, the respondents failed to appear and a *capius* was issued. Per an arrangement with the United States Marshall, the respondents finally appeared on August 10, 2011. Respondents have complied with the subpoena. On December 12, 2011, the Department filed a show cause order regarding the respondents' previously ordered \$1,000 a day penalty. Boston Regional Office

Solis v. Principal Financial Group, Inc. (S.D. Iowa)

On November 18, 2010, the Secretary filed a petition to enforce the Department's subpoena issued to Principal Financial Group, Inc. On December 9, 2010, the court held a status conference to discuss an amended privilege log that Principal Financial had not yet completed. The court decided that the subpoena enforcement action should encompass these additional issues as well. On January 31, 2011, after Principal Financial produced the amended privilege log, the Secretary filed an amended petition addressing the additional production and amended privilege log. Subsequently, Principal Financial produced yet another set of documents and privilege log. On February 9, 2011, the Secretary submitted this additional log to the court for review. On October 31, 2011, following an evidentiary hearing and oral argument, the court adopted the magistrate's report and recommendation rejecting Principal's claim of attorney-client privilege for documents involving plan administration, but upholding the claim for documents addressing personal liability of fiduciaries. The non-privileged documents were produced to EBSA. Kansas City Regional Office

Solis v. Weir (W.D. Pa.)

On December 21, 2011, the Secretary filed a motion for contempt against Kevin T. Weir and Liberty-Pittsburgh Systems, Inc. for failure to comply with a consent judgment, entered in August 2011, requiring the defendants to make full restitution of \$67,137.67 to the company's 401(k) plan through a series of six payments. The court issued a show cause order to the defendants and a hearing was scheduled for January 23, 2012. The consent judgment settled

charges in the Secretary's complaint, filed on February 3, 2011, alleging that the defendants failed to deposit certain employee contributions and employee loan repayments into the plan during the period January 2007 to December 2009. Weir is a former officer of the company and a plan fiduciary. The company sponsored the plan and served as the plan administrator. The consent order also permanently enjoined Weir and the company from acting as fiduciaries and provided for the plan to be terminated. An independent fiduciary is serving as the plan administrator for the purposes of terminating the plan and distributing the recovered assets. See also Solis v. Weir, Section A.2. Collection of Plan Contributions. Philadelphia Regional Office

N. Miscellaneous

In re ACT Electronics, Inc. (Bankr. D. Del.)

On August 24, 2009, the Chapter 7 trustee in this case filed a motion seeking court approval to terminate the debtor's 401(k) plan, delegate his administrative duties as a plan administrator, employ agents to administer the plan, and pay certain fees and expenses from plan assets. The Secretary filed an objection to the motion, on several grounds, in September 2009. First, the plan does not authorize the delegation of plan administration and would have to be amended. Second, the court does not have jurisdiction to approve the payment of fees and expenses from the plan assets. Third, the Department's preliminary investigation of the proposed fees indicates that the fees are not reasonable. A hearing on the motion was scheduled for October 6, 2009, but prior to the hearing, the parties thought that they had come to an agreement, and the hearing was cancelled. The agreement did not materialize, and the trustee filed a new motion on March 5, 2010, seeking court approval to terminate the plan, to pay certain fees and expenses from plan assets, and to obtain a release and discharge the trustee and his professionals from liability.

The Secretary filed an objection to the Chapter 7 trustee's motion on April 5, 2010. During the April 21, 2010 status conference, the court converted the Secretary's limited objection into a motion for summary judgment on (i) whether the court lacks subject matter jurisdiction to address the relief requested in the 2010 motion under 28 U.S.C. § 1334; (ii) whether the court lacks jurisdiction to grant the relief requested in the 2010 motion because the relief requested does not involve a case or controversy and is not ripe; (iii) whether, even if the court has jurisdiction to grant the relief requested in the 2010 motion, the relief sought contravenes ERISA by providing declaratory relief that is not authorized by ERISA's enforcement provision, nullifying ERISA's statute of limitations, and violating ERISA's prohibition against exculpation of fiduciary liability; and (iv) whether the court has authority under the Bankruptcy Code to release non-debtors, such as the trustee and agents of the plan, from ERISA liability in this case. On May 21, 2010, the trustee filed an opposition to the summary judgment motion. On June 4, 2010, the Secretary filed a reply brief asserting that summary judgment should be granted to the Secretary because the undisputed facts demonstrate that the court lacks subject matter jurisdiction, the requested relief is not authorized by the Bankruptcy Code, there is no basis on which to set aside the structure and protections afforded under ERISA, and denial of the relief requested is consistent with the Bankruptcy Code and ERISA. Oral argument on the Secretary's summary judgment motion took place on June 17, 2010. After a May 18, 2011 hearing, the parties resolved to settle matters related to the Department's allegations of excessive fees. On June 7, 2011 all issues relating to fees for termination of the ACT Electronics 401(k) Plan were resolved with the Chapter 7 trustee George Miller, capping the amount that could be billed to the

plan participants. The amount sought by the trustee and various professionals was significantly reduced. The participants will now receive distributions from the plan. All pending motions are being withdrawn by the trustee. Boston Regional Office

In re Detroit Tubular Rivet, Inc. (Bankr. E.D. Mich.)

On June 16, 2011, the Secretary filed an objection to the combined Chapter 11 Disclosure Statement and Plan of Organization of Detroit Tubular Rivet, Inc., due to its expansive waiver language. The Plan of Reorganization, as written, prohibited the Department from initiating litigation against any individual fiduciaries of the ERISA-covered plans sponsored by the debtor-in-possession. The bankruptcy judge denied confirmation to the combined Disclosure Statement and Plan of Organization on August 5, 2011. On August 8, 2011, the debtor-in-possession then filed its First Amended Plan of Liquidation, which excluded third-party non-debtors who are ERISA fiduciaries from the aforementioned broad waivers. Chicago Regional Office

Donne v. Hardt (E.D. Cal.)

On May 25, 2011, the district court in this private case, in response to the defendants' motion to dismiss, issued an order requesting briefing from the Secretary of Labor. The Secretary has brought her own action against both the main plaintiff and defendant in the case (former partners of a company they formed and fiduciaries in the company's plan), which case is presided over by the same judge. The issues to be addressed were whether the private action needs to be dismissed because the Secretary was not brought in as an indispensable party, and whether the suit by one fiduciary against another fiduciary contravened Ninth Circuit precedent barring contribution in an ERISA fiduciary breach case. The Secretary's brief was filed, on extension, on July 19, 2011. The brief argues that the Secretary is not an indispensable party in the private litigation, and that the private litigation is not an action for contribution to the extent it seeks only to recover losses on behalf of, and for the benefit of, the plan. On September 7, 2011, the court issued a favorable decision on the first issue; on the second issue, the court did not explicitly address our argument that a breaching fiduciary who is also a plan participant can bring an action on behalf of the plan without contravening the Ninth Circuit's prohibition against contribution claims, but did find that Donne had standing as a plan participant to bring suit on behalf of the plan. See Solis v. Hardt, Section A.2. Collection of Plan Contributions. Plan Benefits Security Division

In re Franchi Equipment Co., Inc. (Bankr. D. Mass.)

This case concerns a Chapter 7 trustee who became the plan administrator of the debtors' pension plans by operation of the Bankruptcy Code. The bankruptcy trustee essentially requested a finding that he complied with his duties under ERISA in administering the plan and sought a release from liability under ERISA after notice to the Secretary and a hearing. The Secretary opposed the relief sought on the grounds that: (a) the bankruptcy court lacks subject matter jurisdiction to grant this relief; (b) assuming jurisdiction exists, the relief is not specifically authorized by the Bankruptcy Code and contravenes ERISA's statute of limitations, enforcement provisions, and prohibition of fiduciary exculpatory provisions in 410(a); and (c) the Bankruptcy Code does not permit the court to discharge non-debtors, and even if some courts have found that the all-writs type provision (§ 105) allows release of non-debtors in certain

extraordinary circumstances in Chapter 11 cases, such releases are not permitted in Chapter 7 cases and those extraordinary circumstances don't exist in these cases in any event.

Oral arguments on the Franchi Motion took place on November 19, 2009. Following the hearing, the court issued an order essentially preserving the status quo. The order authorizes the trustee to (a) terminate the plan; (b) engage a firm to assist him during the termination process, including by determining whether all employee contributions were properly forwarded to the plan; (c) use the debtor's assets to restore contributions still owed to the plan in an amount not to exceed \$3,000; and (d) establish a reserve from plan assets for costs associated with terminating the plan. The order preserves the trustee's right to seek further relief from the court relating to the plan and the fulfillment of his duties under § 704(a)(11) and preserves the rights of the Secretary, and the plan's participants and beneficiaries, to raise claims under ERISA regarding the plan and its fiduciaries, including claims that the court lacks jurisdiction to enter future orders regarding the trustee's obligations and duties to the plan. Shortly after the November 2009 order was entered, the trustee established a \$10,000 reserve from plan assets and terminated the plan.

On November 8, 2010, the trustee filed a motion seeking to use the reserve to pay his fees. He also filed an application for interim compensation seeking approximately \$11,000 from the debtor's estate for legal fees associated with the plan termination. On December 14, 2010, the Secretary filed an objection to the motion, asserting that, although the Secretary had no objection to the reserve being used to pay plan termination costs, the court lacked subject matter jurisdiction under 28 U.S.C. § 1334 to authorize the use of non-estate assets to pay the trustee's fees. The objection also asserted that, even if the court found it had subject matter jurisdiction, the relief requested should still be denied because: (i) the court lacks authority to approve a transaction that is expressly prohibited by ERISA and to issue an impermissible declaratory order; (ii) the relief requested is an improper comfort order that violates ERISA's prohibition against exculpation of fiduciaries and nullifies ERISA's statute of limitations; and (iii) an action to recover money or property that is not part of the estate cannot be sought by motion but, rather, requires the commencement of an adversary proceeding pursuant to Fed. R. Bankr. P. 7001(1).

On January 5, 2011, the trustee filed a memorandum in support of his motion asserting, among other things, that the court had core jurisdiction over the motion because the fees incurred by the trustee were pursuant to actions he was required to take by § 704(a)(11) of the Bankruptcy Code, that the proof of claim filed by the Secretary to ensure all employee contributions were forwarded by the debtor to the plan created jurisdiction over the trustee's decision to use plan assets to pay his fees, that the court has authority to approve the fees because they are reasonable under ERISA, and that he is not seeking a comfort order because he is not seeking a broad release from ERISA liability.

The Secretary filed a reply brief in further support of its objection on January 20, 2011. The reply brief asserted that the trustee's arguments were flawed because his assertion that he essentially carries around jurisdiction with him, and that a proof of claim against the estate creates jurisdiction over the plan's assets, improperly expands the jurisdictional boundaries set forth in 28 U.S.C. § 1334; his arguments that the court has authority to approve the motion, and that he is not seeking relief that violates ERISA, lack merit as a matter of law because they demonstrate a fundamental misunderstanding of ERISA; and denial of the motion is mandated by black letter law requiring courts to give full effect to the provisions of two applicable statutes where, as in this case, they are capable of coexistence, particularly since denial of the Motion is

also consistent with Congress' intent in passing ERISA and § 704(a)(11). On January 26, 2011, a hearing was held on the trustee's motion.

On June 29, 2011, the bankruptcy court overruled the Department's objection and granted the Chapter 7 trustee's motion. The court held that it had least related-to jurisdiction over fee requests of a Chapter 7 trustee and his professionals because the "possibility for a pension plan's insufficiency of assets creates the ever-present potential that a bankruptcy estate will be called upon to compensate a Chapter 7 trustee and his professionals for their plan administration services." The court also found that it had core jurisdiction to award fees to a trustee and his professionals from pension plan assets for work performed pursuant to § 704(a)(11) of the Bankruptcy Code because trustees are "body and soul, creatures of the Bankruptcy Code" and literally "arise under" the Bankruptcy Code. Boston Regional Office

In re Hogge (My Smart Benefits) (Bankr. N.D. Ind.)

In April 2006, the Secretary filed an adversary complaint against the operator of a group insurance dental and vision program under which individual employer members who formed their own ERISA-covered plans provided dental and vision insurance benefits to their employees. The debtor allegedly took fees in excess of the fees negotiated with employers and transferred plan assets into a corporate account. The complaint alleged that his debts are not dischargeable. The plan, which had about 680 employer clients nationwide, ceased operations in 2003, leaving unpaid claims of \$581,597.33. In January 2007, the bankruptcy court stayed the Secretary's case because of a pending criminal investigation against the debtor. After the case was stayed, however, in a related matter, the Department was able to negotiate a consent judgment with Harris, N.A., on behalf of Mercantile Bank of Indiana (which had been acquired by Harris), to pay \$274,600 to an independent fiduciary for the payment of My Smart Benefits' unpaid health claims. The Secretary's complaint against Mercantile alleged that after My Smart Benefits ceased operations, in order to pay off its \$145,000 corporate loan from Mercantile, Mercantile accepted payment from a My Smart Benefits bank account into which My Smart Benefits had impermissibly transferred plan assets of its employer plans. The \$274,600 includes not only the monies used to pay off the My Smart Benefits corporate loan, but the monies remaining in the My Smart Benefits corporate bank account at Mercantile. After the judgment was entered, Hogge and My Smart Benefits intervened in the case and filed objections to the independent fiduciary's plan of distribution. On December 8, 2008, the court held that the independent fiduciary must consider documentation submitted by Hogge and My Smart Benefits in determining which claims should be paid, but refused to require the independent fiduciary to consider whether participants' employers had sufficient funds in their accounts to pay claims. On December 20, 2008, Hogge and My Smart Benefits filed a motion for reconsideration, which the court denied on March 27, 2009. Thereafter, on November 22, 2010, the court decided that all issues in connection with eligible participants had been settled and directed the independent fiduciary to make distributions. The independent fiduciary is in the process of making final distributions to participants. A criminal judgment was entered against Hogge in March 2011 that provided for non-dischargeable restitution of \$254,425.27 to the victims. On June 1, 2011, the bankruptcy court entered an order of dismissal in this matter. Chicago Regional Office

In the Matter of Mid-States Express, Inc. (Bankr. N.D. Ill.)

On February 2, 2010, the Chapter 7 bankruptcy trustee filed a motion for a comfort order authorizing him to liquidate the assets of the company's 401(k) Plan, disburse the corpus of the plan to plan participants, and pay any administrative expenses associated with the liquidation and disbursement of the plan from the corpus of the plan. On March 10, 2010, the Secretary filed an objection to this order. On July 2, 2010, the court held that it did not have subject matter jurisdiction to issue such an order under the Bankruptcy Code and denied the bankruptcy trustee's motion. Chicago Regional Office

McLemore v. Regions Bank (1 Point Solutions) (6th Cir.)

The Secretary previously filed a district court brief in this case in 2008 on two issues: (1) whether a bankruptcy trustee with control over a bankruptcy estate that holds commingled plan assets (which had been mismanaged and misappropriated by the debtor) is an ERISA fiduciary with standing to bring a fiduciary breach action under ERISA against an alleged co-fiduciary (the bank in which the assets had been deposited and then looted by the debtor); and (2) whether the bankruptcy law doctrine of *in pari delicto* (unclean hands) applies to such an ERISA proceeding to potentially bar the bankruptcy trustee from asserting claims that the wrongdoing debtor arguably could not. The Secretary successfully argued to the district court that the bankruptcy trustee was an ERISA fiduciary with standing to bring a fiduciary breach claim under ERISA to recover plan assets for distribution to the plans for which the debtor had served as a third-party plan administrator, and that the *in pari delicto* doctrine did not apply to such claim. After protracted litigation in which the bankruptcy trustee (McLemore) lost on the merits of his ERISA and state law claims, the case is now before the Sixth Circuit, and the defendant (Regions Bank), in their response brief, has challenged the rulings on the issues in the Department's brief. Appellant McLemore's reply brief was filed on November 12, and the Secretary filed an amicus brief in the Sixth Circuit on November 19, 2010, arguing in support of the appellant (as the Department had before) that the bankruptcy trustee, McLemore, who also is an ERISA fiduciary with control over plan assets commingled in the bankruptcy estate, has standing to bring an ERISA action on behalf of plan participants against a former fiduciary of an employee benefit plan; and that the defense of *in pari delicto* cannot be asserted against an innocent ERISA fiduciary seeking to remedy a fiduciary breach caused by the defendant fiduciary. Oral argument is scheduled for March 1, 2012. Plan Benefits Security Division

In re Newstarcom Holdings, Inc. (Bankr. D. Del.)

On September 29, 2009, the Secretary filed a limited objection to the Chapter 7 trustee's motion for approval of a settlement agreement between the Chapter 7 trustee and Citibank N.A. regarding an adversary complaint that the Chapter 7 trustee filed against Citibank for a post-petition transfer of funds to an account that was solely utilized for funding the debtor's health plan. The debtor filed for bankruptcy on January 14, 2008. Following the Chapter 7 filing, Citibank allegedly initiated a post-petition transfer of funds from Citizens Bank, which had extended a revolving line of credit with the debtor. Thereafter, the trustee sued Citibank for the return of these funds. The Chapter 7 trustee and Citibank entered into a partial proposed settlement agreement whereby Citibank would transfer \$292,361.32 to the trustee. The Secretary filed the limited objection to assert that a portion of these funds may contain plan assets.

Citizen's Bank, the secured creditor, replied to the Secretary's limited objection and objected to the Secretary's request to stay the court's approval of the proposed settlement agreement until the Department concluded its investigation of the debtor's plan. On October 29, 2009, the bankruptcy court entered an order adopting a stipulation between the Department, the Chapter 7 trustee, and Citizen's Bank whereby the \$292,361.32 would be held in escrow for a period pending the Department's investigation.

On December 29, 2011, the Chapter 7 trustee filed a Rule 9019 motion and proposed order seeking the court's approval of the parties' settlement agreement. The agreement provides that the bankruptcy estate of the plan sponsor, along with the secured creditor, will release \$122,000 in contested funds to establish a special health claims account that will go towards payment of outstanding health claims by former plan participants who incurred claims prior to the plan's termination as well as provide for the administrative costs associated with administering these outstanding claims. The agreement sets forth comprehensive procedures for an independent third party to provide notice to all former participants that they may be able to seek relief from this special health claims account, either through satisfaction of a debt they owe to a health service provider or by direct reimbursement for a claim they may have already paid. By virtue of this special fund and related procedures, former participants will be able to seek a recovery far outside the proof of claims deadline which expired in May 2008, and these claimants will have priority over and above any that would be accorded under § 507(a) of the Bankruptcy Code. The agreement provides that in the event the eligible claims submitted exceed the amount in the fund to pay those claims, any remaining amounts may be submitted by the former participant as a claim against the bankruptcy estate. Because the Chapter 7 trustee is unilaterally seeking, through his Rule 9019 motion, to have the Internal Revenue Service be bound to the parties' agreement, the Department has contacted the IRS General Counsel's Office to ensure proper and timely notice. Boston Regional Office

In re Penn Traffic, Inc. (Bankr. D. Del.)

The Department was noticed regarding a motion to settle all matters relating to the Penn Traffic Company's 401(k) Savings Plan in the liquidating Chapter 11 case. The motion indicated that the plan's claim for the 2008 mandatory "Safe Harbor Contribution" was allowed in the amount of approximately \$1.245 million and a dividend of 10% of the amount would be received by the plan consistent with the "Convenience Claims" category in the proposed Chapter 11 Reorganization Plan. The Department's investigation found that the company amended the plan retroactively on December 19, 2009 to remove the mandatory 3% employer contribution for 2009 without the timely notice required by both the plan document and the Internal Revenue Code. The Chapter 11 Plan of Reorganization was confirmed on October 27, 2010. In the confirmation order, the rights of the Department to fully investigate and pursue a claim for the 2009 contribution was preserved, as was the possible priority category of the claim. The Department was also carved out of a release and an injunction in the Reorganization Plan which would have barred the Department from filing any action against the non-debtor officers and directors of the Company.

On February 14, 2011, an objection was filed to the original motion by the debtor to resolve all claims with the plan. The motion eliminated the claim by the plan for the 2009 mandatory safe harbor contribution. The 2009 Safe Harbor Contribution claim, in the amount of slightly over \$1

million dollars, if allowed, would fall into two bankruptcy priorities, so potentially almost 75% of the claim would be paid through the bankruptcy process. The Department argued that the elimination of the obligation to pay the 2009 QNEC is impermissible pursuant to the Internal Revenue Code and related regulations that determine the tax qualification of 401(k) plans and that the company, in its capacity as plan administrator, should have refused to implement the intended amendment. On June 6, 2011, a hearing was held on the Department's objection in relation to the elimination of the 2009 Safe Harbor Contribution of 3% of payroll to the Penn Traffic, Inc. 401(k) Plan. The court entered a stipulation whereby the DOL claim was allowed in full and paid as part administrative claim (100%), part unsecured priority claim (100%) and part unsecured non-priority claim (10%). The full amount of the claim was \$1,052,716.64. Based upon the status of the claim, the plan received approximately \$636,975.27 within ten days of the order. Boston Regional Office and Plan Benefits Security Division

Solis v. Ransohoff (D. Md.)

On September 27, 2011, the Department simultaneously filed a complaint and consent judgment requiring Defendants Jackson A. Ransohoff and James W. Jordan, who are currently the President and Treasurer of Neutron Products, respectively, to restore \$100,000 to company's Employee Savings Plan. The court approved the consent judgment on September 28, 2011. The money represents payments owed to the plan as a result of the plan sponsor's bankruptcy re-organization. The plan sponsor never made any of the required payments to the plan. The settlement amount will be paid in quarterly installments of \$5,000. Defendants will also pay a penalty of \$18,000. Philadelphia Regional Office

In re Robert Plan Corp. (Bankr. E.D.N.Y.)

This case involves an ongoing dispute with a Chapter 7 trustee over a bankruptcy court's jurisdiction to approve payments to the trustee and his retained professionals for work performed in terminating the Chapter 7 debtor's 401(k) plan. In an initial opinion dated October 26, 2010 (the "October Opinion"), the bankruptcy court found that it had core jurisdiction to rule on the fee requests of the Chapter 7 trustee and his professionals for their ERISA plan work, but lacked jurisdiction to determine the amount of the fees to be paid using plan assets. On March 1, 2011, the bankruptcy court issued a first interim fee award to the trustee and his professionals in amounts greater than the Secretary believed appropriate, but consistent with the October Opinion, refused the request by the trustee to rule on what amounts were payable by the plan. On December 11, 2011, the Secretary filed an objection to a second interim fee request by the trustee and his law firm and a final fee application by the auditor and pension consultant assisting the trustee. The court took the matter under advisement after a hearing on February 1, 2012. The court still has not issued an opinion. Plan Benefits Security Division

In re Thelen LLP (Bankr. S.D.N.Y.)

Thelen LLP, a major national law firm and Chapter 7 debtor, was the sponsor and plan administrator for three separate ERISA pension plans: a 401(k) plan, a defined benefit plan, and a cash balance plan. Pursuant to section 704(a)(11) of the Bankruptcy Code, Thelen's Chapter 7 trustee became obligated to fulfill the plan administrator role for the plans. On or about July 13, 2010, the Chapter 7 trustee filed a motion seeking payment from the Plans for legal services

provided by Fox Rothschild LLP ("Fox"), the trustee's law firm. The trustee filed subsequent motions on January 13, 2011, and October 13, 2011, seeking: (i) authorization for termination of the plans; (ii) authorization for payment from the plans for services provided by professionals retained by the trustee; (iii) the retention of Pointe Benefit Consultants, LLC ("Pointe Benefit") as an independent fiduciary for the purpose of terminating the plans and paying retained professionals from the assets of the plans; and (iv) quashing an administrative subpoena issued by the Secretary to the trustee.

On March 17, 2011, and February 10, 2012, the Secretary filed objections to the motions in which she objected to the jurisdiction of the bankruptcy court to approve: (i) the payment of the fees and expenses of Fox and the other professionals; (ii) the appointment of Pointe Benefit as an independent fiduciary; and (iii) the quashing of the administrative subpoena. On October 20, 2011, the PBGC filed an objection to the appointment of an independent fiduciary and the failure of the Chapter 7 trustee to sign a trusteeship agreement for the transfer of the defined benefit plan to the PBGC for termination.

At a hearing on March 8, 2012, the trustee advised the court that he had resolved his disputes with the Secretary and PBGC, which compromise would include a withdrawal of the reference of the motions from the bankruptcy court to the district court and the entry of a consent order requiring: (i) the appointment of the Wagner Law Group, P.C., as the independent fiduciary for the cash balance and the 401(k) plans to terminate those plans and to pay the plan professionals (including Fox) for their past services; (ii) Fox's fees will be fixed at \$125,000, less than half of what Fox would have claimed; (iii) the defined benefit plan will be assigned to the PBGC; and (iv) the Secretary will release her prohibited transaction claims and certain other claims against the Chapter 7 trustee and Fox. The agreed upon consent order has not yet been entered. Plan Benefits Security Division

In re Tweeter OPCO, LLC (Bankr. D. Del.)

On March 4, 2009, a hearing was held regarding the Secretary's motion seeking an order requiring the Chapter 7 trustee to assume plan administrator obligations with regard to the debtor's self-funded health plan, in accordance with 11 U.S.C. § 704(a)(11). The Chapter 7 trustee objected to the Secretary's motion, arguing that while he was willing to assume the obligations of the plan administrator, he did not agree that those obligations required him, or someone retained by him, to process and adjudicate the outstanding health claims. In the Secretary's reply to the trustee's objection and at hearing, the Secretary explained that former employees are likely not aware that they have a claim against the estate for unpaid health costs because the claims have not been processed, and they may not learn of the claims until after the bar dates set for Chapter 11 administrative claims and the bar date for prepetition claims. The Secretary also noted that it is necessary to adjudicate the claims in accordance with the plan's terms because some claims are subject to pre-negotiated payment rates for in-network providers, so having non-adjudicated claims submitted directly to the court could result in over-payments. The Secretary's motion was denied, and on March 24, 2009 the Secretary filed an appeal of the denial with the district court. The parties reached a resolution of the matter during a period of court-mandated mediation. The Chapter 7 trustee agreed to issue notices to certain former plan participants who may have claims against the estate arising from unpaid health claims. The notice instructed these participants that they may have a claim and to file the claim with the

bankruptcy court. The trustee agreed not to object to these claims based solely on timeliness because the proof of claim deadline has already expired. Upon issuance of these notices, the Secretary's appeal was withdrawn. Boston Regional Office