

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

CALENDAR YEAR 2013

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## **A. Employer Stock**

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 ESOP, in connection with the purchase of stock in Bruister & Associates, Inc. from Herbert Bruister for more than its fair market value. Bruister sold 100% of his shares to the ESOP in five transactions between December 2002 and December 2005 for more than \$24 million. Bruister & Associates was a Direct TV installer with more than 1,000 employees until it became defunct, making the ESOP's stock worthless in 2007. The Secretary alleges that the ESOP's trustees failed to engage in the requisite due diligence process prior to hiring the valuation appraiser, failed to provide complete and accurate financial information to the appraiser, and failed to review, understand, and critically analyze the valuations in order to determine whether reliance on them was reasonably justified. The Secretary further asserts that the valuations could not be relied upon because of facial defects, including adding (rather than subtracting) a discount for lack of marketability, utilizing overly optimistic growth projections, failing to account for large amounts of corporate debt, and failing to account for single-customer risk. On July 1, 2011, the Secretary amended the complaint to add a kickback claim as to the first of the five transactions, alleging that Bruister agreed to pay one of the ESOP's trustees a 5% commission on the value of that stock sale. In September 2011, the Secretary participated in a court-ordered mediation, which included two related cases (insurance coverage litigation and private ERISA litigation arising out of the same general set of facts and circumstances) and did not result in any resolution. At the end of 2011, numerous motions were pending, including defendants' partial motion to dismiss, the Secretary's cross-motion for summary judgment, and the Secretary's appeal from one of the magistrate's discovery orders. The court ruled on the discovery order, as a result of which the Secretary was given additional documents that were not available when the summary judgment motions were originally filed. The court sua sponte dismissed the pending motions and ordered them to be re-filed. The parties re-filed motions for summary judgment on the merits and expert challenges. On December 20, 2013, the district court issued a mixed summary judgment decision. The court held that tolling agreements between the Secretary and the defendants were validly executed, but further held that the six year statute of limitations in ERISA is jurisdictional and cannot be extended by tolling agreement between the parties. It thus dismissed the claims relating to the first two transactions at issue in the case, including the "kickback" claim. The district denied the parties' summary judgment motions in all other respects. After lengthy analysis, the Secretary decided not to file a motion asking the district court to certify the statute of limitations issue for appeal under 28 U.S.C. § 1292(b) or Rule 54(b). Also on December 20, the court denied the parties' motions to disqualify expert witnesses, without prejudice to the parties' right to challenge expert witnesses at trial. The court reasoned that, because this case will be tried to the court and not to a jury, the court has a lesser gatekeeping function concerning expert witnesses' threshold reliability and accordingly exercised its discretion to hear live testimony before deciding whether an expert witness is sufficiently reliable to qualify as an expert. The court has scheduled trial beginning August 4, 2014 on the claims that were not dismissed. Atlanta Regional Office and Plan Benefits Security Division

Perez v. California Pacific Bank (N.D. Cal.)

On August 15, 2013, the Secretary filed a complaint alleging that California Pacific Bank and its CEO and Directors, who were all trustees, violated ERISA as fiduciaries of the California Pacific Bank ESOP in connection with the following: (a) the Bank's failure to cash out ESOP participant accounts when the ESOP was terminated in 2010; (b) the improper diversion of ESOP assets to the Bank connection with a real estate "receivable", (c) the failure to hold ESOP assets in interest-bearing accounts at the Bank and (d) a second improper diversion of ESOP assets to the Bank. Named defendants include the Bank, CEO Richard Chi (ESOP trustee and plan administrator), and Akila Chen, Kent Chen and William Mo (Bank directors and ESOP trustees). The complaint seeks recovery of all losses, disgorgement of any unjust enrichment received by the defendants, appointment of an independent fiduciary to liquidate the ESOP, removal of the defendants as fiduciaries, and prospective injunctions barring them from serving as fiduciaries and service providers to ERISA-covered plans. 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, and Stephen Thielking. The complaint alleges that Dr. Caputo, Dr. Bankert, and Caputo's practice are all fiduciaries of the Robert S. Caputo D.O. ESOP and that Thielking and his accounting firm were knowing participants in the fiduciary breaches. The fiduciaries allegedly failed to monitor the employer's operations and management and failed to take action on behalf of the ESOP when inappropriate personal expenses were 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 receivable, artificially inflating the company's stock valuation. As a result, the ESOP overpaid for shares that it purchased from participants leaving the plan. During court-ordered mediation, the Secretary reached an agreement with the fiduciaries as follows. (1) Drs. Caputo and Bankert will be removed from their positions as fiduciaries to the Caputo ESOP, enjoined from acting as fiduciaries to any ERISA-covered plans in the future, except for any plans that they currently serve as fiduciaries, and enjoined from committing further ERISA violations; (2) An independent fiduciary, appointed to the Caputo ESOP at Drs. Caputo and Bankert's expense, will sell the property owned by the Caputo and Bankert ESOPs, with the sale proceeds divided equally between the ESOPs; (3) The independent fiduciary will distribute the assets of the Caputo ESOP and terminate the plan; and (4) Dr. Caputo's participant share of the assets from the sale of the property will be applied as an offset against the first \$225,000 that the Secretary alleges is due to the plan, with Dr. Caputo receiving any cash assets from the sale that exceed \$225,000 and all of the shares of the Caputo P.A. A consent judgment and order, as to Robert S. Caputo, D.O. P.A.; Robert S. Caputo; and Glenn M. Bankert, was entered on June 26, 2013. Mediation with the accountants was unsuccessful, and trial was scheduled for December 13, 2013. However, prior to trial, the court dismissed the case based upon the pre-trial briefs, finding that the Secretary cannot seek a remedy from a non-fiduciary for knowing participation in prudence violations under Section 404 of ERISA. See also Solis v. Bankert, Section B.3. Miscellaneous. Atlanta Office

Perez v. Digital Satellite Services, Inc. (D.S.C.)

On September 13, 2013, the Secretary filed a complaint against Jim Roorda, an independent qualified public accountant, and on September 23, 2013, filed an amended complaint naming Ron Phillips and Dawn Phillips, the owners of Digital Satellite Services, Inc. Ron Phillips and Dawn Phillips were trustees of the Digital Satellite Services, Inc. Employee Stock Ownership Trust (ESOT), which includes both the company's ESOP and its Eligible Individual Account Plan. The Secretary alleges that they engaged in prohibited and imprudent activities due, in part, to their stock valuation methods during the sale of 100% of their stock to company employees through the ESOT. The sponsor was a fulfillment company for DirecTV. The trustees used the same attorney, appraiser and other service providers as Bruister & Associates Inc. (and more than 10 other Direct TV installers' ESOPs) that the Department investigated for over-valued stock sales transactions. An agreement in principle has been reached with Roorda. Defendants retained David Johanson and his group to represent them. On October 28, 2013, the Secretary filed an objection to Johanson's request to be permitted to appear and represent defendants on the basis that he is a witness and is conflicted. The court denied Johanson's application to appear *pro hac vice*. Atlanta Office

Dudenhoffer v. Fifth Third (6th Cir. and S. Ct.)

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 July 7, 2011, and the Secretary filed an amicus brief on July 14, 2011, making similar arguments to those 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. The Secretary participated in oral argument on June 7, 2012. On September 5, 2012, the Sixth Circuit issued a favorable decision on the presumption and pleading issues based on the Pfeil v. State Street decision. Fifth Third petitioned for certiorari, and the Court invited the government's views. The Secretary's brief recommended that the Court grant cert. on the Moench issue, which the Court did.- Plan Benefits Security Division

Perez v. First Bankers Trust Services, Inc. (S.D.N.Y.)

On November 28, 2012, the Secretary filed a complaint against First Bankers Trust Services, Inc. and Maran, Inc., alleging that First Bankers caused the Maran ESOP to purchase employer stock for more than its fair market value. The Secretary alleges that First Bankers, as the ESOP's trustee, imprudently relied on a valuation of Maran that projected the company would far exceed its historical financial performance, ignored Maran's heavy reliance on a single dominant customer, and improperly valued Maran by comparing it to companies that operated in a different segment of the apparel industry. The complaint also alleges that First Bankers' indemnification agreements with Maran were void as against public policy under ERISA §

410(a), as the agreements potentially required Maran – and by extension, the Maran ESOP, which owned 49% of Maran – to indemnify First Bankers for breaching its fiduciary duties to the ESOP. On March 22, 2013, the district court denied First Bankers' motion to dismiss, in which First Bankers argued that its deference to a valuation expert insulated it from ERISA liability.

The Secretary filed an amended complaint on April 1, 2013 that also named as defendants Maran's top two executives, David Greenberg and Richard Huang, who appointed First Bankers as trustee and from whom the ESOP purchased the stock at issue. The amended complaint contends that Greenberg and Huang breached their duty to monitor First Bankers by failing to inform First Bankers of the inaccuracy of the information on which it relied in purchasing Maran stock. It also adds to the initial complaint's allegations against First Bankers, contending that First Bankers imprudently retained a valuation firm that had been recommended by the sellers' agent. On September 20, 2013, the Secretary, Maran, and First Bankers entered into a consent order prohibiting First Bankers from seeking indemnification from Maran in the event that the court finds that First Bankers violated ERISA, in exchange for dismissing the Secretary's claim regarding the indemnification provisions. Greenberg and Huang filed a motion for judgment on the pleadings on November 15, 2013, which the Secretary opposed on December 11, 2013. That motion is pending. Plan Benefits Security Division

Perez v. First Bankers Trust Services, Inc. and Frank Firor (S.D.N.Y.)

On November 28, 2012, the Secretary filed a complaint against the fiduciaries of the Rembar, Inc. ESOP, in connection with the ESOP's purchase of 100% of the plan sponsor's stock. The complaint alleges that First Bankers Trust Services, Inc., the institutional trustee charged with determining the fair value of Rembar's stock, failed to carry out a meaningful review of the valuation of the stock and caused the ESOP to overpay by at least \$2.5 million. The complaint also alleges that Firor, the selling shareholder, was a knowing participant as well as a functional fiduciary because he appointed First Bankers as trustee but failed to monitor or remove it despite knowing that the ESOP overpaid him for his stock. First Bankers filed an answer and on March 8, 2013, Firor filed a motion to dismiss, arguing that he did not act in a fiduciary capacity and therefore, as a matter of law, cannot be held liable for the losses. On May 3, 2013, the Secretary filed an amended complaint, which included additional facts supporting the Secretary's claim that Firor acted as a fiduciary with respect to appointing First Bankers. First Bankers filed an answer, and Firor again filed a motion to dismiss the amended complaint maintaining that he did not act as a fiduciary. On August 15, 2013, the Secretary filed a brief opposing Firor's motion to dismiss, to which Firor filed a reply brief in further support of his position. On January 13, 2014, the court denied Firor's motion, holding that the Secretary had alleged sufficient facts to support his claim that Firor acted as a fiduciary. New York Office

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

On July 17, 2012, the Secretary filed a complaint against the fiduciaries of the SJP Group, Inc. ESOP, alleging that they caused the ESOP to purchase employer stock for millions of dollars in excess of the stock's fair market value. The Secretary alleges that GreatBanc, as the institutional trustee charged with determining the fair market value of the stock, ignored obvious errors in the valuation report and failed to determine whether the financial information provided by the plan sponsor was reliable. The Secretary further alleges that SJP Group, Inc. and its president Vincent DiPano, as the fiduciaries that appointed GreatBanc as trustee, failed to monitor GreatBanc's performance and allowed the transaction to take place knowing that the purchase

price was in excess of fair market value. First Bankers filed a motion to dismiss on October 16, 2012, and Vincent DiPano filed a motion to dismiss on October 30, 2012. The Secretary responded to these motions on December 3, 2012, and defendants' replies were filed on December 17, 2012. The court denied both motions on May 31, 2013. New York Office

Fisch v. Suntrust Bank (11th Cir.)

This is an interlocutory appeal from a district court decision holding that ERISA barred the plaintiffs' claim that fiduciaries were imprudently offering employer stock when they knew it was imprudent given the company's investments in subprime mortgages. The court reasoned that the claims were in fact diversification claims and therefore are barred by the diversification exemption for fiduciaries of ESOP plans that hold employer stock. The court concluded that the Moench presumption contravened the statute because it would permit these claims despite the diversification exemption. The court also declined to dismiss the plaintiffs' misrepresentation claims. The parties' cross-petition for interlocutory review was granted. The Secretary filed an amicus brief on the Moench issues on July 15, 2011 and on the disclosure issues on August 12, 2011. On March 5, 2013, the Eleventh Circuit issued its opinion, deciding in favor of defendants on the disclosure issues and reversing on the diversification issue but remanding on the prudence/Moench issues in light of Lanfear. Plan Benefits Security Division

Perez v. GreatBanc Trust Co. (C.D. Cal.)

On September 28, 2012, the Secretary filed a complaint against GreatBanc Trust Company and Sierra Aluminum Company, alleging that GreatBanc caused the Sierra Aluminum ESOP to purchase employer stock for more than its fair market value. The complaint alleges that GreatBanc, the ESOP's trustee, should not have relied on a valuation which, among other things, used aggressive and overly optimistic projections of Sierra Aluminum's future earnings and profitability, failed to account for its planned capital expenditures, made improper adjustments to its cash flows and failed to make any corresponding adjustments to the public companies used as comparables, inappropriately relied on the purportedly "below market" interest rate on the ESOP's loans to calculate that it was prudent for the ESOP to pay more than the stock's fair market value as calculated by GreatBanc's valuation firm, and valued the performance of Sierra Aluminum's business, which depends on a cyclical commodity, at the peak of its business cycle in perpetuity without any consideration of a drop in aluminum prices or, at a minimum, a reversion to average prices. On March 4, 2013, the court granted the defendants' motions to dismiss the Secretary's second claim for relief, in which the Secretary sought to invalidate the indemnification agreement between GreatBanc and Sierra Aluminum, which is wholly owned by the ESOP. The indemnification agreement requires Sierra to pay for GreatBanc's defense. GreatBanc has to repay any funds that the company advances for its defense if it is found liable by the court, but it is not required to repay such defense expenses absent an order finding it liable. The Secretary objected to the condition requiring a court finding of liability, maintaining that it is void as against public policy under ERISA § 410(a). On November 5, 2013, the Secretary filed a motion for partial summary judgment, based on the fact that the ESOP's purchase price exceeded the amount that GreatBanc's valuation firm calculated as the stock's fair market value. The Secretary argued, among other things, that ERISA places separate and independent obligations on fiduciaries to obtain favorable interest rates on loans to ERISA plans and to pay no more than fair market value for stock; fiduciaries cannot absolve themselves of their obligation to pay no more than fair market value for employer stock by pointing to their

compliance with their separate obligation to obtain a reasonable rate of interest on the stock acquisition loans. The motion is pending. Plan Benefits Security Division

Harris v. Kappler, Inc. (not filed)

On July 29, 2013, the Secretary executed a settlement agreement with Kappler, Inc., George Kappler Jr., and Laura Kappler Roberts with respect to the company's ESOP. The Secretary's investigation concerned whether the securities acquisition loan and the amended securities acquisition loan that were created to finance the ESOP complied with Section 408(b)(3) of ERISA, which requires that a loan from an interested party to an employee stock ownership plan must be "primarily for the benefit of participants and beneficiaries of the plan" and "at an interest rate which is not in excess of a reasonable rate." The settlement agreement requires the appointment of an independent fiduciary and amendments to the ESOP and its securities acquisition loan to bring the loan within the ESOP exception to the prohibition against loans between the plan and parties in interest. The company also agreed to bar Kappler and Roberts from serving as fiduciaries for any ERISA-covered plan. Atlanta Office

Perez v. Kimberly P. Hood, M.D. (N.D. Fla.)

On December 30, 2013, the Secretary filed a complaint against Kimberly P. Hood, M.D., P.A., Kimberly P. Hood, and Glenn M. Bankert, fiduciaries of the Kimberly P. Hood, M.D., P.A. ESOP, alleging that they failed to prudently exercise the shareholder rights to prevent and remedy mismanagement of the medical practice while the plan held an ownership interest in the medical practice and failed to properly determine the fair market value of the medical practice's stock, causing the plan to overpay for the acquisition of employer stock from participants receiving distributions. The complaint seeks to recover losses and to obtain injunctive relief barring the defendant fiduciaries from serving as fiduciaries in the future. Atlanta Office

Kopp v. Klein (5th Cir.)

This case raised issues relating to fiduciary disclosure duties and the Moench presumption's applicability on a motion to dismiss. On March 15, 2012, the district court granted the defendants' motion to dismiss, and the plaintiffs appealed. The Secretary filed an amicus brief on August 15, 2012, arguing that plan fiduciaries are obligated to act prudently even if plan terms mandate investment in employer stock; that the Moench presumption of prudence is inapplicable at the pleadings stage; that a prudence (rather than "dire situation") standard should be used to rebut the presumption; and that fiduciaries have the duty to disclose truthful information about the employer's financial situation and the riskiness of investing in the employer's stock. The Secretary participated in the oral argument on March 7, 2013. On July 9, 2013, the court issued an adverse decision holding, among other things, that the presumption applies on a motion to dismiss and can only be rebutted through showing that the viability of the company was threatened or that the stock was in danger of becoming essentially worthless. The court also held that there is no general duty to disclose non-public information to plan participants. The plaintiffs filed a petition for rehearing en banc on July 23, 2013, which the court denied. The plaintiffs filed a petition for cert. on November 7, 2013. Plan Benefits Security Division

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

This is an appeal from a dismissal on the pleadings of a 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. The Secretary participated in oral argument on March 14, 2013. On July 15, 2013, the court issued an adverse decision upholding the dismissal. Among other things, the court held that the investment committee fiduciaries had no obligation to seek out or act on non-public information about the company and its stock, and the Board member fiduciaries had no obligation to provide non-public information to plan managers, and that, although incorporating securities filings into summary plan descriptions is a fiduciary act, plaintiffs failed to plausibly allege that the fiduciaries who did so had knowledge that anything in those filings was inaccurate or misleading. The plaintiffs filed a petition for rehearing, which the court denied on September 10, 2013. Plan Benefits Security Division

Perez v. Mueller (E.D. Wis.)

On November 18, 2013, the Secretary filed a complaint alleging that the fiduciaries of the Omni Resources, Inc. ESOP violated ERISA in connection with the ESOP's \$13.7 million purchase of Omni Resource, Inc. stock for more than adequate consideration. The defendants include Veronica Mueller and Roger Mueller (Omni's owners, officers and board members and ESOP trustees); Alpha Investment Consulting Group, Inc. (special fiduciary to the ESOP for purposes of the ESOP stock purchase); and six trusts (which held Omni stock on behalf of the Muellers' children and which sold that stock to the ESOP). The complaint alleges that the ESOP paid too much for the stock because, among other reasons, the price paid was based upon a valuation that was four months old and that had not been updated with current financial information that showed a severe downturn in the company's earnings and current economic information that showed a severe downturn in the business in which the company engaged. The complaint also alleges that the Muellers violated ERISA's self-dealing provisions by acting in their own self-interest and in the interests of their children at the expense of the ESOP. The complaint seeks restoration of losses, disgorgement of profits, and a permanent bar against the Muellers and Alpha from acting as fiduciaries or service providers to ERISA-covered plans. Kansas City Office and Plan Benefits Security Division

Perez v. PBI Bank, Inc. (N.D. Ind.)

On December 26, 2013, the Secretary filed a complaint alleging that PBI Bank, Inc., the named trustee of the Miller's Health Systems, Inc. ESOP violated ERISA in connection with the ESOP's \$40 million purchase of Miller's Health Systems stock for more than its fair market value. The complaint alleges that PBI caused the ESOP to pay too much for the stock because, among other reasons, PBI relied upon a valuation that (a) ignored an "earn-out" agreement designed to divert 40% of the company's profits above a certain threshold to the selling shareholders (even though the ESOP was paying for all of the upside of the company), (b) ignored a shareholders' agreement that entrenched the selling shareholders in control of the company (even though the ESOP was paying a control price), (c) undervalued a stock options agreement that reserved 20% of the company's equity for management (even though the ESOP was paying for 98.6% of the

company's equity), and (d) failed to discount the stock due to its lack of marketability (even though all the draft valuations prior to the transaction included such a discount). The complaint also alleges that PBI violated its fiduciary duties by agreeing to debt financing for the ESOP stock purchase at an above-market rate. The complaint seeks restoration of losses to the ESOP, appointment of an independent fiduciary, and a permanent bar against PBI from acting as a fiduciary or service provider to ERISA-covered plans. Chicago Office and Plan Benefits Security Division

Perez v. Sergio J. Cabrera, M.D. (N.D. Fla.)

On December 30, 2013, the Secretary filed a complaint against Sergio J. Cabrera M.D, P.L., Sergio Cabrera, and Robert S. Caputo M.D., alleging that the fiduciaries of the Sergio J. Cabrera M.D., P.L. ESOP failed to prudently exercise shareholder rights to prevent and remedy mismanagement of the medical practice while the plan held an ownership interest in the medical practice and failed to properly determine the fair market value of the medical practice's stock, causing the plan to overpay for the acquisition of employer stock from participants receiving distributions. The complaint seeks to recover losses and to obtain injunctive relief. Atlanta Office

Harris v. Sherwin-Williams Company (not filed)

On February 20, 2013, the Department reached a settlement with Sherwin-Williams Co. that provided \$81 million to current and past participants of its Employee Stock Purchase and Savings Plan. The settlement also required GreatBanc Trust Co. to undergo an audit of its pension plan activities. The Department's investigation focused on two transactions, one in 2003 and one in 2006, in which Sherwin-Williams and GreatBanc caused the plan to purchase specially designed stock issued by Sherwin-Williams solely for the purpose of the transactions. The investigation also looked at whether Sherwin-Williams had forwarded employee salary deferrals appropriately and promptly to their individual plan accounts. The Department concluded that, as a result of Sherwin-Williams' and GreatBanc's violations of their fiduciary duties and the design of the transactions, the stock purchases did not provide benefits to the plan and its participants commensurate with the amount the plan paid for the stock, the transactions were not primarily for the purpose of providing benefits to plan participants, the transactions did not promote employee ownership of Sherwin-Williams and, at times, employee salary deferrals were not appropriately paid to the plan. The investigation found that Sherwin-Williams' purpose in the transactions was to take advantage of substantial tax benefits designed to reward companies that provide their workers with significant stock ownership while, at the same time, ensuring that its employees did not actually receive stock or retirement benefits in amounts close to what the plan spent on the transactions or that the company claimed on its government filings. In October 2011, Sherwin-Williams reached a settlement with the Internal Revenue Service in connection with the transactions for excise tax and penalty claims. The IRS settlement did not address violations of fiduciary duty or resolve the Department's concerns relating to Sherwin-Williams' use of employee salary deferrals. Plan Benefits Security Division

Tatum v. RJ Reynolds (4th Cir.)

In this private ERISA class action, the district court, following an earlier remand from the Fourth Circuit, held that plan fiduciaries violated their procedural duties of prudence by selling stock in Nabisco after a corporate spin-off, but also held that because a prudent fiduciary could have

concluded that selling the stock was prudent given such factors as the general risk of holding a single-stock investment, the fiduciaries established that the plan participants were not economically harmed by their decision. The plaintiffs take issue with this holding, asserting that the proper standard is not what a hypothetical prudent fiduciary "could" have done, but what it "would" have done under the circumstances and have just appealed to the Fourth Circuit. The plaintiffs filed his opening brief is currently due on May 27, 2013, and the Department filed an amicus brief in support on June 25, 2013. 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 ESOP, caused the ESOP to pay more than fair market value for employer stock. He approved the ESOP's purchase of 100% of the employer's common stock for about \$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, so a payment plan is incorporated into the consent judgment. This judgment is in conjunction with a settlement relating to another ESOP that the defendant established, the Frank L. Woodworth, Inc. ESOP. Concurrent with the execution of the consent order in Solis v. Thomas, Thomas executed a settlement agreement in which he agreed to pay \$75,000 to the Woodworth ESOP, for which he also was a trustee. Thomas agreed to the appointment of an independent fiduciary for both plans and to pay all costs of administering the ESOPs. The funds will be collected through a payment plan with interim payments held by the independent fiduciary until distribution to the ESOPs' participants. Settlements of \$10,000 and \$5,000, respectively, have been executed with two other fiduciaries, Tchad Robinson and Brent Hartley. Thomas was indicted on April 4, 2012 for attempted tax evasion. As part of a guilty plea on September 11, 2012, he admitted that he failed to file his 2005 through 2007 individual income tax returns and failed to file 2005 through 2007 corporate income tax returns for ECG, an entity that he utilized to establish the Gagne and Woodworth ESOPs and to manage the companies. He also admitted that he engaged in a series of affirmative acts of tax evasion during 2005 through 2007. On January 23, 2013, Thomas was sentenced to 18 months in prison and ordered to pay \$154,362 in restitution to the IRS. Boston Office

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, alleging that when the company's ESOP terminated in 2009, the fiduciaries permitted unallocated ESOP shares valued at \$21,638 to revert to the company when they should have been allocated to participants and also failed to take any action to repay \$62,939 in

improperly charged interest on ESOP loans. The complaint also named Mark Eldridge as a knowing participant and sought his removal as a service provider. On January 7, 2013, the court entered a consent judgment ordering the company and Ver Helst to restore \$20,000, permanently enjoining Ver Helst from serving as a fiduciary or service provider to any ERISA-covered plan, and enjoining Eldridge from providing any further services to the ESOP. Kansas City Office

Solis v. Webb (N.D. Cal.)

On October 17, 2013, the court entered a consent order requiring the defendants to pay \$4.4 million, with \$4,181,818 paid to the Parrot Cellular ESOP and \$218,182 paid as a civil penalty. The Secretary's complaint, filed on April 25, 2012, alleged that the ESOP's fiduciaries caused the plan to purchase stock of Entrepreneurial Ventures, Inc., dba Parrot Cellular ("EVI") for more than its fair market value. The defendants were Dennis Webb, EVI's founder, former president, and director, Matthew Fidiam and J. Robert Gallucci, who were ESOP trustees, Plan Committee members, and EVI officers and Board members, and Consulting Fiduciaries, Inc. ("CFI"), which was the independent fiduciary for purposes of the stock transaction. The complaint alleges that the fiduciaries should not have relied upon a valuation that, in addition to other flaws, contained at least one significant mathematical error, used inappropriate companies as comparables, used overly optimistic projections of future earnings and profitability, and failed to account for a deferred compensation agreement with Webb in the projected cash flow analysis. CFI agreed to cause its insurer to pay \$2 million to the ESOP. Its civil penalty was waived based on financial hardship because the company is defunct and has no assets. Webb, Fidiam and Gallucci agreed to collectively pay \$1.5 million to the ESOP plus a civil penalty of \$150,000, and Webb agreed to pay an additional \$681,818 to the ESOP plus an additional civil penalty of \$68,182. In an earlier order, dated September 26, 2012, the court denied motions to dismiss filed by the fiduciaries and by the ESOP, rejecting their principal argument that an ESOP is not subject to ERISA until it is funded. Plan Benefits Security Division

White & Marshall & Isley Corp. (7th Cir.)

This is an appeal from a district court decision applying the Moench presumption to grant a motion to dismiss under a "viability as a going concern" standard. The district court also held that plaintiffs failed to state a claim for breaches of fiduciary duty based on the Marshall & Isley misrepresentations and failure to disclose the company's true financial condition. The court reasoned that these claims failed because plaintiffs did not allege that the fiduciaries made intentional misrepresentations and because the claims were conclusory and concerned business decisions made by Marshall & Isley. The plaintiffs filed their brief on May 9, 2012, and the Secretary filed an amicus brief on May 30, 2012. The Secretary participated in oral argument on September 13, 2012. On April 19, 2013, the Seventh Circuit issued a decision adopting the Moench presumption and affirming the dismissal on that basis. Plan Benefits Security Division

## **B. Financing the Employer**

### **1. Collection of Plan Contributions**

Solis v. All American Rentals, Inc. (N.D. Cal.)

On March 30, 2012, the Secretary filed a complaint against All American Rentals, Inc. (AAR) and its President, Michael Carter, for failing to collect mandatory employer contributions due the company's 401(k) Plan from March 2006 through July 2011. The complaint also alleges that the

fiduciaries failed to remit employee contributions. The total amount due the plan is \$257,949.84, plus lost opportunity costs. On August 2, 2013, the clerk entered default against the defendants. Thereafter, the court extended the date by which the Secretary must submit the motion for default judgment. San Francisco Office

Harris v. American Marble Products Inc. (D.S.C.)

On August 19, 2013, the Secretary filed a complaint against American Marble Products Inc., Daryl H. Sorensen and Monica Sorensen, alleging that they failed to remit employee contributions to the American Marble Products Inc. SIMPLE IRA Plan. The complaint seeks restitution of all losses including lost earnings, a permanent injunction preventing the fiduciaries from serving as fiduciaries to any ERISA-covered plan, and the appointment of an independent fiduciary to oversee the plan at the defendants' expense. Atlanta Office

Solis v. Arlen-Jacob Manufacturing Co. (N.D. Ill.)

On April 9, 2010, the Secretary filed a complaint against Keith Czaja and Arlen-Jacob Manufacturing Co. as fiduciaries to the company's 401(k) Plan, for failing to remit and to timely remit employee salary contributions to the plan from January 5, 2004 through July 27, 2009. The plan had been frozen since 2010. On April 3, 2013, the court entered a consent judgment, ordering the defendants to restore the \$2,728 in contributions and lost opportunity costs owed to the plan and ordering Czaja to terminate the plan by May 31, 2013. The defendants also were removed and enjoined from serving as fiduciaries or service providers to any ERISA-covered plan other than for purposes of complying with the judgment. Chicago Office

Solis v. Awesome Enterprises (S.D. Fla.)

On September 14, 2012, the Secretary filed a complaint against Awesome Enterprises, Inc. and Susan Evans, for failing to remit to the plan \$29,047.10 in employee contributions and \$11,305.06 in loan repayments. The lawsuit seeks restitution of all losses, removal of the fiduciary, a permanent injunction preventing Evans from serving as a fiduciary to any ERISA-covered plan, and the appointment of an independent fiduciary to oversee the plan at the defendants' expense. Atlanta 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. On July 18, 2013, the court entered a consent judgment and order holding that Stowe caused \$100,000 in losses to the plan and providing that, due to his financial condition, Stowe will restore \$50,000 to the plan by September 30, 2013 and pay a \$10,000 retainer to Jeanne Barnes Bryant, the court-appointed fiduciary to the plan. If the Secretary finds that Stowe's financial condition materially improves or that he materially misrepresented his situation, the Secretary may bring a contempt action before January 15, 2015 to seek additional restitution. The order also permanently enjoins Stowe from violating ERISA and from serving as a fiduciary or service provider to any ERISA-covered plan. Atlanta Office

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

On November 21, 2013, the Secretary filed a complaint against American Home Care, LLC and its owner and president, Rebecca Bellamy, for failing to ensure that employee contributions were timely remitted to and collected by the two American Home Care SIMPLE IRA Plans between June 2008 and April 2010. Philadelphia Office

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

On May 10, 2013, the court entered a consent judgment ordering \$22,106.57 to be paid to the Fresh Start, Inc., 401(k) Plan, permanently enjoining Ruby Black from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to terminate the plan. The Secretary's complaint, filed on December 4, 2012, alleged that Ruby Black, fiduciary of the plan, failed to remit \$15,912.85 in employee contributions and loan payments from August 3, 2010, through May 27, 2011, and failed to timely remit \$125,867.80 in employee contributions and loan payments from July 13, 2007 through August 5, 2010. On August 6, 2012, the Secretary filed an adversary complaint in bankruptcy court against Black seeking to have her debt to the plan declared non-dischargeable. On May 14, 2013, the bankruptcy court entered a consent judgment finding the debt non-dischargeable. Chicago Office

Perez v. Boschwitz (D. Minn.)

On December 19, 2013, the Secretary filed a complaint against Gerald Boschwitz, Thomas Boschwitz and Home Valu, Inc., d/b/a Home Value Interiors, fiduciaries to the Home Value Interiors Employee Benefit Plan, Home Valu Interiors Self-Insured Voluntary Dental Plan, Home Valu, Inc. Group Insurance Plan and Home Value Flexible Reimbursement Plan, for failing to ensure that amounts withheld from employees' paychecks in January 2010, were used for ongoing coverage under the company's benefits plans. The total loss to the plans was approximately \$44,000. Chicago 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. 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 28, 2011, the court granted the Secretary's motion for summary judgment with respect to the company, finding

it liable for \$20,951.80, and denied the Secretary's motion with respect to 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 case until June 2, 2013, the scheduled date of Botes' release from federal prison. On August 12, 2013, Botes filed a notice of address change with the court, reflecting that he is no longer in prison and is now living in South Africa. The Secretary has requested a trial date and is awaiting a scheduling order. Atlanta Office

Solis v. Breeden & Collier Co., Inc. (E.D. Va.)

On August 10, 2012, the Secretary filed a complaint against Breeden & Collier Co., Inc. and Gregory J. Harmon, fiduciaries of the company's SIMPLE IRA Plan, for failure to forward and to timely forward employee contributions to the plan between January 2007 and December 2009. The complaint sought restoration of all losses and a permanent injunction barring the defendants from serving as fiduciaries to ERISA-covered plans. On October 26, 2012, the court entered default against both defendants. On January 4, 2013, the court held a hearing on the Secretary's motion for default judgment. On March 1, 2013, the court entered default judgment against the defendants. Philadelphia Office

Perez v. Brown (E.D. Va. and Bankr. E.D. Va.)

On September 23, 2013, the Secretary filed a complaint against Brian Brown in district court and an adversary complaint to establish non-dischargeability in Brown's personal bankruptcy proceeding. The district court complaint alleged that during some or all of the time from January 1, 1998 through June 17, 2009, The Classic Group, Inc. and Brown failed to remit or to timely remit employee elective salary deferrals and loan repayments to the company's 401(k) profit sharing plan. The complaint also alleged that Brown and the company failed to pay health insurance premiums for employee health coverage under the company's health plan, causing harm to one participant who was denied coverage for surgical services received after coverage had ended but before the insurance carrier issued a notice of cancellation. The parties reached an informal agreement with the insurance carrier that resolved the unpaid surgical claim, and the Secretary and Brown entered into a consent judgment resolving the claims related to the 401(k) plan. On November 14, 2013, the court approved the consent judgment, which requires Brown to repay all losses totaling \$18,728.84 to the 401(k) plan within 90 days of the completion of his personal bankruptcy proceedings, and enjoins him from serving as an ERISA fiduciary in the future. On November 26, 2013, the bankruptcy court approved a consent judgment in which Brown's debt to the plan is deemed non-dischargeable in bankruptcy. Philadelphia Office

Solis v. BSML, Inc. (S.D. Fla. and Bankr. S.D. Fla.)

On January 5, 2012, the Secretary brought an action in bankruptcy court to remove \$64,938.31 directly traceable to plan assets from the debtor/employer's bankruptcy estate. The Secretary contends that BSML, Inc. d/b/a Britesmile and plan fiduciaries, Jeff Nourse and Tere Guerrero, caused all assets of the company's 401(k) Plan to be transferred into BSML's bankruptcy estate and that the debtor used over \$160,000 of these assets to pay service providers and creditors in its bankruptcy action. In 2012, through voluntary compliance, the Secretary recovered \$113,321.96 in plan assets wrongfully distributed through the bankruptcy court, plus lost earnings. On August 23, 2012, the bankruptcy court granted in part the Secretary's motion for summary judgment, ordering the return of \$64,938.31, representing the amount in the bankruptcy estate directly traceable to plan assets, appointing an independent fiduciary to the plan, and

denying the Secretary's request that the debtor's estate pay for the independent fiduciary and lost earnings. On May 10, 2013, the court accepted the Secretary's dismissal without prejudice of the case against Nourse and Guerrero. On May 31, 2013, the court entered a consent judgment and order permanently enjoining BSML, Inc. from acting as a fiduciary to any ERISA-covered plan. The Secretary also recovered through informal settlement over \$120,000.00 from two law firms that had received plan assets as payment through the bankruptcy court. Atlanta Office

Perez v. Capital Risk Insurance (S.D. Miss.)

On December 12, 2013, the Secretary filed a complaint alleging that Capital Risk Insurance Inc., and Phillip Willis failed to remit employee contributions totaling \$6,352.50 to the company's SIMPLE IRA Plan, failed to pursue the collection of \$1,531.60 in mandatory employer contributions from September 2010 to February 2011, and did not ensure that the plan was administered properly following the closure of the company. The complaint seeks plan losses and opportunity costs from Willis or an offset of Willis' individual plan account. The complaint also seeks an injunction permanently barring the defendants from serving as fiduciaries to any ERISA-covered plan and from violating ERISA in the future and the appointment of an independent fiduciary to distribute the plan's assets at the defendants' expense. Atlanta Office

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

On March 23, 2012, the Secretary filed a complaint against Cardiografix, Inc. and Dr. David Hyun, alleging that they failed to remit and untimely remitted approximately \$66,000 in employee contributions and participant loan repayments to the company's 401(k) Profit Sharing Plan from March 2008 through May 2010. On July 10, 2012, after the defendants failed to answer the complaint, the Secretary filed a motion for default judgment, which the court granted on August 22, 2012, finding Huyn liable for all plan losses and for the cost of an independent fiduciary. The court also found that such amounts should be offset from Huyn's plan account. On December 5, 2012, the Secretary filed a motion to appoint an independent fiduciary to recover the amount of the judgment, terminate the plan, and distribute the plan's assets. On February 5, 2013, the court granted the Secretary's request to remove Hyun as plan trustee and appointed an independent fiduciary. San Francisco Office

Perez v. Clark (M.D. Pa.)

On December 9, 2013, the Secretary filed a complaint against Central Pennsylvania Pulmonary Associates LLC and its president, Timothy A. Clark, for failing to ensure that employee contributions and loan repayments were timely remitted to and collected by the Central Pennsylvania Pulmonary Associates LLC 401(k) Plan between June 2010 and April 2011. Philadelphia Office

Solis v. Conlon (E.D.N.Y.)

On February 2, 2012, the Secretary filed a complaint against William Joseph Conlon III, Mark Conlon, Margaret Conlon, and William J. Conlon & Sons, Inc., alleging that they failed to forward approximately \$70,000.00 in employee contributions and approximately \$50,000.00 in employee loan repayments to the William J. Conlon & Sons Inc. 401(k) Plan. While Margaret Conlon filed an answer to the complaint, William Conlon, Mark Conlon, and the company did not file an answer or otherwise respond to the complaint, and the clerk of court entered a default against them. Notwithstanding the entry of default, on March 26, 2013, the court approved an

interim consent order in which William and Mark Conlon agreed to resign as trustees and agreed to the appointment of an independent fiduciary. On July 30, 2013, the court approved three consent orders and judgments resolving all claims against the individuals, who agreed to make full restitution of \$132,671.40 to the plan and to forfeit any interest they may have in the plan. New York Office

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

On November 4, 2010, the Secretary filed a complaint against Corinthian Custom Homes, and fiduciaries Nicholas Psillas, Deborah Psillas, and Richard DePriest, alleging that between 2005 and 2007, the defendants untimely remitted \$100,248.96 in employee contributions to the company's 401(k) Plan, resulting in \$13,036.16 in lost earnings. The complaint seeks an order requiring defendants to restore all losses, requiring any of their claims to plan assets to 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. On August 24, 2012, the Secretary was informed that the bankruptcy trustee serving as fiduciary for Corinthian Custom Homes was arranging for \$152,507 to be restored to the plan. The bankruptcy trustee is currently in the process of appointing an independent fiduciary to administer the plan. The bankruptcy trustee has worked, and is continuing to work, with the Secretary to ensure the distribution of account balances to plan participants. Atlanta Office

Perez v. Counseling and Educational Consultants d/b/a Rumford Day Nursery, Inc.  
D.R.I.)

On December 4, 2013, the Secretary filed a complaint against Counseling and Educational Consultants d/b/a Rumford Day Nursery, Inc. (RDN), the sponsor of a SIMPLE IRA Plan, and Deborah Very-King, owner, president, secretary, treasurer, and chief operating officer of RDN. The defendants, who were plan fiduciaries, allegedly failed to remit \$23,506.98 in employee contributions and failed to collect \$20,947.14 in employer contributions beginning in 2007. On December 12, 2013, the court entered a consent judgment and order, in which Very-King agreed to pay the plan \$52,945.96, representing principal and pre-judgment interest, plus pay post-judgment interest under a payment plan, for a total of \$56,598.17. She also is permanently enjoined from serving as a fiduciary to any ERISA-covered plan. Boston Office

Harris v. Covenant Equipment Corp. (M.D.N.C.)

On April 30, 2013, the Secretary filed a complaint against Covenant Equipment Corporation and Mark Sowka, alleging that they failed to remit employee contributions to the company's SIMPLE IRA plan. On November 20, 2013, the court approved and entered a consent judgment and order requiring that all non-fiduciary losses arising from the unremitted employee contributions be restored. Sowka is also required to complete eight hours of fiduciary education as long as he remains a fiduciary to an ERISA-covered plan. Atlanta Office

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

On March 7, 2012, the Secretary filed a complaint in the district court against Karen Curry, Danny Woods and Heartland Foods, Inc., alleging that they failed to remit \$85,232.08 in

employee contributions and loan repayments to the company's 401(k) Profit Sharing Plan from January 1, 2008 to December 31, 2010. The complaint also alleges that they transferred \$171,225.00 from the plan to Heartland Foods and distributed \$21,610.71 in plan assets to participants in excess of the amount authorized in the plan document. On December 9, 2010, the Secretary filed an adversary complaint in the bankruptcy court seeking to have Karen Curry's debt to the plan declared non-dischargeable. The Secretary secured an order, entered May 31, 2012, deeming Curry's debt to the plan non-dischargeable. On February 19, 2013, the court entered a default judgment against Heartland Foods in the district court action. On June 5, 2013, the court entered a consent order and judgment against Woods and Curry, requiring them to restore \$302,247.47 to the plan and removing them as fiduciaries and appointing an independent fiduciary to administer and terminate the plan. Cleveland Office

Solis v. Daniels Electric Corp. (D.N.H.)

On November 29, 2012, the Secretary filed a complaint alleging that the Daniels Electric Corporation and Gerard and Barbara Milligan, the functional fiduciaries, failed to remit employee contributions and failed to collect \$78,167 in matching employer contributions to the company's SIMPLE IRA Plan from 2006 through 2009. From December 2012 to April 2013, the Milligans submitted the records necessary to enable the investigator to determine that all repayments to the plan had been completed. Therefore, the Department filed a voluntary dismissal of action on April 23, 2013. Boston Office

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

On May 11, 2012, the Secretary filed a complaint against Derek Michael Danks, Karen Williams, and Sun Mortgage, LLC, fiduciaries of the company's 401(k) Plan, alleging that they failed to remit \$30,906.90 in employee contributions and loan payments to the plan from August 1, 2006 through July 6, 2009 and failed to timely remit \$37,884.90 in employee contributions and loan payments from April 1, 2006 through November 16, 2007. The complaint also alleged that there was a prohibited loan between the plan and Danks and that the defendants failed to file annual reports, distribute summary annual reports and maintain a fidelity bond. On August 30, 2012, the court entered a default judgment against the company, requiring it to restore more than \$2.7 million to the plan. On March 4, 2013, the court entered a default judgment against Danks, Williams, and Sun Mortgage, requiring them to restore \$52,173 to the plan. In a separate criminal proceeding, Danks entered into a plea agreement filed on February 20, 2013, in which he agreed to repay \$26,387 in mandatory restitution representing unremitted employee contributions and loan payments owed to plan participants other than himself. On June 4, 2013, the court sentenced Danks to three years of probation and ordered him to pay a \$2,500 fine and \$26,387 in restitution. Chicago Office

Harris v. Dayton Imaging Solutions, Inc. (S.D. Ohio)

On August 3, 2012, the Secretary filed a complaint against Dayton Imaging Solutions, Inc. and Bryan Belden, fiduciaries of the company's SIMPLE IRA Plan, alleging that they failed to remit \$21,156.10 in employee contributions to the plan from July 6, 2005 through October 20, 2010 and failed to timely remit employee contributions, resulting in an additional \$11,555.77 in lost earnings. The complaint also alleges that the fiduciaries failed to make certain required annual disclosures to participants. Pursuant to his agreement with the Secretary, Belden restored \$7,499.78 in unremitted employee contributions prior to the entry of the consent judgment. On

May 29, 2013, the court entered a consent judgment finding Dayton Imaging and Belden liable for their fiduciary breaches and requiring them to restore \$10,389.33 to the plan. The consent judgment also ordered Belden to terminate the plan and distribute its assets to participants and permanently enjoined Dayton Imaging and Belden from serving as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

Perez v. Deighan (N.D. Ohio)

On October 29, 2013, the Secretary filed a complaint against Daniel Deighan, Timothy Deighan, Sunset Golf, LLC and Revolution Golf, LLC, successor to Sunset Golf, LLC, fiduciaries of the company's Employee Retirement Plan and Group Health Plan, for failing to ensure that participant contributions and health premiums were remitted to the plans from October 4, 2007 through March 16, 2011. The total loss to the plans was approximately \$35,000. Chicago Office

Solis v. Diamond Air Freight, Inc. (S.D. Fla.)

On January 25, 2013, the Secretary filed a complaint against Diamond Air Freight, Inc. and the company's owner, Carlos R. Vimo, the fiduciaries of the company's Group Health Plan, alleging that they failed to forward \$13,194.58 in employee contributions to the plan between March 1, 2009 and June 30, 2009 and failed to forward employee health premiums to the company's health insurance carrier/claims administrator. On December 19, 2013, the court entered a consent order and judgment requiring the defendants to restore all losses to the plan, and enjoining them from serving as fiduciaries to any ERISA-covered plan in the future. Atlanta Office

Perez v. Doll (D. Neb.)

On December 30, 2013, the Secretary filed a complaint against David E. Doll, seeking restoration of contributions not forwarded, plus lost earnings, for employees participating in The Double D Excavating, LLC 401(k) Plan, for health premiums not forwarded to the company's Health Plan, and for dental premiums not forwarded to the company's Dental Plan. Doll was the president, owner and operator of the company and was trustee of the 401(k) plan. Doll failed to forward \$6,965 in employee contributions in 2012 and 2013 before the business shut down, causing \$3,724 in lost earnings. Doll also failed to forward \$2,608 in employee health insurance premiums from 2012 and 2013, causing cancellation of the health plan and lost earnings of \$111. In addition, Doll failed to forward \$2,067 in employee dental insurance premiums from 2012 and 2013, causing cancellation of the dental plan and lost earnings of \$60. The Secretary is seeking to recover the missing 401(k) withholdings and the health and dental premiums and to obtain an injunction to permanently enjoin Doll from future ERISA violations. Kansas City 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 Secretary secured a default judgment on June 18, 2013, against Marty Hickman for \$7,255.88 in outstanding employee contributions and \$2,078.43 in interest, for a total of \$9,334.31, plus post-judgment interest on any remaining unpaid balance of

such amount. The court granted a default judgment on June 18, 2013, ordering Hickman to restore \$9,334.31 plus post judgment interest, appointing an independent fiduciary to administer and wind down the plan, and barring Hickman from serving as a fiduciary to any ERISA-covered plan. The Secretary settled the case with Parker pursuant to a consent judgment, filed on July 18, 2013, requiring Parker to restore \$2,000 and barring him from serving as a fiduciary to any ERISA-covered plan. Atlanta Office

Harris v. Empact Medical Services (W.D. Tenn.)

On April 15, 2013, the Secretary filed a complaint against Elizabeth DeBusk and Angela Cotter, alleging that they failed to remit approximately \$10,582 in employee contributions to the Empact Medical Services SIMPLE IRA Plan. The complaint seeks restitution including lost earnings, appointment of an independent fiduciary, and a permanent injunction barring the defendants from serving as a fiduciary to any ERISA-covered plan. Atlanta Office

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

On December 20, 2012, the Secretary filed a complaint against Charles H. England and Charles H. England, Inc. for failure to forward employer and employee contributions to the company's SIMPLE IRA Plan from January 2007 through December 2009. The complaint seeks restoration of all losses to the plan and a permanent injunction barring the defendants from serving as ERISA fiduciaries. The defendants failed to answer the complaint, and on March 28, 2013, the clerk of court entered a default. Thereafter, the Secretary filed a motion for default judgment, which was granted on June 25, 2013. Pursuant to the default judgment, the defendants are required to restore approximately \$13,700 in unremitted contributions and lost opportunity costs to the plan. The defendants failed to pay the judgment, and the Secretary filed a judgment lien on England's property. Philadelphia Office

Solis v. Estate of John Buckingham (D. Md.)

On December 5, 2012, the Secretary filed a complaint against the Estate of John Buckingham, Thomas Buckingham and Sun Control Systems, Inc., alleging multiple violations arising from the defendants' mismanagement of the company's Profit Sharing Plans and 401(k) Plan. John Buckingham was the plans' trustee until Thomas Buckingham succeeded him as trustee on January 21, 2010. The complaint alleges that the defendants authorized multiple withdrawals from the plans' bank accounts to pay operating expenses and repay debts incurred by Sun Control and that they failed to remit and to timely remit employee contributions. Thomas Buckingham is also liable because he failed to correct this when he became sole trustee in 2010. The complaint seeks restitution of approximately \$175,000, the appointment of an independent fiduciary to manage and oversee the plans, and a permanent injunction barring Thomas Buckingham and Sun Control from serving as fiduciaries to any ERISA-covered plan. In November 2012, Thomas Buckingham filed for Chapter 7 bankruptcy protection. On April 11, 2013, the Secretary filed an adversary complaint in that bankruptcy proceeding, alleging that his debt to the plans was non-dischargeable and obtained a default judgment against him on August 2, 2013. On August 16, 2013, Thomas Buckingham moved to vacate that judgment, and thereafter the parties agreed to stay the adversary case. The court scheduled a status conference on the stay request for February 2014. Neither Thomas Buckingham nor the company filed answers to the Secretary's district court complaint, and on May 10, 2013, at the Secretary's request, the clerk of the court entered a default as to the two defendants. On August 20, 2013,

the Secretary moved for entry of a default judgment against Thomas Buckingham and the company. The Secretary and the estate of defendant John Buckingham entered into a consent judgment, which provides for the estate to restore \$80,628 to the plans and for removal of the current fiduciaries and appointment of an independent fiduciary to terminate the plans. The Secretary filed a motion to approve that consent judgment on November 13, 2013. See also Solis v. Estate of John Buckingham, Section B.3. Miscellaneous. Philadelphia Office

Solis v. Explore General, Inc. (E.D. Cal.); Solis v. Gonzalez (In re Gonzales) (Bankr. E.D. Cal.); Gonzales v. Solis (9<sup>th</sup> Cir. BAP Cal.)

On June 25, 2010, the Secretary filed a complaint against Jaime M. Gonzalez, Paul Gong and Explore General, Inc., fiduciaries of the company's 401(k) Profit Sharing Plan. The complaint 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, which the court granted on December 22, 2011, finding that Explore General and Gonzales were liable for \$519,601.14 in plan losses, enjoining them from future fiduciary service to any ERISA-covered plan, and ordering that an independent fiduciary be appointed. On April 26, 2012, Gonzales filed for Chapter 7 bankruptcy and, on July 26, 2012, the Secretary filed an adversary complaint seeking a determination that the debt due the plan, as determined by the district court proceeding, is non-dischargeable. On December 20, 2012, the Secretary filed a motion for summary judgment in the bankruptcy proceeding, asserting that all the necessary elements to establish defalcation were decided in the district court action and the defendant should be precluded from re-litigating the issues. On February 5, 2013, the bankruptcy court granted the Secretary's motion for summary judgment, finding that the final judgment entered against Gonzalez in Solis v. Explore General, Inc. is a non-dischargeable debt. On February 12, 2013, Gonzales filed a notice of appeal to the Bankruptcy Appellate Panel. Thereafter, the parties agreed to resolve the matter and, on August 20, 2013 and September 5, 2013, the bankruptcy court and district court, respectively, entered amended judgments, which reduce the debt due the plan to \$250,000 plus interest, find that it is non-dischargeable and provide for the appointment of an independent fiduciary. The parties agreed that the amount due the plan shall be restored under a payment plan and if Gonzales defaults under the plan, he will be liable to restore to the plan the original judgment of \$519,601.14 plus interest. San Francisco Office

Harris v. Fahnlander (D. Minn.)

On August 27, 2013, the Secretary filed a complaint against the fiduciaries of the Sister Rosalind Gefre Employee Retirement Plan, alleging that Sister Rosalind Gefre Schools and Clinics of Massage, Inc. and its president and part owner, Peter Fahnlander, failed to remit and timely remit employee contributions to the plan resulting in losses of \$28,610. The complaint also alleged that, Larry Hanson, the named trustee, failed to ensure that plan assets were remitted and timely remitted to the plan. The complaint seeks restoration of employee contributions and lost opportunity costs, as well as an injunction barring the individuals from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan. Chicago Office

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

On September 17, 2013, the Secretary filed a complaint against Industrial Surfacing Corp. Inc. and Rodger D. Ferguson, the company's owner, alleging that they failed to remit \$47,636 in employee retirement contributions to the company's 401(k) Plan from May 28, 2010 through April 18, 2011. The complaint seeks restoration of the employee contributions and lost opportunity costs and an injunction barring Ferguson and Industrial Surfacing from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan. Chicago Office

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

On January 9, 2013, the Secretary filed a complaint against Thomas Fernandes, fiduciary of the Air Gage Company 401(k) and Health Care Plans, seeking payment of employee contributions and loan repayments that not forwarded to the plans timely, if at all. On June 10, 2013, the court entered a consent order and judgment ordering Fernandes to pay \$11,143.21 to the plan participants. Once payment has been made, Fernandes will be removed as fiduciary of the plan and will be permanently enjoined from service as a fiduciary or service provider to any ERISA-covered plan. Cleveland Office

Solis v. First Restoration Services (W.D.N.C.)

On December 13, 2012, the Secretary filed a complaint against First Restoration Services and Frank Headen, alleging that they failed to remit \$27,637.00 in employee contributions to the company's 401(k) Retirement Plan between April 2008 and September 2008. Since the complaint was filed, some losses have been restored to the plan. Through negotiations, the Secretary achieved restitution of all losses to the plan, except those contributions due to Frank Headen, the company's owner. The Secretary entered into a consent judgment to terminate the plan and permanently enjoin the company and Headen from serving as a fiduciary, trustee, or service provider to any ERISA-covered plan and from violating ERISA in the future. The Secretary also reached a stipulation of settlement with former plan trustee, T. Lynne Blevins, in which she agreed to refrain from violating ERISA and from serving as a fiduciary, trustee, or service provider to any ERISA-covered plan. Atlanta Office

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

On August 29, 2013, the Secretary filed a complaint against David Fisher and Fisher & Partners Structural Engineers, Inc., alleging that they failed to remit \$9,640.96 in employee salary contributions to the company's SIMPLE IRA Plan from January 1, 2008 through December 31, 2008, failed to timely remit \$1,605.24 in employee salary contributions to the plan from August 15, 2008 through March 31, 2009, and failed to collect \$21,852.94 in employer contributions owed to the plan from December 31, 2008 through January 1, 2011. On September 17, 2013, the court entered a consent judgment ordering the defendants to restore \$33,409.80 to the plan, removing them as fiduciaries, and enjoining them from acting as fiduciaries or service providers to ERISA-covered plans. Chicago Office

Harris v. Forms Plus Inc. (N.D. Ala.)

On August 30, 2013, the Secretary filed a complaint against J. Len Howell and Forms Plus Inc. for failing to remit employee contributions to the Forms Plus Inc. Money Purchase Pension Plan. The lawsuit seeks restitution, along with lost earnings, removal of Howell as a plan fiduciary,

and a permanent injunction preventing Howell from serving as a fiduciary to any ERISA-covered plan. Atlanta Office

Perez v. F.V. Zanetti, Inc. (D. Conn.)

On December 5, 2013, the Secretary filed a complaint against F.V. Zanetti, Inc. and Robert Zanetti, as fiduciaries of the F.V. Zanetti, Inc. Prevailing Wage Plan, alleging that they failed to take measures to collect prevailing wage fringe benefit contributions due to the plan. Robert Zanetti acknowledges that monies are due to the plan. The Department found that \$14,609.00 is owed to the non-fiduciary participants. Boston 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 failing to remit to the plan \$103,841 in employee contributions. Since the Secretary's complaint was filed, some losses were restored to the plan. On May 20, 2013, the court approved a consent judgment with Cameron Garrison and the company, permanently enjoining Cameron Garrison from acting as a fiduciary to any ERISA-covered plan. During negotiations for the consent judgment, Garrison paid \$115,981.45 in restitution for all losses to the plan. In addition, Garrison Enterprises agreed to ensure that all fiduciaries to the plan receive six hours of fiduciary education. Atlanta Office

Perez v. Gold (D. Colo.)

On August 1, 2013, the Secretary filed a complaint against Matthew Gold and Todd Gold, the fiduciaries of the Streamline Inc. Employee Savings Trust, alleging that they failed to ensure the timely and complete remittance of employee contributions and loan repayments and, among other things, failed to effect plan account distributions in a timely manner and make arrangements to terminate the accrual of unnecessary service provider fees. The Secretary seeks recovery of plan losses associated with the unremitted employee contributions as well as unnecessarily incurred administrative fees. Denver Office

Perez v. Goldsmith, Prest & Ringwall, Inc. (D. Mass.)

On October 31, 2013, the Secretary filed a complaint against Calvin R. Goldsmith, Bruce D. Ringwall, and Goldsmith, Prest & Ringwall, Inc. (GPR), as fiduciaries to GPR's SIMPLE IRA Plan, alleging that they failed to remit \$71,855 in employee contributions due to the plan and did not collect \$26,628 in employer contributions owed to the plan beginning in 2008. On November 1, 2013, the court entered a consent judgment in which the fiduciaries agreed to pay the plan \$90,288.91, representing all principal and lost earnings owed to non-fiduciary plan participants, and also agreed to pay post-judgment interest, for a total payment of \$93,912.12 to the plan. Boston Office

Perez v. Grandy (W.D.N.Y.)

On October 23, 2013, the Secretary filed a complaint against Darryl Grandy, the trustee of the Syracuse Lithographing Co. Employees Profit Sharing Retirement Plan, alleging that he failed to remit over \$20,000.00 in employee contributions between 2009 and 2011. On January 24, 2014, the court approved a consent judgment providing for restitution of \$20,063.03 in employee contributions and \$2,625.00 in lost interest. New York Office

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

On July 8, 2011, the Secretary filed a complaint against Jeff Hagstrom, Daniel Elofson, and Mirror Factory, Inc., fiduciaries of the company's 401(k) Plan, alleging that they 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. On March 5, 2012, the court entered a default judgment ordering full restoration of the losses owed the plan. Elofson filed for bankruptcy on December 28, 2012. On March 22, 2013, the Secretary filed an adversary complaint in Elofson's bankruptcy proceeding, seeking to exempt his debt to the plan from discharge in bankruptcy. On June 25, 2013, the judge entered a default judgment finding Elofson's debt non-dischargeable. On May 9, 2013, Hagstrom filed for bankruptcy. On September 30, 2013, the Secretary filed an adversary complaint in Hagstrom's bankruptcy proceeding, seeking to exempt his debt to the plan from discharge. On October 29, 2013, the judge entered an order finding Hagstrom's debt non-dischargeable. Chicago 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. Resolution of this case was contingent on the sale of Stainless Steel Fabricating's assets through its Chapter 11 liquidation bankruptcy case which was filed on November 19, 2010 and closed in September 2012. The assets that were sold through the liquidation were not sufficient to restore all losses, so the civil action continued. On June 9, 2013, the court entered a consent judgment requiring Hall to restore \$32,463 to the plan, less the amount owed to him, requiring him to restore \$1,314 in unremitted health plan contributions to affected health plan participants, and permanently enjoining him from serving as a service provider or fiduciary to any ERISA-covered plan. Chicago 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 in district court 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, 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, Donne had filed a motion to dismiss, arguing that the private case should be dismissed because JET's receiver and the Department are

not named parties 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. The court agreed with the Secretary that the Department was not a necessary party to the private case and that a decision issued in that case would not be binding on the Department, and said that recovery in one suit would be considered in determining damages in a second suit. On May 30, 2012, the Secretary obtained a consent judgment against Donne, requiring him to restore \$570,983 to the plan. At the time of the court's entry of the judgment, the parties understood that the judgment amount would be funded through proceeds from a private lawsuit in which JET prevailed. Thereafter, a third party claimed title to the funds in a separate state court action. The Secretary did not intervene in this state action but appeared and participated in mediation. Ultimately, the parties agreed the Secretary would get a majority of the funds, and the Secretary agreed to amend the judgment amount from \$450,000 to \$312,240.44; the amended judgment also required Donne forfeit his entire plan account. The stipulated amendment to the judgment also appoints an independent fiduciary, replacing Dell Donne. On June 28, 2013, the Secretary filed a Satisfaction of Judgment as to Donne. Los Angeles Office

Solis v. Harlow (D. Mass.)

On January 11, 2013, the Secretary filed a complaint alleging that Warren C. Harlow and Electro-Freeto Manufacturing Co., fiduciaries of the company's SIMPLE IRA Plan, failed to remit employee contributions of approximately \$6,600 to the plan from June 2008 through February 2011 when the company ceased operations. A default judgment was entered against Warren Harlow on September 10, 2013 and against the company on November 11, 2013. Boston Office

Solis v. Harris (D. Minn.)

On December 19, 2012, the Secretary filed a complaint against Michael Harris, fiduciary of the Faribault Woolen Mills, Inc. Fully Insured Hospital Life Welfare Plan, alleging that he failed to ensure that \$55,041 in employee contributions were remitted to the plan from January 9, 2009 through March 20, 2009. Chicago Office

Solis v. Hartford Construction Group, LLC (N.D. Ga.)

On December 28, 2012, the Secretary filed a complaint against The Hartford Construction Group LLC and Travis Donnelly, alleging that they failed to forward employee contributions to the company's 401(k) Plan and Group Health Plan, resulting in 401(k) Plan losses totaling at least \$3,400 and losses to Group Health Plan participants totaling about \$4,905.33 plus \$20,000 in denied health benefits. The Secretary moved for entry of clerk's default, which was granted on April 24, 2013. The Secretary then moved for entry of default final judgment on June 17, 2013, which was granted on June 25, 2013. The final judgment permanently enjoins Donnelly from serving as a fiduciary to an ERISA-covered plan, and requires Donnelly and the company to restore \$3,954.12 to the 401(k) plan and \$4,905.33 to the Group Health Plan. On August 21, 2013, the court granted the Secretary's request for appointment of an independent fiduciary. Atlanta Office

Solis v. Hartmann (N.D. Ill.); In re Bruce Hartmann (Bankr. N.D. Ill)

On January 8, 2010, the Secretary filed a complaint in district court 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 participant contributions and loan repayments between January 1, 2009 and February 8, 2009. 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. On February 12, 2012, the Secretary filed an adversary complaint in the bankruptcy court against Bruce Hartmann, seeking to have his approximately \$3 million debt to the plans declared non-dischargeable. On August 31, 2012, the district court issued a fully favorable summary judgment opinion finding that the defendants had committed numerous fiduciary breaches. As of December 15, 2013, the parties had reached a settlement in principle in both the district court and bankruptcy court matters and were working to draft a consent judgment. Chicago Office

Solis v. Harvey, Pennington Ltd. (E.D. Pa.)

On August 22, 2012, the Secretary filed a complaint against Harvey, Pennington Ltd., and plan trustees Ernest Bernabei, and Frederick Walton for failure to remit and to timely remit elective salary deferrals and loan repayments to the law firm's 401(k) Plan beginning in 2005. As of May 2012, the plan had lost nearly \$100,000 as a result of the alleged fiduciary breaches. Prior to the filing of the complaint, the fiduciaries restored much of the amount due. After the complaint was filed and all amounts due were restored to the plan, the parties entered into a consent judgment, which was entered on March 11, 2013. The consent judgment requires the company to retain at its expense an independent fiduciary with responsibility for monitoring employee contribution remittances to the Plan for a minimum of five years and requires all future employee contributions to the Plan to be remitted no later than the seventh business day following the day on which the funds are received or would otherwise have been payable to the participants. The consent judgment also removes Bernabei and Walton as Plan fiduciaries and permanently enjoins them from serving as ERISA fiduciaries. Philadelphia Office

Perez v. Hathaway (D. Md.)

On November 1, 2013, the Secretary filed a complaint against William Kristen Hathaway, alleging that he failed to forward employee contributions and loan repayments to the Baltimore Behavioral Health 403(b) Plan. The complaint alleges that beginning in January 2007, the company, which is in Chapter 7 bankruptcy, and Hathaway failed to timely remit employee contributions to the plan and ceased to remit employee contributions altogether between October 2009 and April 2010. Arlington Office

Perez v. Hayes (Bankr. N.D. Ohio)

On October 8, 2013, the Secretary filed an adversary complaint in the bankruptcy case of Clark Hayes. The Secretary alleges that losses to the Applied Technology Systems, Inc. Retirement Plan that occurred as a result of Hayes' failure to remit employee contributions to the plan are non-dischargeable in bankruptcy. Cleveland Office

Harris v. Hirst (D. Del.)

On August 21, 2013, the Secretary filed a complaint alleging that from January 2009 through December 2011, Progressive Services, Inc. and Michael and Peg Hirst failed to deposit elective employee contributions and loan repayments and failed to contribute mandatory employer safe harbor contributions to the company's 401(k) Plan. On September 4, 2013, the court approved a consent judgment in which defendants agreed to restore \$70,735.42 to the plan, and the plan was required to allocate this amount to plan participants other than the Hirsts. Philadelphia Office

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

On September 24, 2012, the Secretary filed a complaint in district court against Scott Horning, the fiduciary of the Summit Mechanical, Inc. SIMPLE IRA Plan. On January 15, 2013, the district court granted the Secretary's motion for default judgment and ordered Horning to pay \$19,659.48 within 30 days of the order and enjoined Horning from violating ERISA or from serving as a fiduciary in the future for any other ERISA-covered plan. Prior to filing the civil action, the Secretary had obtained an order from the bankruptcy court on October 5, 2010, declaring Horning's \$19,659.48 debt non-dischargeable. Kansas City Office

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

On December 28, 2011, the Secretary filed a complaint against Glen Hostetler, Julie Hostetler, and Hostetler Door, Inc., alleging that they failed to remit \$21,552.07 in employee contributions and \$14,885.90 in participant loan repayments and untimely remitted \$117,233.18 in employee contributions and \$36,557.45 in participant loan repayments to the company's 401(k) Plan. On May 28, 2013, the court entered a consent judgment finding that the defendants were jointly and severally liable, they had paid \$34,572.95 to the plan, and they waived their rights to losses owed to them as participants in the plan. The court also ordered them removed as fiduciaries to the plan, permanently enjoined them from serving as a fiduciary or service provider to any ERISA-covered plan, and ordered the appointment of an independent fiduciary to administer and terminate the plan. Chicago Office

Solis v. Innovative Logistics Techniques, Inc. (E.D. Va.)

On November 11, 2012, the Secretary filed a complaint against Innovative Logistics Techniques, Inc. for failure to forward employee contributions to the company's 401(k) plan between January 2007 and April 2011, and for using plan assets to pay for fees that were unrelated to the provision of benefits under the plan and not reasonable expenses incurred in administering the plan. The complaint seeks restoration of all losses and a permanent injunction barring the company from serving as an ERISA fiduciary. On July 10, 2013, the court entered a consent judgment in which Innovative agreed to restore \$133,568.07 to the plan and to pay the costs and expenses related to hiring an independent fiduciary to oversee and administer the plan. On September 5, 2013, Innovative filed a suggestion of bankruptcy with the court. At the time of

the bankruptcy filing, Innovated had made only a partial payment of the restitution due to the plan. On December 13, 2013, the Secretary filed a motion to amend the consent judgment to allow the cost of the independent fiduciary to be paid by the plan. On December 31, 2013, the court entered an order granting the Secretary's motion. See also Solis v. Innovative Logistics Techniques, Inc., Section B.3. Miscellaneous. Philadelphia 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) Plans 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. On April 18, 2013, the court entered a consent judgment ordering Jones to waive all amounts he is owed and reallocate his individual account balance to restore the remaining \$19,878 owed to the 401(k) Plan and to restore \$1,533 to the Benefit Plan. Jones was also permanently enjoined from violating ERISA. Cleveland Office

Harris v. Kalucha (D.D.C)

On May 21, 2013, the Secretary filed a complaint and consent judgment against Vineet Kalucha as a result of his failure to honor the terms of a settlement agreement with the Secretary by which he was required to restore \$20,834.08 to the Q Know Technologies, Inc. 401(k) Plan. Pursuant to the settlement executed on March 28, 2013, Kalucha, a former trustee of the plan, agreed that if he did not restore the money to the plan in accordance with the parties' settlement agreement, the Secretary could file a complaint and consent judgment against him in the district court. The complaint alleged that between January 2006 and April 2008, Q Know Technologies, Inc. failed to deposit, or failed to deposit in a timely manner, certain employee contributions into the plan. On May 22, 2013, the court entered a consent judgment requiring Kalucha to restore \$20,834.08 to the plan within ten days and then allocate and distribute the restitution to plan participants. Thereafter, Kalucha was removed from all fiduciary positions with the plan and permanently enjoined from serving as a fiduciary to any ERISA-covered plan. He also was required to pay and not contest the penalty provided for under ERISA Section 502(l). Philadelphia Office

Perez v. Kephart (W.D. Pa.)

On December 19, 2013, the Secretary filed a complaint against Timothy Kephart, David Kephart, and Kephart Trucking Company alleging that they failed to forward employee contributions and loan repayments to the company's 401(k) Plan beginning in September 2011. The case has been designated for mandatory Alternative Dispute Resolution. Philadelphia Office

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

On February 28, 2013, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was significantly delinquent under the terms of the payment plan provided for in the consent judgment. On March 14, 2013, the Secretary withdrew the petition for civil contempt following Sampson's tender of approximately \$11,000 that was past due. The Secretary's district court complaint, filed on November 15, 2010 against Kineticsware, Inc., Jeffrey Sampson and Richard Barnett, alleged that they 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 Sampson's Chapter 7 bankruptcy case, 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 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. See also Solis v. Kineticsware, Inc.; Solis v. Sampson (In re Sampson), Section M. Contempt and Subpoena Enforcement. Seattle Office

Harris v. KIP Corporation Inc. (W.D.N.C.)

On March 28, 2013, the Secretary filed a complaint against Moniquea Scott, Eugene Kiser, and KIP Corporation, alleging that they failed to remit employee contributions and failed to collect employer contributions on behalf of the company's Retirement Savings Plan. The total losses to the plan were approximately \$85,142.00, plus lost earnings, all or most of which have been paid since the complaint was filed. Atlanta Office

Perez v. LeBlanc (N.D. Tex.)

On June 28, 2013, the Secretary filed a complaint against David LeBlanc and Chris LeBlanc in an effort to recover \$18,904 in employee retirement contributions and employee-paid premiums for medical and disability insurance coverage. The complaint alleges that during the last three months of the hospital's operations, the LeBlancs used employee retirement contributions and insurance premium payments to run the hospital and pay creditors. At the time of the violations, approximately 56 employee participants were affected by the missing retirement contributions and insurance premium payments. The Secretary seeks a court order requiring the defendants to restore all plan losses and permanently barring the LeBlancs from serving an ERISA-covered plan in any capacity in the future. Dallas Office

Perez v. Lehman (E.D. Wis.)

On April 26, 2013, the Secretary filed a complaint against Jane E Lehman and Teletrans Services, Inc., the fiduciaries of the company's Savings and Retirement Plan, alleging that they failed to remit \$35,077 in participant contributions to the plan from May 31, 2007 to September 20, 2009, failed to ensure that participant contributions were timely remitted from October 31, 2007, to March 31, 2008, and failed to ensure that participant loan repayments were timely remitted from August 31, 2009, through November 30, 2010. The Secretary seeks restoration of all losses and an injunction barring the defendants from serving as a fiduciaries or service providers to any ERISA-covered plan. Chicago 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. On January 11, 2012, the bankruptcy court approved the parties' stipulation that Levy's debt is non-dischargeable. On May 10, 2013, the court entered a consent judgment finding that Levy violated his ERISA fiduciary duties and had restored \$11,029.57 to the plan, representing the full amount owed, and ordering him permanently enjoined from violating ERISA. Chicago Office

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

On June 22, 2011, the Secretary filed a complaint against Life Care Hospice, Inc. and plan trustee Todd Adkison, for untimely remitting about \$66,664.08 in participating employee contributions and loan repayments to the company's Retirement Trust from January 1, 2005 through December 31, 2008. The complaint also alleges that on or around April 12, 2008, Life Care completely ceased remitting employee contributions and loan repayments to the plan and that from April 12, 2008 through November 29, 2008, Life Care failed to remit about \$2,284.03 in employee contributions. On June 6, 2012, the Department filed a motion for default judgment as to Adkison. The court granted the Secretary's motion for default judgment on March 29, 2013, ordering Adkison to restore all losses to the plan, barring him from serving as a fiduciary to an ERISA-covered plan, and appointing an independent fiduciary to administer and wind down the plan. Atlanta Office

Solis v. Lifecare of Alabama (N.D. Ala.)

On June 14, 2012, the Secretary filed a complaint against LifeCare of Alabama, Inc. and Susan Clingman-Banks, alleging that they failed to remit and timely remit employee contributions to the company's 401(k) Plan. The December 9, 2013 consent order and judgment found that Lifecare and Clingman-Banks caused \$63,934.69 in plan losses, plus \$14,945.88 in lost earnings through November 30, 2013. The court ordered defendants to restore \$39,000 to the plan by January 15, 2014 and the remaining balance and accrued interest by March 15, 2014, permanently enjoined them from violating ERISA and from serving as fiduciaries or service providers to any ERISA-covered plan, and appointed an independent fiduciary for the plan at defendants' expense. Atlanta Office

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

On April 12, 2013, the Secretary filed a complaint against John Loderbauer and Hamilton Financial Equipment, Inc., alleging that from January 1, 2008 through July 31, 2009, the defendants failed to remit \$8,890.38 in employee salary contributions to the company's SIMPLE IRA Plan. On October 2, 2013, the court entered a default judgment ordering the defendants to restore \$10,592.29 in unremitted employee contributions and lost opportunity costs, removing them as fiduciaries, and permanently enjoining them from acting as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

Harris v. Losik (E.D. Wis. and Bankr. E.D. Wis.)

On May 3, 2013, the Secretary filed a complaint against Michael Losik, alleging that Losik breached his fiduciary duties by improperly distributing approximately \$360,000 to himself from the Losik Engineering Design Group Ltd. Defined Benefit Plan. On February 22, 2013, the Secretary also filed an adversary complaint in Losik's personal bankruptcy seeking a finding that the debt owed the Plan was non-dischargeable. On February 26, 2013, the bankruptcy court entered an order finding the debt to the plan non-dischargeable. On June 7, 2013, the district court judge entered a consent judgment ordering Losik to restore \$225,000 to the plan, permanently enjoining him from violating ERISA, removing him from his position as a fiduciary to the plan, and permanently enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan. The court also ordered the appointment of an independent fiduciary to terminate the plan and distribute approximately \$150,000 in plan assets. Chicago Office

Solis v. Louis & Riparetti, Inc. (N.D. Cal.)

On April 10, 2012, the Secretary filed a complaint against Louis & Riparetti, Inc. and Darrel Wayne Louis, alleging that, from March 2007 through September 2009, they failed to collect and remit approximately \$200,000 in prevailing wage contributions and failed to remit and untimely remitted employee contributions to the company's Retirement Plan, causing approximately \$45,000 in plan losses, plus lost opportunity costs. San Francisco Office

Harris v. Lunsford (S.D. Ill.)

On January 31, 2013, the Secretary filed a complaint against Paul Lunsford and Lunsford Architects, Inc., fiduciaries of the company's Safe Harbor 401(k) Plan, alleging that they failed to remit \$5,335.28 in employee contributions to the plan from January 1, 2008 to July 7, 2009. Pursuant to their agreement with the Secretary, prior to entry of the consent judgment, the defendants restored \$6,367 to the plan. On June 4, 2013, the court entered a consent judgment ordering Lunsford to terminate the plan and permanently enjoining him from serving as a service provider or fiduciary to any ERISA-covered plan. Chicago Office

Solis v. M&B Truck Center LLC (N.D. Ala.)

On December 11, 2013, the Secretary simultaneously filed a complaint and consent judgment and order. The complaint alleges that fiduciaries M&B Truck Center, LLC, Dwayne A. Bush, Brian Alismiller and Stephen L. Vance failed to remit employee contributions to the company 401(k) Retirement Plan. Pursuant to the consent judgment and order, Bush and Vance are permanently enjoined from acting as fiduciaries, trustees, agents or representatives in any capacity to an ERISA-covered plan, Bush and Vance restored \$40,252.11 to the plan, and an independent fiduciary was appointed for the plan at the defendants' expense. Atlanta Office

Solis v. Masek (W.D. Mich.)

On October 23, 2012, the Secretary filed a complaint against Timothy A. Masek and Grand Craft, LLC, fiduciaries of the company's 401(k) Plan, seeking payment of employee contributions that were not forwarded to the plan timely, if at all, from January 1, 2008 to April 2009. On May 3, 2013, the court entered a consent order and judgment appointing an independent fiduciary to administer and terminate the plan and ordering Masek to pay for the independent fiduciary's fees and expenses. Cleveland Office

Solis v. Mashali (D. Mass.)

On November 12, 2010, the Secretary filed a complaint against Dr. Fathalla Mashali, 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 for the 2006, 2007 and 2008 plan years. 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 Secretary's motion for withdrawal of reference 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 independent fiduciary was successful in enabling participants to access funds in the 401(k) component of the plan, which funds had been frozen by the third party administrator pending payment of overdue qualified non-elective contributions. Mashali also paid out some employees through settlements in private actions. After determining that Mashali lacks the financial ability to pay the total amount he owes (besides his personal bankruptcy, his licenses to practice medicine were revoked), the Secretary has agreed to enter into a consent judgment which requires Mashali immediately to restore \$100,000 to the plan and to comply with an installment payment plan tied to his ability to pay. Boston Office

Perez v. McCutchin (E.D. Pa.)

On September 19, 2013, the Secretary filed a complaint against Snyder Heating Company, Inc., and trustees Samuel McCutchin and Cynthia Lindenman for failing to remit and timely remit withheld employee contributions to the company's 401(k) Plan from January 2007 through December 2010. Arlington Office

Harris v. Nyanjom (D. Md.)

On July 1, 2013, the Secretary filed a complaint alleging that Pulmonary Disease and Critical Care Associates, P.A. and its owner David Nyanjom, who also served trustee of the firm's 401(k) Plan, and Laura Nyanjom, the firm's practice manager, failed to remit and timely remit employee contributions and loan repayments to the plan during the period November 2006 through April 2012. Philadelphia Office

Solis v. Oakes (W.D. Mich.)

On April 17, 2012, the Secretary filed a complaint against Philip Oakes and Herb's Carpet & Tile, Inc., fiduciaries of the company's SIMPLE IRA Plan, seeking payment of employee contributions that were not forwarded to the plan timely, if at all. On February 4, 2013, the court entered a default judgment against the defendants, ordering Oakes to pay \$6,939.10, including lost opportunity costs, to the individual plan participants. If this is not done within 10 days of the entry of the judgment, the Secretary may set off the amount owed from Oakes' individual plan account. The order also removed the defendants as fiduciaries, enjoined them from violating ERISA, and enjoined them from acting as fiduciaries or service providers to any ERISA-covered plan. Cleveland 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, as fiduciaries of the company's 401(k) Profit Sharing Plan, for failing to remit to the plan \$52,245.64 in employee contributions and \$1,512.90 in participant loan repayments from January 2003 to June 2006. On May 10, 2012, the Secretary obtained an order from the probate court approving the estate's entering into a consent judgment to resolve the district court proceeding. On May 14, 2012, the district court entered a consent judgment requiring the estate to pay \$44,608.94 to the plan, requiring Joyce Olszewski, the executor, to assign to the plan her rights to any monies collected for the estate until all plan losses and opportunity costs are restored, and requiring the appointment of an independent fiduciary with costs paid by the estate. On April 7, 2013, the court entered an order appointing an independent fiduciary. San Francisco Office

Perez v. Orsuto (D.N.J.)

On August 16, 2013, the Secretary filed a complaint against 800 West Salon Inc. and its owner Raymond Orsuto, alleging that from 2007 through 2009, defendants failed to remit approximately \$38,000 in employee contributions and participant loan repayments to the company's 401(k) plan. On January 17, 2014, the court approved a consent order and judgment requiring the appointment of an independent fiduciary, requiring defendants to pay the plan at least \$56,746.66, comprised of \$38,080.94 to individual plan participants, \$13,675.72 in lost opportunity costs, and \$4,990.00 in independent fiduciary fees (plus any additional costs the independent fiduciary may incur), and permanently enjoining the defendants from violating ERISA and barring them from serving as fiduciaries or service providers to an ERISA-covered plan. New York Office

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

On June 29, 2012, the Secretary filed a complaint in the district court against David Scott Owens and his company, Advetech, Inc., seeking payment of employee contributions and loan repayments that were not forwarded to the plan timely, if at all. On December 21, 2011, the Secretary filed an adversary complaint in the bankruptcy court, seeking to have Owens' debt declared non-dischargeable. On March 30, 2012, the Secretary and Owens filed an agreed order, entered on April 2, 2012, deeming his debt non-dischargeable. On May 30, 2013, the court entered a consent order and judgment holding the defendants jointly and severally liable for the \$112,121.24 in losses to the plan. The judgment orders the appointment of an independent fiduciary, and enjoins the Owens from being a fiduciary or service provider to any ERISA-covered plan. Cleveland Office

Solis v. Palmetto Medical Group (D.S.C.)

On February 28, 2013, the Secretary filed a complaint against Palmetto Family Medical Group, P.C., Robert Mack Durham and Sharon Kaye Durham, alleging that the defendants failed to timely remit employee contributions, failed to ensure that safe harbor non-elective contributions were remitted to the company's 401(k) Profit Sharing Plan, and failed to collect employer safe harbor, non-elective contributions. The Secretary seeks an order restoring all plan losses, permanently enjoining defendants from serving as fiduciaries, and appointing an independent fiduciary, if necessary, to terminate the plan and distribute its assets. Atlanta Office

Perez v. Pasdon (S.D.N.Y.)

On November 13, 2013, the Secretary filed a complaint against Mark Pasdon, Oxygen Electronics, LLC, and the company's 401(k) Profit Sharing Plan, alleging that the defendants failed to remit over \$23,000 in employee contributions to the 401(k) Plan. Defendants did not file an answer or otherwise respond to the complaint, and the Secretary requested entry of default against them on December 18, 2013. New York Office

Perez v. Pazdar (D. Conn.); Perez. v. Trahan (D. Conn.)

The Secretary filed a complaint against Thomas M. Trahan on May 16, 2013 and against Stephen T. Pazdar on September 4, 2013, alleging that as co-owners of the now-defunct Steel Fab, Inc., and fiduciaries of the company's 401(k) Employee Savings Plan, they allegedly failed to remit \$30,430.00 in employee deferred contributions and loan repayments to the plan. Trahan never answered, and the Department moved for a default judgment. Boston Office

Perez v. Ramsburg (E.D. Pa.)

On August 29, 2013, the Secretary filed a complaint alleging that TMR, Inc. and its owner, Thomas Ramsburg, who also served as the trustee of the company's 401(k) Plan, failed to remit and timely remit participant loan repayments to the plan during the period January 2008 to January 2011. On August 30, 2013, the Secretary filed a motion for approval of the parties' consent judgment, which requires defendants jointly and severally to pay \$13,486 in restitution to the plan for the late and missing loan repayments and lost opportunity costs of \$4,579.62, as well as a penalty of \$3,613.28 in accordance with Section 502(l) of ERISA. The consent judgment also permanently enjoins the defendants from serving as fiduciaries to any ERISA-covered plan. Philadelphia Office

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

On October 5, 2012, the Secretary filed a complaint in district court against Tracy S. Randall and TS Randall Company, LLC, fiduciaries of the company's Retirement Savings Plan, alleging that the fiduciaries failed to remit and timely remit employee salary contributions to the plan between Oct. 21, 2008 and July 26, 2011. On October 2, 2012, the Secretary filed an adversary complaint in bankruptcy court against Randall to have his debt to the plan declared non-dischargeable. On March 22, 2013, the bankruptcy court entered a default judgment holding that Randall's \$4,881.17 debt to the plan is non-dischargeable. On May 20, 2013, the district court entered a default judgment ordering the defendants to restore \$5,013 to the plan and permanently enjoining Randall from violating ERISA and from serving as a fiduciary or service provider to any ERISA-covered plan. Cleveland Office

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

On September 14, 2012, the Secretary filed a complaint against Charles Red, Jr. for failing to remit \$9,485.91 in employee contributions to the Etheridge Cabinet Shop, Inc. SIMPLE IRA Plan. The company filed for Chapter 13 bankruptcy and is no longer in operation. The Secretary seeks an order restoring all plan losses, permanently enjoining the defendant from serving as a fiduciary, offsetting the defendant's plan account against the amount of losses, and appointing an independent fiduciary, if necessary, to terminate the plan and distribute its assets. Atlanta Office

Perez v. Replica, LLC (N.D. Ill)

On August 1, 2013, the Secretary filed a complaint against William Morris, Replica, LLC, and Steuber, Morris and Joiners, LLC (SMJ), alleging that Morris and Replica failed to ensure that \$2,640.83 in participant contributions were remitted to the SMJ SIMPLE IRA Plan from September 24, 2010, to May 27, 2011 and failed to ensure that \$6,064.32 in participant health insurance premium contributions were remitted to the SMJ Group Health Plan from February 5, 2010, to June 24, 2011. The complaint also alleges that Morris and SMJ failed to ensure that \$1,496.30 in participant health insurance premium contributions were remitted to the Group Health Plan from June 5, 2009 to August 28, 2009. The complaint seeks an order requiring restoration of plan losses, the correction of prohibited transactions and the disgorgement of any profits received from the fiduciary breaches. The complaint also seeks the removal of the defendants from their positions as fiduciaries of both plans, and a permanent injunction barring them from acting as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

Perez v. Rodabaugh (W.D. Ky.)

On November 12, 2013, the Secretary simultaneously filed a complaint and consent judgment and order against Andrew Clyde Rodabaugh, the owner and president of A.R.E. Machine Products Inc. and a fiduciary of the company's 401(k) Retirement Plan. The complaint alleges that he failed to remit participant elective salary deferrals to the plan and failed to remit other deferrals in a timely manner, resulting in \$11,969 in losses. On November 18, 2013, the court entered an order approving the consent judgment and order, which requires that \$11,969 be restored to the plan from Rodabaugh's individual plan account, requires Rodabaugh to distribute the plan assets to the participants and terminate the plan, and enjoins him from serving as a fiduciary in the future. Cleveland Office

Solis v. Rothstein Rosenfeldt and Adler (S.D. Fla.)

On December 6, 2012, the Secretary filed a complaint against Scott Rothstein and Rothstein Rosenfeldt Adler P.A., alleging that they failed to remit employee contributions to the firm's 401(k) Plan. The complaint seeks restoration of all losses including lost earnings, a permanent injunction barring the defendants from serving as fiduciaries to any ERISA-covered plan, and the appointment of an independent fiduciary to administer the plan. Through the bankruptcy of the firm, the plan recovered approximately \$317,000, as a result of which the Secretary filed a joint stipulation dismissing the firm from the case. Rothstein has not answered the complaint, so the Secretary will pursue default against him. Atlanta Office

Perez v. Schneider (W.D. Mo.)

On December 6, 2013, the Secretary filed a complaint against Stephen Schneider, President, CEO, and sole owner of Pinnacle Telemarketing, Inc. The lawsuit alleges that Schneider, as trustee of the company's 401(k) Plan, failed to timely remit \$7,456.94 in employee contributions and \$478.59 in loan repayments to the plan. The Secretary asks that the court order Schneider to restore plan losses, including lost interest earnings, remove Schneider as fiduciary to the plan, and permanently enjoin Schneider from violating ERISA. Kansas City Office

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

On August 3, 2012, the Secretary filed a complaint against Joseph Seher, Pat Mowery and Cheryl Sloan, alleging that they failed to remit \$7,425.64 in employee contributions to the Accucast Technology, LLC 401(k) Plan. The complaint further alleged that Seher failed to remit \$2,546.00 in employee contributions to the company's Health Plan. On August 3, 2012, the Secretary, Mowery, and Sloan filed a consent order and judgment that recovered all monies owed to the 401(k) Plan. On October 23, 2012, the Secretary filed a motion for default judgment against Seher for the money owed to the Health Plan. On February 15, 2013, the court entered a default judgment against Seher. Chicago 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. and J. Brant Singley and Bradley Weiss, who were trustees of the company's 401(k) Plan, for failing to remit in excess of \$20,000.00 in employee contributions to the plan and for untimely remitting certain contributions without interest. On March 20, 2012, the court entered a consent order and judgment requiring Singley to restore over \$23,000 in unremitted contributions and lost opportunity costs to the plan, and a default judgment and order finding Weiss liable for over \$26,000 in plan losses and the cost of an independent fiduciary. Pursuant to the court's order, an independent fiduciary was appointed, and Weiss was removed as trustee and permanently barred from serving as a fiduciary to any ERISA-covered plan. On August 8, 2012, the Secretary filed a motion for contempt against Singley for his failure to pay restitution to the plan. In October 2012, Singley died. On November 19, 2012, the Secretary filed a Statement Noting a Party's Death, informing the court of Singley's death. On February 15, 2013, the Secretary filed a Notice of Withdrawal Without Prejudice of Motion for Adjudication of Civil Contempt. See also Solis v. J.M. Singley and Associates Inc., Section L. Orphan Plans and Solis v. Singley and Associates, Inc., Section M. Contempt and Subpoena Enforcement. Philadelphia Office

Harris v. Sippola (N.D. Ohio)

On June 27, 2013, the Secretary filed a complaint against Richard Sippola, alleging that he failed to remit and timely remit employee contributions to the Carnegie Body 401(k) Retirement Plan between March 13, 2009, and January 10, 2010, causing a loss of approximately \$11,000. The complaint seeks the restoration of all losses to the plan, disgorgement of any profits, and a permanent injunction against Sippola barring him from violating ERISA and serving as a fiduciary or service provider to an ERISA-covered plan. Cleveland Office

Solis v. Smart Technology, Inc. (E.D. Va.)

On March 14, 2012, the Secretary filed a complaint against Smart Technology, Inc. and Shawn Hedgspeth for failure to forward employee contributions to the company's 401(k) retirement plan between January 2007 and January 2009. On October 11, 2012, the court entered a default judgment in the amount of \$28,712.13 and ordered the defendants to restore the losses to the plan and to take steps to terminate the plan and distribute its assets. The court further ordered that, following the termination of the plan, both defendants would be permanently enjoined from serving as trustees, fiduciaries, advisors or administrators to any ERISA-covered plan. The defendants failed to pay the judgment, and the Secretary filed a judgment lien on defendant Hedgspeth's property. Philadelphia Office

Perez v. Snyder (N.D. Ohio)

On November 7, 2013, the Secretary filed a complaint against Charles David Snyder, Joseph Burmester, Cirric, Inc., and Ruralogic, Inc. The complaint alleges that the defendants failed to remit and timely remit employee salary contributions and loan repayments to the Attevo 401(k) Retirement Plan between January 31, 2009 and July 2, 2012, causing losses of approximately \$123,000. The complaint seeks the restoration of all losses to the plan, a permanent injunction against the fiduciaries barring them from violating ERISA and serving as fiduciaries or service providers to an ERISA-covered plan, and the appointment of an independent fiduciary to terminate the plan. Cleveland Office

Harris v. Sonoran Commercial Group, L.L.C. (D. Ariz.)

On April 1, 2013, the Secretary obtained a consent judgment against Margaret Phillips in connection with failure to remit contributions to the Sonoran Commercial Group LLC 401(K) Plan. The Secretary's complaint, filed on October 12, 2012, alleged that the company, Kevin Tomkeil, and Margaret Phillips failed to remit employee contributions and failed to collect and deposit mandatory employer contributions to the plan from March to December 2007, causing about \$26,000 in losses to the plan. The consent judgment provides, among other things, that Phillips is liable for the full \$26,615.30 in losses and that based on her representations in her asset affidavit, the Secretary agreed, at that time, not to bring a collection action for the full amount. It also provides that Phillips must submit an asset affidavit to the Secretary on an annual basis. The Secretary may, at any point, demand full repayment to the plan if Phillips' finances support it. On April 16, 2013, the Secretary dismissed Tomkiel from the lawsuit. In August 2011, the Secretary had obtained non-dischargeability orders in Tomkeil's and Phillips' individual Chapter 7 bankruptcies for the amount owed to the plan. Los Angeles Office

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

On April 30, 2013, the court granted the Secretary's March 28, 2013 motion requesting an order to show cause why Moshe Klein should not be held in contempt for failure to repay approximately \$9,500 to the plan, including interest. Based on documentation received after the show cause filing, the Secretary's notice to withdraw the motion for contempt was filed on July 24, 2013 and entered by the court on July 25, 2013. On February 22, 2012, the Secretary obtained a consent judgment against Sophisticated Technologies and Moshe Klein, requiring them to pay \$48,857.78 to the SophTech 401(k) Plan, pay the Section 502(l) penalty, and pay the costs of an independent fiduciary. The Secretary's complaint, filed on November 15, 2010, alleged that, between January 2001 and 2003, Klein and the company failed to remit to the plan \$26,825 in salary deferrals. See also Solis v. Sophisticated Technologies, Inc., Section M. Contempt and Subpoena Enforcement. San Francisco Office

Solis v. Southeastern Materials (M.D.N.C.)

On October 15, 2012, the Secretary filed a complaint against now-defunct Southeastern Materials, Inc., and fiduciaries Tony M. Dennis, Betty Lambert, and Maria Meyers, alleging that the company, Dennis, and Lambert failed to remit employee contributions and loan repayments to the company's 401(k) Plan. Dennis, Lambert, and Meyers also allegedly failed to remit employee contributions for health insurance premiums to the company's Flexible Benefit Plan, resulting in the termination of the health plan and unpaid health claims of at least \$46,661.39.

The complaint seeks a court order requiring the defendants to restore all plan losses, including lost earnings, offsetting their claims to plan assets against losses, appointing an independent fiduciary to terminate the plans and distribute the assets, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. A motion to approve consent judgment and order was filed on September 3, 2013. Atlanta Office

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

On August 21, 2012, the Secretary filed a complaint in district court against Bruce Spencer, Tannile Ortiz, and Paul Olzeski, fiduciaries of the Spencer & Associates, LLC Profit Sharing and 401(k) Plan, alleging that they failed to remit and timely remit employee contributions between March 7, 2008 and July 11, 2010 and that Spencer terminated the plan and took approximately \$34,000 in plan assets, which he did not distribute to participants. On January 25, 2013, the district court entered a default judgment against Ortiz, ordering her to restore about \$7,000 to participants and waiving an additional \$4,321, which she was owed. On January 26, 2012, the Secretary filed an adversary complaint against Spencer in bankruptcy court to have his debts to the plan declared non-dischargeable. On April 17, 2012, the bankruptcy court entered a default judgment declaring Spencer's debt non-dischargeable. On October 21, 2013, the district court entered a consent order and judgment. The consent judgment provides for Spencer to restore \$12,837 to the plan's participants and for Ortiz to waive the \$4,412 that she is owed as a participant and agree that the \$6,768 that she is owed due to Spencer's fiduciary breaches would be paid directly to other participants. It also provides for Spencer and Ortiz to be permanently enjoined from serving as fiduciaries or service providers to ERISA-covered plans and all three defendants to be permanently enjoined from violating ERISA. Cleveland Office

Perez v. Storrow (S.D. Ind.)

On September 10, 2013, the Secretary filed a complaint against Margaret Storrow and Storrow Kinsella Associates, Inc., fiduciaries of the company's SIMPLE IRA Plan, for failing to ensure that participants' contributions were remitted to the plan from January 1, 2007 through November 21, 2012. The total loss to the plan was approximately \$35,000. Chicago Office

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

On January 18, 2013, the Secretary obtained a consent judgment requiring Shannon Stuart to pay approximately \$10,000 for an independent fiduciary to terminate the SJB 401(k) Plan and distribute its assets. The Secretary's complaint, filed on August 5, 2011, alleged that Shannon Stuart, S.J. Burkhardt, Inc. and SJB Group, Inc. failed to exercise their authority to appoint someone with the responsibility to collect outstanding mandatory employer/prevailing wage contributions or to take any action that would result in the collection of approximately \$291,236 in mandatory employer/prevailing wage contributions due the plan for the period beginning September 2007 and ending September 2008. Los Angeles Office

Solis v. Tele-Optics of Nashville (M.D. Tenn.)

On December 27, 2012, the Secretary filed a complaint against Tele-Optics of Nashville, Inc. and its president, Joseph Grills, for failing to remit employee contributions to the company's 401(k) and Group Health Plans. When the company began experiencing financial difficulties in 2009, it ceased forwarding employee contributions to its 401(k) Plan. Health insurance coverage was terminated in June 2011, but the company continued to withhold employee contributions

from the Group Health Plan. The company declared bankruptcy in 2012. The Secretary seeks to recover about \$32,000 in unremitted contributions and lost earnings and to enjoin Grills from serving as a fiduciary to any ERISA-covered plan. The Secretary filed a motion for default judgment on November 20, 2013. Atlanta Office

Solis v. Themescapes, Inc. (D. Minn.); In re: Themescapes, Inc. (Bankr. 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. On February 13, 2012, the court entered a consent order and judgment requiring the defendants to pay \$101,248 to the plan. On June 14, 2013, Themescapes, Inc. filed for Chapter 11 bankruptcy protection. On August 13, 2013, the Secretary filed a proof of claim in the amount of \$55,677.76 for the unrestored losses owed the company's 401(k) Plan. On December 12, 2013, the Secretary filed a limited objection to the debtor's reorganization plan because the reorganization plan failed to properly identify the plan as the creditor and it inaccurately identified the amount owed to the plan. Chicago Office

Harris v. Track Express Services, Inc. (D.S.C.)

On March 28, 2013, the Secretary filed a complaint against Track Express Services Inc. and Todd Arnold Jr. for allegedly failing to remit employee contributions and COBRA payments, resulting in unpaid health claims and the termination of the Health Plan sponsored by Track Express, and for failing to timely remit the employee contributions on other occasions. The complaint seeks a court order requiring the defendants to restore all losses, appointing an independent fiduciary, and permanently enjoining the defendants from serving as fiduciaries to any ERISA-covered plan. By court order dated November 7, 2013, the parties must engage in mediation prior to April 30, 2014. Atlanta Office

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

On January 25, 2013, the Secretary filed a complaint against Tradition, LLC and Keith Vinson, the company's president and plan trustee, for allegedly failing to remit at least \$10,944.88 in employee contributions and \$6,099.18 in COBRA payments to the company's Group Health Plan from October 24, 2009 through March 24, 2010, resulting in unpaid medical claims of at least \$64,461.89. The complaint seeks a court order requiring the defendants to restore all losses, including any lost earnings, requiring that any of the individual fiduciary's 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 Office

Solis v. Tripp Mechanical (E.D.N.C.)

On January 17, 2013, the Secretary filed a complaint against Tripp Mechanical Services, its owner, Jarvis Edward Tripp, Jr., and its office manager, Gina Tripp, alleging that they failed to remit employee contributions to the company's SIMPLE IRA Plan. The complaint seeks the repayment of the unremitted contributions, lost earnings, and a permanent injunction enjoining the defendants from acting as fiduciaries to any ERISA-covered plan. On June 14, 2013, the court approved a consent judgment requiring defendants to pay to the plan \$8,757.82 in restitution, which includes interest, and permanently enjoining the individual defendants from

violating ERISA and from acting as fiduciaries, trustees, agents or representatives of any ERISA-covered plan. Atlanta Office

Solis v. Wahlco Fabricators, Inc. (N.D. Okla.); Solis v. Wahl (Bankr. 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 company's 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. On May 29, 2012, the Secretary filed an adversary complaint in Ms. Wahl's Chapter 7 bankruptcy to ensure that her debt to the plan would not be discharged. On January 4, 2013, the bankruptcy court entered an agreed order of non-dischargeability of debt. On January 28, 2013, the district court entered a default judgment against Wahlco Fabricators. On August 31, 2013, the court entered a partial consent judgment and order against Ms. Wahl, ordering restitution of \$5,000, civil penalties, and a permanent bar against serving as a fiduciary of an ERISA-covered plan. Dallas Office

Perez v. Walker (M.D. La.)

On August 9, 2013, the Secretary filed suit against Gulf States Staffing and Personnel, LLC and its owner, Gregory Walker, for failing to forward \$87,600.00 in employee premiums to the company's Short Term Disability Plan, Long Term Disability Plan and Dental and Vision Plan and for using the plans' assets for their own benefit. On November 12, 2013, the Secretary obtained a consent judgment and order in which the defendants admitted to the ERISA violations, agreed to a permanent bar against serving as fiduciaries, admitted that their fiduciary breaches constitute defalcation, and agreed that the debt owed to the plans is non-dischargeable in any current or future bankruptcy filed by Walker at any time until October 23, 2023. Dallas Office

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

On May 6, 2011, the Secretary filed a complaint in the district court against Scott Wallis, Ronald Eriksen, and USA Baby, Inc., the fiduciaries of the company's 401(k) Plan and Health Plan, alleging that they failed to ensure that employee contributions and loan repayments were remitted and timely remitted to the 401(k) Plan and failed to ensure that participant contributions were remitted to the Health Plan. On October 14, 2011, the Secretary filed an adversary complaint to have the amounts owed to the 401(k) Plan deemed non-dischargeable in Eriksen's bankruptcy. On June 15, 2012, the bankruptcy court ordered that Eriksen's debt to the plan was non-dischargeable based on the debtor's signed stipulation with the Secretary. On December 6, 2013, Eriksen filed a motion for judgment on the pleadings. At the December 17, 2013 hearing on the motion, the court summarily denied it, agreeing with the Secretary's argument that the motion should be denied because the defendant had made the same arguments in two previous motions which the court denied. In addition, on December 17, 2013, the district court judge stayed the case pending the Supreme Court's ruling on a petition for certiorari for a related case that may impact this case. Chicago Office

Perez v. Welding Unlimited, Inc. (C.D. Cal. and Bankr. C.D. Cal.)

On October 1, 2013, the Secretary filed a complaint naming David Shields and the now-defunct Welding Unlimited as defendants. The complaint alleges that Shields failed to remit employee contributions to the company's 401 (K) Profit Sharing Plan from January 2008 through May 2009. Shields previously admitted to a bankruptcy court that he was a fiduciary to the plan and that he breached his fiduciary duties to the plan, causing over \$39,000 in plan losses, with lost-opportunity costs continuing to accrue. On April 15, 2011, the bankruptcy court found the \$39,000 in losses to be a non-dischargeable debt. On December 11, 2013, the clerk entered default against the defendants. Los Angeles Office

Harris v. Wesco Signs Inc. (W.D.N.C.)

On August 15, 2013, the Secretary filed a complaint against Wesco, Inc. and Mitchell Messer, seeking restoration of losses to the company's Retirement Plan and Group Health Plan and alleging that the fiduciaries failed to remit employee contributions to these plans. In addition to restitution of losses, the complaint seeks lost earnings, the appointment of an independent fiduciary, and a permanent injunction enjoining the defendants from serving or acting as fiduciaries to any ERISA-covered plan. Atlanta Office

Harris v. Wilkie (D. Conn.)

On June 1, 2013, the Secretary filed a complaint against David Wilkie and Daniel Wilkie, trustees of the Harrington Engineering Inc. Retirement Plan, alleging that they failed to ensure that employee contributions of approximately \$46,551 were remitted to the plan for the period January 2009 through March 2010. Boston Office

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

On September 10, 2013, the Secretary filed a complaint against Brandy Williams, Wanda Knight, and Dmazana Lumukana, alleging that they breached their fiduciary duties by failing to ensure that approximately \$43,000 in employee contributions and loan repayments were remitted to the Lakes Area Advertisers, Inc. 401(k) Plan and the ADS Delivery Service, Inc. 401(k) Plan. Chicago Office

Solis v. Williams (W.D. Ky.)

On October 3, 2012, the Secretary filed a complaint against Jeremy B. Williams, individually and as fiduciary of the Williams Construction and Masonry Contractors, Inc., Profit Sharing Plan. The company ceased operations in the fourth quarter of 2009. As of October 3, 2012, the plan had assets of \$10,199. The complaint alleges that the defendants failed to forward and to timely forward to the plan \$23,124.31 in employee contributions between January 5, 2007 and November 20, 2009. On July 1, 2013, the court entered an order granting the Secretary's motion for entry of default against defendants. The order removes and permanently enjoins the defendants from serving as fiduciaries or service providers to any ERISA-covered plan and appoints an independent fiduciary to make all participant distributions and terminate the plan, with the independent fiduciary's fees paid from Williams' individual plan account. The plan participants will receive \$10,199, in unpaid employee contributions and lost opportunity costs which will be restored from Williams' plan account. Cleveland Office

Solis v. Yanek (E.D. Va.)

On January 4, 2013, the Secretary filed a complaint against Richard Yanek and Cardservice of Virginia, Inc. for failure to remit and to timely remit employee contributions and participant loan repayments to the company's 401(k) retirement plan from 2007 through 2011. A consent judgment was filed simultaneously with the complaint. On January 9, 2013, the court entered the consent judgment, which appoints an independent fiduciary at the defendants' expense, orders the defendants to pay restitution to the plan in excess of \$70,000, and bars them from serving as fiduciaries to any ERISA-covered plan in the future. Philadelphia Office

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

On January 4, 2013, the Secretary filed a complaint against Charles Yaskulski and the Eagle Warranty Corporation for failure to remit and to timely remit employee contributions to the company's 401(k) retirement plan from 2003 through 2009. On June 3, 2013, the court approved a consent judgment in which Yaskulski agreed to sign over to the plan as restitution his right to \$20,500 in an escrow account being held for legal matters involving the Pennsylvania Attorney General's office and was permanently enjoined from serving as a fiduciary or service provider to any ERISA-covered plan. In addition, Eagle Warranty was removed as the administrator of the plan and an independent fiduciary was appointed. Philadelphia Office

**2. Insurance Rebates**

Solis v. Source HR, LLC (E.D. Mich.)

On May 31, 2012, the Secretary filed a complaint against Source HR, LLC, a professional employer organization that was the administrator of its own plan and plans of its client employers, and Austin R. Ritter, its owner and president. The complaint alleged that from May 1, 2007 through March 30, 2011, Ritter received a \$20,784.47 in prohibited insurance commission income from insurance carriers that provided coverage for the plans. Ritter allegedly negotiated an increase in commissions in order to increase his income, resulting in higher premium payments from participants. On January 4, 2013, the court entered the parties' consent judgment, requiring Source HR to repay \$24,062.25 in insurance commissions and lost opportunity costs to the affected plans and permanently enjoining the defendants from serving as fiduciaries or service providers to ERISA-covered plans. Chicago Office

**3. Miscellaneous**

Solis v. Bankert (not filed)

This unfiled case, related to the Caputo litigation described above, involves Glenn Bankert, Glenn M. Bankert, D.O., P.A., Robert S. Caputo, the fiduciaries of the Glenn M. Bankert, D.O., P.A., ESOP. The Secretary contended that Dr. Bankert treated the practice's assets as his own, using them to pay many of his personal expenses, although the ESOP owned 100% of the practice, and that the fiduciaries failed to intervene in the mismanagement of the assets to protect the plan's investment in the practice. The Secretary resolved this unfiled case through a settlement agreement, in which an independent fiduciary was appointed to sell a piece of land owned by a related company and use the sale proceeds to make up to \$225,000 in participant distributions before terminating the plan. The Caputo consent judgment and order enjoined Dr.

Bankert from serving as a fiduciary to any ERISA-covered plan in the future. See also Solis v. Caputo, Section A. Employer Stock. Atlanta Office

Harris v. Bowman (D.N.J.)

On March 20, 2013, the Secretary filed a complaint alleging that William Bowman, trustee of the William Bowman Associates, Inc. Profit Sharing 401(k) Plan, caused the plan to make a series of unsecured loans to parties in interest totaling \$188,325.00. On April 25, 2013, the court entered a consent judgment ordering Bowman to restore the full \$188,325.00 in losses pursuant to an installment plan, appointing an independent fiduciary to monitor the repayments to the plan and make any required distribution, and permanently enjoining Bowman from acting as a fiduciary or service provider to any ERISA-covered plan. New York Office

Harris v. Cottone (N.D. Ill.); In re Cottone (Bankr. N.D. Ill.)

On July 16, 2013, the Secretary filed a complaint against Mark Cottone, John Senese, Cougar Package Designers, Inc., and Cougar Packaging Solutions, Inc., alleging that they permitted Cottone to take \$285,000 from the Cougar Package Designers, Inc. Profit Sharing Plan. The complaint also alleged that Cougar Packaging Solutions was a successor in liability to Cougar Package Designers and that John Senese was liable for losses to the plan as a knowing participant. On July 24, 2013, the court entered a consent judgment ordering that Cottone and the companies are jointly and severally liable to the plan for \$150,226.17. The consent judgment requires Cougar Packaging Solutions to restore the amount in full over a 12 month period, orders Cottone to be removed from his fiduciary position with the plan, permanently enjoins Cougar Packaging Solutions, Cottone, and Senese from serving as fiduciaries or service-providers to ERISA-covered plans, and provides for appointment of an independent fiduciary to administer and terminate the plan. The court also found that Cottone and Senese waived their right to recoveries that totaled \$135,000. On October 11, 2012, the Secretary had filed an adversary complaint against Mark Cottone, alleging that improper transfers to himself or Cougar Packaging was a non-dischargeable debt owed to the company's Profit Sharing Plan. On November 29, 2012, the debtor filed a motion to dismiss, to which the Secretary responded on December 20, 2012. On January 23, 2013, the court denied the motion to dismiss. On May 20, 2013, the court entered a consent judgment finding Cottone's debt to the plan non-dischargeable. Chicago Office

Solis v. Davis (N.D. Ill.); Perez v. Davis (Bankr. 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, remove the defendants as fiduciaries, enjoin them from serving as fiduciaries or service providers to any ERISA-covered plan, and appoint an independent fiduciary to administer and terminate the plan. On August 30, 2012, the court entered a default judgment against the company, requiring it to restore more than \$2.7 million to the plan. On February 9, 2013, the court entered a default judgment against Keith Davis and ordered him to pay \$2,849,557 to the plan within fourteen days from the entry of the judgment. On December 20, 2013, the Secretary filed an adversary complaint against Davis, seeking an order from the bankruptcy court that his debt to the plan is non-dischargeable. The complaint

alleged that between December 2006 and November 2010, Davis misappropriated in excess of \$2,430,470 from the plan. Including lost opportunity costs, Davis's total debt to the plan is \$2,797,000. Chicago Office

Solis v. Estate of John Buckingham (D. Md.)

On December 5, 2012, the Secretary filed a complaint against the Estate of John Buckingham, Thomas Buckingham and Sun Control Systems, Inc., alleging multiple violations arising from the defendants' mismanagement of the company's Profit Sharing Plans and 401(k) Plan. John Buckingham was the plans' trustee until Thomas Buckingham succeeded him as trustee on January 21, 2010. The complaint alleges that the defendants authorized multiple withdrawals from the plans' bank accounts to pay operating expenses and repay debts incurred by Sun Control and that they failed to remit and to timely remit employee contributions. Thomas Buckingham is also liable because he failed to correct this when he became sole trustee in 2010. The complaint seeks restitution of approximately \$175,000, the appointment of an independent fiduciary to manage and oversee the plans, and a permanent injunction barring Thomas Buckingham and Sun Control from serving as fiduciaries to any ERISA-covered plan. In November 2012, Thomas Buckingham filed for Chapter 7 bankruptcy protection. On April 11, 2013, the Secretary filed an adversary complaint in that bankruptcy proceeding alleging that his debt to the plans was non-dischargeable and obtained a default judgment against him on August 2, 2013. On August 16, 2013, Thomas Buckingham moved to vacate that judgment, and thereafter the parties agreed to stay the adversary case. The court scheduled a status conference on the stay request for February 2014. Neither Thomas Buckingham nor the company filed answers to the Secretary's district court complaint, and on May 10, 2013, at the Secretary's request, the clerk of the court entered a default as to the two defendants. On August 20, 2013, the Secretary moved for entry of a default judgment against Thomas Buckingham and the company. The Secretary and the estate of defendant John Buckingham entered into a consent judgment, which provides for the estate to restore \$80,628 to the plans and for removal of the current fiduciaries and appointment of an independent fiduciary to terminate the plans. The Secretary filed a motion to approve that consent judgment on November 13, 2013. See also Solis v. Estate of John Buckingham, Section B.1. Collection of Plan Contributions. Philadelphia Office

Perez v. Fadevich (E.D. Tex.)

On August 6, 2013, the Secretary filed a complaint against Vivian Fadlevich and Consolidated Mine Services, Inc., alleging that they failed to distribute \$96,235.77 in profit sharing plan assets to the eligible participants and instead used those funds to operate the business. On August 23, 2013, the court approved a consent judgment that requires defendants to make restitution to the participants, imposes a permanent injunction against future ERISA violations, and bars the defendants from serving as fiduciaries of ERISA-covered plans. Dallas Office

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

On September 9, 2013, the Secretary filed a complaint against Orland Fasel, Bernice Fasel, and Edward Fasel, alleging that they permitted Orland Fasel to take approximately \$83,000 from the E.L. Fasel & Sons Profit Sharing Plan. The complaint alleged that Orland Fasel took the money from the plan and wrote checks to himself or his wife. On September 11, 2013, the judge entered a consent judgment ordering Bernice and Edward Fasel to restore \$83,500 to the plan, permanently enjoining them from violating ERISA, removing them from their positions as fiduciaries to the plan, and permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan.. In a separate criminal matter, Orland Fasel was indicted

for the theft from the plan. The Department's civil case against him has been stayed pending resolution of the criminal matter. Chicago Office

Perez v. Gill (N.D. Okla.)

On May 1, 2013, the Secretary filed a complaint against Debra S. Gill, DDS, PC and its president, Debra S. Gill, to recover over \$15,000 in pension plan assets that Gill used for the benefit of the company over a three year period. The Secretary seeks a court order requiring defendants to restore all plan losses and barring them from serving an ERISA-covered plan in any capacity in the future. Dallas Office

Perez v. Hofmeister (E.D. Ky.)

On August 9, 2012, the Secretary filed a complaint against George Hofmeister, Bernard Tew, Tew Enterprises, LLC, Bluegrass Investment Management, LLC, Metavation, LLC, and MIDS, LLC. The complaint alleges that Hofmeister, as trustee of the Hillsdale Salaried Pension Plan and the Hillsdale Hourly Pension Plan, engaged in a series of prohibited transactions and imprudent actions, including loans to companies affiliated with Hofmeister, use of plan assets for the purchase and lease of employer property of a company affiliated with Hofmeister, purchase of customer notes from companies affiliated with Hofmeister, and the improper allocation of income and expense payments between the pension plans. The complaint further alleges that Bernard Tew, Tew Enterprises, LLC, and Bluegrass Investment Management, LLC, who served as investment advisors to the plans, approved many of the prohibited transactions and were paid excessive fees for their services. On July 26, 2013, the court entered an order removing Hofmeister as fiduciary and recognizing the resignation of Bernard Tew as fiduciary and appointing independent fiduciary to administer the plans. See also Perez v. Hofmeister, Section K. Financial Institution and Service Provider Cases. Cleveland Office

Perez v. Hofmeister (E.D. Ky.)

On May 30, 2013, the Secretary filed a complaint against George Hofmeister, Bernard Tew, Bluegrass Investment Management, LLC, Fairfield Castings, LLC f/k/a Revstone Casting Fairfield, LLC, DIDS, LLC, William Twardy, Nelson Clemmens, and Revstone Casting Fairfield, GMP Local 359 Pension Plan. The complaint alleges Hofmeister, as trustee of the Revston Casting Fairfield, GMP Local 359 Pension Plan, engaged in a series of prohibited transactions and imprudent actions, including use of plan assets for the purchase and lease of employer property of a company affiliated with Hofmeister, purchase of customer notes from companies affiliated with Hofmeister, and the improper transfer of plan assets to a company affiliated with Hofmeister. The complaint further alleges that Bernard Tew and Bluegrass Investment Management, who served as investment advisors to the plans, approved many of the prohibited transactions and were paid excessive fees for their services. On July 26, 2013, the court entered an order removing Hofmeister as fiduciary, recognizing the resignation of Bernard Tew as fiduciary, and appointing independent fiduciary to administer the plan. See also Perez v. Hofmeister, Section K. Financial Institution and Service Provider Cases and In re Revstone Casting Fairfield, Section O. Miscellaneous. Cleveland Office

Solis v. Innovative Logistics Techniques, Inc. (E.D. Va.)

On November 11, 2012, the Secretary filed a complaint against Innovative Logistics Techniques, Inc. for failure to forward employee contributions to the company's 401(k) plan between January

2007 and April 2011, and for using plan assets to pay for fees that were unrelated to the provision of benefits under the plan and not reasonable expenses incurred in administering the plan. The complaint seeks restoration of all losses and a permanent injunction barring the company from serving as an ERISA fiduciary. On July 10, 2013, the court entered a consent judgment in which Innovative agreed to restore \$133,568.07 to the plan and to pay the costs and expenses related to hiring an independent fiduciary to oversee and administer the plan. On September 5, 2013, Innovative filed a suggestion of bankruptcy with the court. At the time of the bankruptcy filing, Innovated had made only a partial payment of the restitution due to the plan. On December 13, 2013, the Secretary filed a motion to amend the consent judgment to allow the cost of the independent fiduciary to be paid by the plan. On December 31, 2013, the court entered an order granting the Secretary's motion. See also Solis v. Innovative Logistics Techniques, Inc., B.1. Collection of Plan Contributions. Philadelphia Office

Harris v. Isaacs (N.D. Ill.)

On February 28, 2013, the Secretary filed a complaint against Hico Flex Brass Co., Inc., as well as former vice presidents and plan trustees, Mark Isaacs and Neil Isaacs, alleging they withdrew \$702,153.99 in plan assets from the Hico Flex Brass Co., Inc., 401(k) Plan in September 2010 and thereafter failed to distribute the full amount of plan assets to participants. On June 4, 2013, the court entered a consent judgment finding Hico Flex liable for failure to distribute all plan assets to participants and enjoining Hico Flex from serving as a fiduciary or service provider to any ERISA-covered plan. Chicago Office

Perez v. La Courciere (E.D. Ky.)

On May 30, 2013, the Secretary filed a complaint against Robert La Courciere, Pamela Babbish, George Hofmeister, Fourslides, Inc., Bernard Tew, Bluegrass Investment Management, LLC and the Fourslides Inc. Pension Plan. The complaint alleges that La Courciere, as trustee of the Fourslides Plan, authorized a loan from the plan to a company affiliated with Hofmeister. Hofmeister subsequently became trustee of the Plan and took no action to correct the prohibited transaction. The complaint also alleges that the plan's administrator, Fourslides, Inc., La Courciere, and Pamela Babbish, committed fiduciary breaches by authorizing the Fourslides Plan to pay settlor expenses and by depositing checks intended for the Plan in Fourslides' corporate account. On July 26, 2013, the court entered an order removing Hofmeister as fiduciary, recognizing the resignation of Bernard Tew as fiduciary, and appointing independent fiduciary to administer the plan. Cleveland Office

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

On November 23, 2010, the Secretary filed a complaint against Colette Mordo, trustee of the Sadimara Knitwear, Inc. and the Stallion Knits, Ltd. Defined Benefit Pension Plans, 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 case, Mordo 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 ERISA claims seeking equitable relief. On June 26, 2013, the court approved a consent judgment and order in which the defendant admitted to entering into \$4.3 million in transactions between the plans and parties-in-interest, agreed to be permanently barred from serving as a fiduciary to

any ERISA-covered plan, agreed to restore to the plans any shortfall in assets that are owed to participants and beneficiaries of the plans, and agreed to the appointment of an independent fiduciary to administer, distribute benefits, and terminate the plans. On July 3, 2013, the court appointed the Secretary's proposed independent fiduciary candidate to administer the plans. New York 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 restoration of losses to the plan and the appointment of an independent fiduciary to distribute the 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. On September 25, 2012, Caro, acting pro se, filed a motion for partial summary judgment on a statute of limitations defense. The Secretary filed a cross motion on October 23, 2012. On November 29, 2012, the district court denied Caro's motion and granted the Secretary's cross motion for partial summary judgment. On November 15, 2012, Caro was criminally indicted on charges of mail fraud and embezzlement from an employee benefit plan. On December 18, 2012, the court granted Caro's motion to stay the civil proceedings because of his criminal indictment; a status hearing is set for April 17, 2013. The adversary proceeding in the bankruptcy court was stayed on April 26, 2012, because of the district court action; a status hearing is set for April 24, 2013. Chicago Office  
Harris v. Nohl Crest Homes Inc. (M.D. Fla.)

On May 22, 2013, the Secretary filed a complaint against Nohl Crest Homes Corporation, Kenneth R. Emery, and Peter G. Tibma, in connection with the transfer of assets from the Nohl Crest Homes Corporation Employee Stock Ownership Plan. Nohl Crest Homes (NCH) is a defunct Florida corporation. Emery and Tibma each owned 50% of the company and were chairman and president, respectively. On October 16, 2007, Emery executed a wire transfer and moved \$650,000 from the plan's account to NCH's account. Emery claims that this transfer was for the purchase of shares of stock from Tibma and Emery. However, the Department has not been provided with stock certificates for this purported sale or an appraisal reflecting the share price paid. NCH closed its doors approximately six months later, in April 2008. Participants have not received any distribution of the plan assets to date. Atlanta Office

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

On June 28, 2012, the Secretary filed a complaint against James Palmer and the James Palmer Associates, Inc. Employees Profit Sharing Plan and Trust, alleging that Palmer unlawfully transferred \$95,000.00 in plan assets to the company and to Susan Cotton, a co-trustee. On September 24, 2012, the clerk of the court entered Palmer's default for failure to answer the complaint or otherwise appear. On October 23, 2012, the Secretary moved for a default judgment. Palmer filed a response to the motion, in which he stated that some monies had been repaid to the plan and that there was a dispute concerning the money owed to one participant. The Secretary replied that in light of Palmer's statements, the appropriate relief would be to require Palmer to conduct an accounting of plan assets and to appoint an independent fiduciary to determine the correct amounts owed to plan participants. The parties entered into a consent

order and judgment, approved by the court on June 7, 2013, setting forth a payment plan for Palmer to repay the lost plan assets, plus interest and independent fiduciary fees. The order also permanently bars Palmer from serving as a fiduciary or service provider to any employee benefit plan, requires that Palmer resign as trustee to the plan, and provides for the appointment of an independent fiduciary. New York Office

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

On November 30, 2012, the Secretary filed a complaint against Bennett Sipes and Brian Kirshner, fiduciaries of the First Profit Sharing Plan of Sunset Heating & Cooling, Inc. The complaint alleges that Kirshner, the sole trustee, failed to take any action to administer the plan following the plan sponsor's dissolution over five years earlier. It further alleges that Sipes, an officer and co-owner of the plan sponsor, appointed himself successor trustee and withdrew money from the plan, improperly distributed plan assets to himself and others, and imprudently held plan assets in the form of cash. On February 5, 2013, the court entered separate consent judgments, resolving the case as to both defendants. The consent judgment with Kirshner provided that the plan will be terminated and an independent fiduciary appointed at Kirshner's expense. The consent judgment with Sipes provided that Sipes will reallocate approximately \$800 from his account to the accounts of other participants. Both defendants are also permanently barred from violating ERISA and from serving as fiduciaries or service providers to any ERISA-covered plan. Cleveland Office

Harris v. South Florida Emergency Physicians, Inc. (S.D. Fla.)

On September 27, 2013, the Secretary filed a complaint against South Florida Emergency Physicians Inc. and Lorn E. Leitman, involving the South Florida Emergency Physicians, P.A. Profit Sharing Plan. The complaint alleges that on July 21, 2010, Leitman, a former attorney and CPA, wire transferred plan assets belonging to himself and two other participants into another bank account and then into another corporate bank account of a different company that he owned. Leitman later used the money for corporate and personal expenses. Leitman is currently serving a lengthy federal prison sentence for embezzling from the plan and for an unrelated Ponzi scheme. On October 8, 2013, the court approved a consent judgment and order, requiring Leitman to restore plan assets and lost opportunity costs in the amount of \$237,328.13 plus post-judgment interest and permanently enjoining Leitman from acting as a fiduciary, trustee, agent or representative for any ERISA-covered plan. Atlanta Office

Perez v. Sunkist Growers, Inc. (C.D. Cal.)

On October 18, 2013, the court entered a consent judgment between the Secretary and Sunkist Growers involving three ERISA-covered plans sponsored by Sunkist. The consent judgment requires Sunkist to restore over \$1.6 million to the plans as well as pay over \$300,000 in civil penalties. The complaint, filed on September 25, 2013, alleges that there were improper reimbursements by the plan to the company for numerous non-reimbursable company expenses, such as undocumented expenses relating to its legal and human resources departments from January 2005 through April 2011. The consent judgment requires Sunkist to restore all plan losses and retain an independent fiduciary should the company wish to seek reimbursement from the plans for purported direct expenses in the future. Los Angeles Office

Solis v. Tomco Auto Parts, Inc. (C.D. Cal.); Solis v. Schoenfeld (In re Schoenfeld) (Bankr. C.D. Cal.)

On January 13, 2012, the Secretary filed a complaint against Tomco Auto Parts, Inc. and Richard Alan Schoenfeld, and on January 17, 2012, the Secretary filed an adversary complaint in Schoenfeld's Chapter 13 bankruptcy. The complaints allege that, between October and November 2004, Schoenfeld, as trustee of the company's ESOP, authorized improper withdrawals of \$197,000 from the ESOP, \$47,000 of which was never repaid. On January 27, 2012, the Secretary filed a motion to withdraw the bankruptcy reference and to remove the action to district court. On April 25, 2012, over Schoenfeld's objection, the court removed the matter to district court. The district court granted the Secretary's motions to strike Schoenfeld's affirmative defenses, including claims of contribution, failure to name all indispensable parties and other inappropriate defenses, and denied his jury demand. On September 17, 2012, Schoenfeld filed a motion for partial summary judgment, arguing, among other things, that he was not liable for any losses because a settlement agreement between the defunct company and a successor addressed the liability and, as a matter of law, defalcation cannot be found. On September 26, 2012, the Secretary opposed the motion, and on October 29, 2012, the court denied Schoenfeld's motion. On October 26, 2012, the Secretary filed her own motion for summary judgment on all claims, and on January 31, 2012, the court granted the Secretary's motion, finding that Schoenfeld breached his fiduciary duties and committed defalcation, rendering the debt non-dischargeable. The court also imposed injunctive relief, including requiring Schoenfeld to pay all costs of an independent fiduciary to terminate the plan and distribute its assets. This case is on appeal before the Ninth Circuit. See Schoenfeld v. Perez, Section N. Bankruptcy. Los Angeles Office

Perez v. Twelve Signs, Inc. (C.D. Cal.)

On October 3, 2013, the Secretary filed a complaint against Twelve Signs, Inc. and its president, Richard Housman, alleging that, from May 2006 to October 2009, they caused \$497,000 in loans from the Twelve Signs Inc. Pension Plan to the company. On October 21, 2013, the court entered a consent judgment, finding that the defendants caused \$617,839 in losses to the plan and are liable for restoring \$363,912.23 to the plan, representing complete restoration of plan losses to non-fiduciary participants. Based on Housman's financial condition over time, the amounts due the plan under the consent judgment increase. Further, the consent judgment requires Housman to use his best efforts to secure a life insurance policy with the plan named as the beneficiary for as long as losses remain outstanding to the plan. Housman also waived all of his interest in the plan. Los Angeles Office

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

On October 15, 2012, the Secretary filed a complaint against fiduciaries Gary Waters, Sandra Waters, and Customwood Stairs, Inc. for failing to remit and timely remit employee contributions to the company's Employee Savings Plan from January 5, 2007 through February 21, 2011. The complaint also alleged that the fiduciaries permitted prohibited loans. The losses attributed to the fiduciary breaches are estimated to total \$122,000. On October 31 2013, the court entered a default judgment finding that the defendants were liable for \$133,944.98 in losses to the plan and ordered the plan amended to reallocate Gary Waters and Sandra Waters account balances to fully restore losses to plan participants. Chicago Office

Solis v. Weiss (E.D.N.Y)

On January 17, 2012, the Secretary filed a complaint against Gary Weiss and the Marvin Knitting Mills, Inc. Profit Sharing Plan, alleging that Weiss unlawfully transferred and loaned \$735,436.03 in plan assets to himself, his company, Marvin Knitting Mills, Inc., and a plan participant. None of the money has been repaid to the plan. As of December 31, 2010, the plan had \$3,638.81 in assets. On June 11, 2012, the clerk of the court entered Weiss' default. The Secretary filed a motion for a default judgment on October 22, 2012. On September 13, 2013, the court entered a default judgment against Weiss, requiring that he pay the plan the \$735,436.03, plus pre-judgment interest of \$166,408.58, for a total award of \$901,844.61, and permanently enjoining him from serving as a fiduciary, trustee, agent, representative or service provider to any ERISA-covered plan, and from violating ERISA in the future. To date, Weiss has not made any restitution to the plan. The Secretary is currently engaged in efforts to enforce the default judgment. New York Office

**C. Financing the Union**

Harris v. McNamee (S.D.N.Y.)

On February 29, 2012, the Secretary filed a complaint against John V. McNamee, Jr., Kevin Dunphy, Manuel Farina, John Hall, John Hamilton, Michele Sullivan, and John Walsh, who are the trustees of the pension plan, annuity fund, and vacation fund of Exhibition Employees Local 829 of the International Association of Theatrical Stage Employees. The complaint alleges that the defendants have been engaging in prohibited transactions between 2006 and the present, including the improper transfer of over \$2.9 million in assets from Local 829's pension plan to the union and its annuity, vacation and hiring hall funds, and the improper transfer of at least \$240,000.00 from the pension plan and annuity fund to service providers. The complaint further alleges that the trustees allowed the annuity fund to retain at least \$5.9 million in undocumented secured loans to fund participants, including trustee and Local 829 president McNamee, Jr., and failed to prudently investigate or evaluate the annuity fund's investment of over \$5 million into an illiquid real estate investment trust. On May 2, 2012, the court entered a partial consent order removing the defendants as trustees and appointing an independent fiduciary. In addition to administering the funds, the independent fiduciary provided an accounting of transactions and investments that conflict with the plan documents of the funds or any other fiduciary obligations of the trustee defendants. The parties attended mediation on February 19, 2013. On June 28, 2013, the court approved a consent judgment that requires the trustees to permanently resign as fiduciaries to the funds, bars them from serving as fiduciaries to any ERISA-covered plans, retains an independent fiduciary to run the funds, and requires the trustees to pay at least \$2.6 million as restitution and Section 502(l) penalties in addition to forfeiting of their annuity fund accounts of up to \$275,000.00. New York Office

**D. Prudence**

Solis v. A.D. Vallett (M.D. Tenn.)

On February 8, 2013, the Secretary filed a complaint against Aaron Vallett and A.D. Vallett & Co., LLC, as plan administrators of the Mephisto, Inc. 401(k) Profit Sharing Plan and Trust, Wiley Group, Inc. 401(k) Profit Sharing Plan and Trust, Southeastern Building Corporation 401(k) Profit Sharing Plan and Trust, Timothy E. McNutt, Sr. D.D.S. 401(k) Profit Sharing Plan

and Trust, and Project C.A.M.P 401(k) Profit Sharing Plan and Trust (collectively, the "plans"). The complaint alleges that on December 22, 2009, Vallett caused unauthorized distributions totaling \$630,000 to be made from the plans' participant accounts into his company's general operating account. On January 20, 2010, Vallett allegedly caused another series of distributions totaling \$258,237.69 to be made from participant accounts into his company's general operating account. Vallett allegedly falsified the plans' records by indicating that the withdrawals had been placed in outside brokerage accounts, making it appear as if the funds were still in the plans. After the unauthorized withdrawals were discovered, Vallett asked the trustees to sign a form that would allow for the funds to be placed back into the plans and a form that indicated that the trustees had authorized the withdrawals. Vallett allegedly used the stolen plan money for his company's operating expenses and his own personal expenses. The complaint seeks to hold defendants liable for lost earnings on the amounts stolen from the plans and seeks to permanently enjoin defendants from acting in a fiduciary capacity to ERISA-covered plans and from committing future ERISA violations. Vallett has been criminally prosecuted and is serving a 120 month sentence in federal prison. The SEC has also brought civil action against Vallett and his company, through which it recovered (through a fiduciary liability insurance policy) all amounts stolen from the plans, but not lost earnings on those amounts. The court has granted the Secretary's motion for summary judgment. Atlanta Office

Austin Capital Management (not filed)

On February 15, 2013, the Secretary executed a settlement agreement with investment fund manager Austin Capital Management, LTD and its general partner, Austin Capital Management GP Corp., who agreed to pay \$37.8 million in connection with the investment of ERISA plan assets with Bernard L. Madoff and his firm. Certain funds managed by Austin Capital Management invested a percentage of their assets in the Rye Select Broad Market Prime Fund L.P. offered by Tremont Partners Inc. which, in turn, was 100 percent invested with Bernard L. Madoff. Under an earlier settlement on December 13, 2012, Keycorp, Austin's parent company, paid \$10 million, for a total settlement of \$47.8 million, including a \$4.3 million civil penalty. Plan Benefits Security Division

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

At the fairness hearing on March 15, 2013, the court approved the global settlement of this case and multiple state and federal suits, including a case brought by the New York Attorney General, against three investment companies and their principals in connection with imprudent investments with Bernard L. Madoff and his firm made by more than 100 ERISA plans and other investors. 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 settlement, which was preliminarily approved on November 30, 2012, provides for the Ivy defendants to pay \$210 million, the Jeanneret defendants to pay \$3 million, and the Beacon defendants to pay \$3.5 million and also give up claims to about \$3.4 million. It is expected that additional money will be recovered from other sources, including the Madoff bankruptcy estate. The settlement documents include an agreement on a method for allocating the money among the ERISA plan investors and individual investors and an agreement limiting the amount that the private

attorneys will receive from the settlement fund. On May 30, 2013, court issued its final order approving the attorneys' fees. On July 17, 2013, the court issued an order approving distribution of the settlement proceeds in accordance with the plan of allocation. The Secretary's complaint, filed on October 21, 2010, alleges, among other things, that the defendants lost millions of dollars of their clients' assets as a result of Madoff investments while collecting huge fees for themselves. The amended complaint, filed on March 8, 2011, added allegations about Ivy's fiduciary status and allegations that the defendants' fraudulent material misrepresentations and failures to disclose material facts about Madoff constitute "fraud or concealment" under ERISA's statute of limitations. Plan Benefits Security Division

Harris v. Chambliss (W.D. Ky.)

On April 30, 2013, the Secretary filed a complaint against Robert B. Chambliss, Robert B. Chambliss M.D. PLLC, and the Robert B. Chambliss, M.D. Profit Sharing Plan, alleging that . Chambliss failed to diversify plan investments, failed to act prudently, and acted in his and his son's self-interest. On May 6, 2013, the court entered a consent order and judgment requiring Chambliss to make payments to the plan until the current and former participant balances, excluding his own participant balance, total \$362,346. The order also enjoins Chambliss and his company from violating ERISA, removes them as fiduciaries, and enjoins them from serving or acting as a fiduciary or service provider to any ERISA-covered plan. Cleveland Office

Solis v. Dynasty Construction, Inc. (D. Md.)

On January 25, 2012, the Secretary filed a complaint against Dynasty Construction, Inc. and John J. Barrett, III, alleging that they invested the assets of the company's 401(k) plan in an Employee Investment Savings Account ("EISA") investment offered by TransContinental Airlines. The TransContinental EISA was a Ponzi scheme operated by Louis Pearlman, who has been sentenced to 25 years in prison. Before the plan assets were transferred to the EISA, they were worth over \$775,000. After the transfer, they were valued at less than \$30,000. The Secretary contends that Barrett and Dynasty did not act prudently and did not act in the sole interest of the plan participants, that they did not adequately research the EISA, and that had they adequately researched it, they would have determined that it was not a prudent investment for the plan. On August 27, 2013, the court entered a consent judgment, which requires the defendants to restore \$110,000 to the plan and requires Barrett to forfeit his individual account balance in the plan. The consent judgment also requires that any additional amounts recovered by the plan, such as through separate litigation, will be allocated between defendant Barrett and his spouse and the non-Barrett injured plan participants, until \$523,000 is restored to the plan. Philadelphia Office

Solis v. Hutcheson (D. Idaho)

On May 15, 2012, the Secretary filed a complaint along with a motion for a temporary restraining order and a preliminary injunction, seeking removal of Matthew D. Hutcheson and the appointment of an independent fiduciary to take control of plan assets currently under the control of an entity called the Retirement Security Plan & Trust ("RSPT"). On May 16, 2012, the court entered the temporary restraining order. On June 13, 2012, the court issued a preliminary injunction, finding that the Secretary had demonstrated the type of immediate and irreparable injury necessitating entry of a preliminary injunction and granting the Secretary's request to continue the appointment of the independent fiduciary over RSPT and the removal of

Hutcheson through the pendency of the litigation. The Department continues to investigate whether Hutcheson has control over any other (non-RSPT) ERISA-covered assets and whether further action is necessary to prevent his misuse of those assets as well. The Secretary's action is stayed pending conclusion of Hutcheson's criminal trial. Plan Benefits Security Division

United States Department of Labor v. Mahaffy (D. Or.)

On June 29, 2012, the Secretary filed a complaint against Georgetown Realty, Inc. and John Mahaffy, fiduciaries of the company's Profit Sharing Plan and Trust, alleging that they imprudently invested nearly all of the plan's assets in a failed real estate joint venture called RiverGate, causing the plan to lose substantially all of its assets (approximately \$1.5 million). The complaint further alleges that the fiduciaries made prohibited payments to parties in interest, failed to collect on a participant loan, and failed to maintain the liquidity of plan assets sufficient to meet benefit obligations and timely pay distributions. Seattle 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. Parnell received proceeds from the real estate transaction, but allegedly never restored to the plan the initial investment from the transaction or the 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 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 that he was physically and mentally unable to serve in such a capacity and that plan participants actually served as fiduciaries because of their awareness of Parnell's alleged illness. Pursuant to a consent judgment and order entered on June 12, 2013, Christopher Parnell has agreed to a permanent bar, appointment of an independent fiduciary to distribute the remaining plan assets, and future reporting of his financial condition for ten years. Atlanta Office

Perez v. Reef Development of Hawaii, Inc. (D. Haw.)

On December 16, 2013, the court entered an amended consent judgment and order, restoring \$463,000 to the Reef Development of Hawaii, Inc. Profit Sharing Plan. The consent judgment requires the cash payment to the plan, the distribution of \$2.2 million in plan assets to participants, and a \$92,000 civil penalty payment. It also requires that all non/underperforming assets be transferred to the individual account of the breaching fiduciary, who waived his interest in any amounts recovered under the judgment, and that the plan be terminated. The Secretary's complaint, filed on November 27, 2013 against Reef Development of Hawaii, Inc., Reef Development of Hawaii, Inc. Profit Sharing Plan, and Samuel Sanchez Aguirre Jr, arose from Aguirre's allegedly imprudent investment in various financial instruments related to several properties from 1997 to 2008. Los Angeles Office

## **E. 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 ("ALPA") brought suit 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 v. Lanier Collection Agency & Service, Inc.). On January 31, 2014, the California Court of Appeal upheld the trial court's decision in its entirety, finding that United's payment scheme did not provide sufficient protections to employee benefits to be deemed an ERISA plan, and therefore that United's ERISA preemption defense must be rejected. 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 "[s]tate 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 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 did not petition for rehearing, Blue Cross petitioned for panel rehearing with regard to the unfair insurance practices law. Rehearing was denied on December 23, 2011. After Blue Cross filed a cert. petition, the Supreme Court invited the government's views on whether

ERISA preempts the state unfair insurance practice law. On December 26, 2012, the government filed its brief opposing certiorari and arguing that the ERISA does not preempt the state law. The Court denied cert. on January 22, 2013. Plan Benefits Security Division

Liberty Mut. Ins. Co. v. Donegan (2d Cir.)

This case involves ERISA preemption of a Vermont law that requires insurers and self-funded plans to provide the state with claims data. The Department has prepared an options memo on possible amicus participation, and has now circulated internally an amicus recommendation in support of respondent. Liberty Mutual's brief was filed on March 29, 2013, Kimbell's brief was filed on June 27, 2013, and the Secretary filed an amicus brief in support of the state arguing for no preemption on July 5, 2013. Oral argument, in which the Department did not participate, was held November 18, 2013. Plan Benefits Security Division

Sherfel v. Gassman (S.D. Ohio)

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 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 the federal FMLA encourages states to adopt more protective leave provisions. On December 7, 2010, the Secretary filed an amicus brief 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). The district court issued an adverse decision on September 28, 2012, finding that ERISA preempts Wisconsin from enforcing the WFLMA and rejecting the savings clause argument. The case has been appealed, but the Department decided not to participate. Plan Benefits Security Division

**F. Participants' Rights and Remedies**

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

This is an appeal from a dismissal of a case involving the management of a MEWA that provides benefits for California firefighters. On February 7, 2012, the Secretary filed an amicus brief arguing, on the one hand, that the district court properly found that the trustees of a welfare plan funded exclusively by employee contributions breached their fiduciary duties by failing to undertake an annual actuarial review of the plan's funding reserves but, on the other hand, that the court erred in excusing them from their statutory duty to hold the plan's assets in trust based on their alleged reliance on the oral statements of an unidentified employee at the Department of Labor. The Secretary also argued that the court erred in failing to consider whether to appoint an independent fiduciary to hold the plan's assets in trust and perform other necessary administrative functions. Plan Benefits Security Division

CIGNA Corp. v. Amara (S. Ct. and D. Conn.)

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 Supreme 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 an amicus brief in the district court on remand arguing that, under the Supreme Court's decision in the case, the court could award the same remedy as a matter of reformation or surcharge. The Secretary participated in the oral argument on December 9, 2011. On December 20, 2012, the district court issued a wholly favorable decision granting the same remedy as a matter of reformation or surcharge. The court stayed the remedies pending appeal. The plaintiffs appealed on one issue, and CIGNA also appealed. The Secretary filed an amicus brief on November 19, 2013 arguing in favor of reformation or, in the alternative, surcharge. Plan Benefits Security Division

David v. Alphin (4th Cir.)

The plaintiffs appealed the dismissal of their class action suit, arguing that the fiduciaries of 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 suit was filed. The Secretary's amicus brief, filed on December 28, 2011, 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. The Secretary presented oral argument on September 18, 2012. The court issued a wholly adverse decision on January 14, 2013. The plaintiffs filed a petition, which the Secretary supported, for en banc and panel rehearing on February 28, 2013. The court denied the petition on March 12, 2013. Plan Benefits Security Division

Fish v. Greatbanc Trust Co. (7th Cir.)

In this private ERISA action, plaintiffs appealed from a summary judgment that dismissed their entire lawsuit as time-barred because they filed suit more than three years after "the earliest date that the plaintiff had actual knowledge of the breach or violation." 29 U.S.C. § 1113(2). The district court found that, more than three years before filing, plaintiffs received documents that disclosed facts sufficient to state plaintiffs' pleaded claims. On January 29, 2013, the Secretary filed an amicus brief in support of plaintiffs, arguing that the court erred in ascribing actual knowledge to the plaintiff-participants and current trustee. Oral argument, in which the Secretary participated, was held on May 30, 2013. Plan Benefits Security Division

Fisher v. JP Morgan (2d Cir.)

This is an appeal to the Second Circuit of an employer stock case that was dismissed on Moench grounds. On June 8, 2010, the Department sent a letter to the court alerting it to Secretary's briefs in Gearren and Citigroup and attaching those briefs. Oral argument was held on January 25, 2011, but the Secretary did not participate. The panel asked the parties for additional letter briefing on the effect of the Citigroup decision, which the parties simultaneously filed on January 3, 2012. On May 8, 2012, the court issued an adverse decision, upholding the dismissal, based on the Citigroup decision. The plaintiffs filed a petition for cert. on September 5, 2012, which the Supreme Court denied on November 13, 2012. Plan Benefits Security Division

Frommert v. Conkright (2d Cir.)

After remand from the Supreme Court and the Second Circuit, the district court deferred to the plan administrator's interpretation of the plan language as permitting an offset of the kind the defendants advocated and also held that there was no disclosure violation despite the fact that the plan Summary Plan Description (SPD) indicated that there would be a straight offset of the lump sum benefits. The plaintiffs' opening brief was filed on April 20, 2012, and Secretary filed an amicus brief on May 11, 2012, arguing that the court erred on these holdings. The Secretary participated in oral argument on November 15, 2012. The court issued a favorable decision on December 13, 2013, and remanded for the district court to consider both equitable remedies and the claim for benefits. Plan Benefits Security Division

Gates v. United Health (2d Cir.)

This private ERISA case alleging systematic abuses in setting reimbursement rates was dismissed by the district court and we are evaluating for possible amicus participation. On September 19, 2013, the Secretary filed an amicus brief arguing that, in light of substantial claims regulation violations, the district court erred in deferring to the claims administrator's plan interpretation on a denial of benefits and that the claimant had standing to and could simultaneously assert a claim for benefits, along with claims for equitable relief requiring compliance with the claims regulation. Plan Benefits Security Division

Halo v. Yale Health Plan (2d Cir.)

A pro se plaintiff appealed from the March 8, 2012 decision of a district court in Connecticut affirming a denial of benefits for eye surgery that the plaintiff, a PhD student at Yale, had performed out-of-network for what she alleges was an emergency. The appeal raises, among other things, the proper standard of review of an administrator's denial where the denial was

untimely and otherwise violates the claims regulation, an issue which the Secretary has addressed previously. On January 28, 2013, the Secretary filed an amicus brief supporting Halo and arguing that the case should be considered by the district court de novo given the numerous violations of the claims regulation. On September 18, 2013, the court issued a decision favorable to Halo, reversing the district court and remanding for a consideration of the standard of review given the multiple violations of the claims regulation. Plan Benefits Security Division

Kenseth v. Dean Health Plan (W.D. Wis. and 7th Cir.)

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 an amicus brief on June 13, 2011, arguing that the plaintiff is entitled to make-whole relief under the intervening Cigna v. Amara Supreme Court decision. The Secretary participated in oral argument on December 8, 2011. On June 13, 2013, the Seventh Circuit issued a favorable decision on ERISA remedies in which it acknowledged the availability of equitable monetary relief under ERISA Section 502(a)(3). Relying on CIGNA Corp. v. Amara, 131 S. Ct. 1866 (2011), the Seventh Circuit held that "[m]onetary compensation is not automatically considered 'legal' rather than 'equitable.'" The court further held that under Section 502(a)(3), a participant who establishes a breach of fiduciary duty and a harm caused by the breach, "may seek an appropriate equitable remedy including make-whole relief in the form

of money damages." The court remanded the case to the district court to decide whether Dean had breached its fiduciary duty; and whether the breach caused Kenseth harm by committing her to expensive surgery she might otherwise have avoided or delayed until covered by other insurance; and to decide what form of equitable relief is appropriate under the circumstances. The majority opinion made clear, however, that it was standing by the previous holdings that the plan was ambiguous and Dean's customer representatives had been inadequately trained, and it rejected new arguments that Kenseth should have provided more complete information to the customer representative. Plan Benefits Security Division

North Cypress Operating Center v. CIGNA (5th Cir.)

This case involves numerous ERISA benefit claims asserted by a hospital in Texas, which provided out-of-network benefits to participants and beneficiaries of numerous ERISA-covered health care plans and sued as assignee of these participants and beneficiaries. On October 13, 2013, the Secretary filed an amicus brief in support of the plaintiff, arguing that the district court erred in ruling that it lacked Article III standing to pursue its benefit claims simply because it had not billed the patient-participants for the disputed amounts. Plan Benefits Security Division

Osberg v. Foot Locker (2d Cir.)

This is a case about what relief is available to remedy misrepresentations with regard to a wear-away provision similar to Amara. The plaintiff filed his brief on extension on May 17, 2013, and the Secretary filed an amicus brief on May 24, 2013. Oral argument, in which the Secretary participated, was held on December 19, 2013. On February 13, 2014, the court issued a favorable, unpublished decision on reformation, and plaintiff has moved for panel rehearing on another issue that the Secretary did not address. Plan Benefits Security Division

Pacific Shores Hospital v. United Behavioral Health (9th Cir.)

This is an appeal of a district court decision upholding a denial of benefits by a third party administrator under an arbitrary and capricious standard despite numerous errors in the denial. The plaintiff's brief was filed on July 23, 2012, and the Secretary filed a brief on August 13, 2012, supporting the plaintiff and arguing that arbitrary and capricious review entails a serious look at a denial and requires reversal when, as here, the final decision maker disregards or misapprehends the relevant facts and fails to apply the standards set out in the plan. Plan Benefits Security Division

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

The first appeal in this case was from a dismissal of a private ERISA claim brought by plan participants challenging certain investment fees. This case involved a class action of plan participants, suing on behalf of their plan, against John Hancock for allegedly charging excessive fees to retirement plan. Scibal Associates, Inc. sponsored 401(k) plans administered by the trustees, who entered into agreements with John Hancock, a service provider. John Hancock provided a group annuity contract and provided a menu of investment options, including John Hancock mutual funds and independent mutual funds. The Trustees selected a subset of the options on this menu to be included in their plans. Employees chose their options from the small menu. 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 plaintiffs on September 30, 2011, arguing that the district court's holding on the demand issue is entirely

without merit. The Secretary participated in oral argument on February 10, 2011 and received a favorable decision on April 16, 2012. A petition for cert. was denied on October 30, 2012. After remand, on a motion to dismiss, the district court decided: (1) John Hancock had no fiduciary status with respect to its fees because it had no discretion over its own fees, since the Trustees could have rejected the contract if they did not like the fees; (2) that John Hancock's undisclosed revenue sharing agreement with the mutual funds also did not make it a fiduciary, so long as its fees to the plan and total expenses were disclosed; and (3) John Hancock's lack of ultimate authority over which investments were included in the plans also meant that its selection of the investment options on the menu from which the Trustees chose the particular lineup for their plan also did not confer fiduciary status on it. The appeal was filed on August 9, 2013. The Secretary's amicus brief was filed on January 21, 2014. The brief argues that, under the analysis developed in the Leimkuehler v. AUL case, under the facts alleged, John Hancock retained sufficient discretion over the investment options on its menu to make it a fiduciary with regard to its selection of funds and the setting of its administrative fees. Plan Benefits Security Division Silva v. MetLife (8th Cir.)

This is supplemental life insurance case presenting the Amara/McCravy surcharge/equitable estoppel issue. The decedent raised his basic coverage to the required level and paid premiums for a number of years for supplemental life insurance coverage but failed to file a required proof of eligibility form that he was never told about. The case was originally brought solely as a benefits claim but after the decision in Amara, the plaintiff sought to amend his complaint to seek equitable surcharge, but the court denied the motion saying that as there is no available remedy, the amendment would be futile. The plaintiff appealed and filed his opening brief on July 17, 2013. On August 14, 2013, the Secretary filed a brief addressing the remedies issue as well as on an issue concerning whether a 100 page insurance certificate that was available to employees on a workplace intranet met ERISA's summary plan description requirements. Plan Benefits Security Division

Spinedex v. United Healthcare (9th Cir.)

This is a class action by several plan participants, a physical therapy provider and a state chiropractic association against United Healthcare and numerous group health plans. Plaintiffs brought both claims for benefits under § 502(a)(1)(B) and claims under § 502(a)(3) based on alleged fiduciary breaches under § 404 and prohibited transactions under § 406. The district court dismissed all claims on summary judgment. The plaintiffs filed their brief on May 29, 2013, and the Secretary filed a supporting amicus brief curiae on June 5, 2013, arguing: (1) the district court erred in holding that the plaintiffs lacked standing on the grounds that they failed to demonstrate that the medical providers planned to collect any unpaid medical claims from the plan participants; (2) the plaintiffs should be deemed to have exhausted their plans' procedures for review of benefit claims because defendants failed to follow a reasonable claims procedure as mandated by the Secretary's claims regulation; and (3) the district court also erred in dismissing the plaintiffs' fiduciary breach claims on exhaustion grounds. 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. The last cross-reply brief was filed on December 8, 2011. The Secretary participated in oral argument on November 6, 2012. The court issued a mixed decision on March 21, 2013, agreeing with the Secretary and plaintiffs on the prudence claims and 404(c), but agreeing with the defendants that the claims based on funds that were selected more than six year before the suit were time barred. Plan Benefits Security Division

Tiblier v. Dlabal & CACH Securities (5th Cir.)

This is a private 401(k) investment case that presents an issue of the effect of conflict waiver on imprudence and prohibited transaction analysis. Currently, there is a Rule 59 motion pending in the district court. The plaintiff appealed and filed his opening brief on June 12, 2013. The Secretary filed an amicus brief in support of plaintiff on extension on July 19, 2013, arguing that that the plan's investment advisor was not relieved of liability based on any action or consent given by the trustee, and that the prohibited transaction claim should not have been dismissed insofar as the advisor's commission from the investment exceeded any offset passed on to the plan. Plan Benefits Security Division

Tussey v. ABB (8th Cir.)

On March 31, 2012, the district court for the Western District of Missouri issued a decision in the first, and so far only, excessive fee case to have gone to trial. The court found that the ABB defendants violated their fiduciary duties in a number of respects with regard to the 401(k) plan's fees and ordered those defendants to repay the plan \$13.4 million lost by the plan due to the defendants' failure to monitor recordkeeping fees and negotiate rebates, and to pay \$21.8 million lost due to mapping of investments from a Vanguard fund to Fidelity funds. The court mostly held that the Fidelity defendants were not liable, except with respect to \$1.7 million in float income. The case has now been appealed by both defendants, and the brief of the defendants-appellants was filed on February 26, 2013. The Secretary filed an amicus brief in support of the defendants on June 17, 2013. The court held oral argument, in which the Secretary participated, on September 24, 2013. Plan Benefits Security Division

U.S. Airways v. McCutchen (S. Ct.)

On June 25, 2012, the Supreme Court granted cert. in this subrogation/reimbursement case presenting the issue whether ERISA permits courts to use equitable principles such as the make-whole doctrine in fashioning equitable relief under Section 502(a)(3). The government filed a brief "in support of neither party" on September 5, 2012, arguing that section 502(a) does not generally allow courts to recognize equitable defenses or principles overriding or limiting plan terms, for instance, by subjecting a plan subrogation or reimbursement provision to pro rata apportionment, but also arguing that the well-established common fund principle allowing an offset for a proportionate share of attorney's fees incurred in recovering monies from a third-

party tortfeasor is the type of "appropriate equitable relief" that does apply in these circumstances. The Solicitor General participated in the oral argument which took place on November 27, 2012. On April 16, 2013, the Supreme Court issued a decision mostly tracking the government's brief, holding that equitable defenses cannot override an ERISA plan's reimbursement provision. The decision also rejects an attorney's fee exception to this general principle but holds, under ordinary principles of contract interpretation, the Court thus holds that "if U.S. Airways wished to depart from the well-established common-fund rule, it had to draft its contract to say so – and here it did not." Plan Benefits Security Division

#### **G. Section 510**

Sexton v. Panel Processing (6th Cir.)

In a decision issued October 30, 2012, the Eastern District of Michigan held that the plaintiff failed to state a claim under Section 510 for retaliation because his complaint about an alleged ERISA violation did not ask for a response and thus did not constitute an "inquiry." Sexton filed his brief on July 5, 2013, and the Secretary filed an amicus brief on July 19, 2013, arguing that unsolicited complaints are protected by ERISA's anti-retaliation provision. Plan Benefits Security Division

#### **H. Defensive Litigation**

None

#### **I. Participant Loans**

Harris v. Dalton (D. Mass.)

On March 15, 2013, the Secretary filed a complaint against John Dalton, trustee of the John W. Dalton, M.D., P.C. Pension Plan, alleging that Dalton had engaged in prohibited transactions when he caused the plan to grant him participant loans without documentation and in excess amounts permitted by the plan and the Internal Revenue Code. On March 27, 2013, the parties filed a consent judgment and order requiring Dalton to correct the prohibited transactions and resign as trustee. The consent order also bars Dalton from serving as a fiduciary and provides for an independent third party trustee. Boston Office

#### **J. MEWAs**

Solis v. Doyle (D.N.J. and 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 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. Following a bench trial in 2009, 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 more than \$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 on August 27, 2010, with an opening brief filed on December 13, 2010 and a reply on March 4, 2011. The Secretary's 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, and that there was substantial evidence, which 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. The Secretary received a favorable decision on March 27, 2011, vacating the decision and remanding for further proceedings. The Secretary and the defendants have submitted briefs to the district court on the remanded issues, and are awaiting the court's decision. New York Office

Harris v. Sommet Group (M.D. Tenn.)

On July 5, 2013, the Secretary filed a complaint against Sommet Group LLC, Edwin Todd and Brian Whitfield. This is a health plan case with almost \$3 million in unpaid claims. The Justice Department has filed indictments against three plan fiduciaries, alleging that they committed wire fraud, embezzlement, and money laundering. The FBI's investigation revealed that the fiduciaries had purposely enticed participating employers by establishing artificially low contribution rates. The investigation also revealed that Sommet had attempted to deflect its participating employers' suspicions of unpaid claims by assuring them that the company was simply experiencing routine banking problems and that payments would be processed in time. Sommet's assets have been frozen, and the fiduciaries are awaiting trial in June 2014. Based on a request by the Justice Department, the Secretary filed a motion to stay the civil case, which was granted. Atlanta Office

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

Perez v. Dietrich & Associates (E.D. Pa.)

On July 24, 2013, the court entered a consent order in this case against an annuity consultant and insurance brokerage firm, Dietrich & Associates, and its chief executive and sole shareholder, Kurt E. Dietrich, in connection with the purchase of a group annuity for a pension plan sponsored and administered by Memorial Hospital - West Volusia, Inc. The Secretary's complaint, filed on August 27, 2012, alleged that the defendants received a payment from the insurance carrier in connection with the annuity purchase that was not disclosed to plan fiduciaries, far exceeded the amount that the Hospital had agreed to pay for Dietrich & Associates' services, and violated a contractual provision specifically barring Dietrich & Associates from receiving compensation from any insurer for the pension plan's annuity. The consent order provides for defendants to pay \$300,000, with \$272,722 divided among the participants in the annuity pro rata based on the cost of each annuitant's share at the time of purchase and \$27,273 paid to the government as a civil penalty. In addition, the defendants must enter into written agreements disclosing all information required by the law with any plans they service and must ensure that any entities they control in the future comply with the consent order's requirements. On November 26, 2012, the court denied the defendants' motion to dismiss, rejecting their arguments that injunctive relief was not an appropriate remedy and that

the complaint was barred by the statute of limitations despite the parties' written agreement to toll the statute of limitations. Plan Benefits Security Division

Perez v. Hofmeister (E.D. Ky.)

On August 9, 2012, the Secretary filed a complaint against George Hofmeister, Bernard Tew, Tew Enterprises, LLC, Bluegrass Investment Management, LLC, Metavation, LLC, and MIDS, LLC. The complaint alleges that Hofmeister, as trustee of the Hillsdale Salaried Pension Plan and the Hillsdale Hourly Pension Plan, engaged in a series of prohibited transactions and imprudent actions, including loans to companies affiliated with Hofmeister, use of plan assets for the purchase and lease of employer property of a company affiliated with Hofmeister, purchase of customer notes from companies affiliated with Hofmeister, and the improper allocation of income and expense payments between the pension plans. The complaint further alleges that Bernard Tew, Tew Enterprises, LLC, and Bluegrass Investment Management, LLC, who served as investment advisors to the plans, approved many of the prohibited transactions and were paid excessive fees for their services. On July 26, 2013, the court entered an order removing Hofmeister as fiduciary and recognizing the resignation of Bernard Tew as fiduciary and appointing independent fiduciary to administer the plans. See also Perez v. Hofmeister, Section B.3. Miscellaneous. Cleveland Office

Perez v. Hofmeister (E.D. Ky.)

On May 30, 2013, the Secretary filed a complaint against George Hofmeister, Bernard Tew, Bluegrass Investment Management, LLC, Fairfield Castings, LLC f/k/a Revstone Casting Fairfield, LLC, DIDS, LLC, William Twardy, Nelson Clemmens, and Revstone Casting Fairfield, GMP Local 359 Pension Plan. The complaint alleges Hofmeister, as trustee of the Revston Casting Fairfield, GMP Local 359 Pension Plan, engaged in a series of prohibited transactions and imprudent actions, including use of plan assets for the purchase and lease of employer property of a company affiliated with Hofmeister, purchase of customer notes from companies affiliated with Hofmeister, and the improper transfer of plan assets to a company affiliated with Hofmeister. The complaint further alleges that Bernard Tew and Bluegrass Investment Management, who served as investment advisors to the plans, approved many of the prohibited transactions and were paid excessive fees for their services. On July 26, 2013, the court entered an order removing Hofmeister as fiduciary, recognizing the resignation of Bernard Tew as fiduciary, and appointing independent fiduciary to administer the plan. See also Perez v. Hofmeister, Section B.3. Miscellaneous and In re Revstone Casting Fairfield, Section O. Miscellaneous. Cleveland Office

ING Life Insurance and Annuity Company (not filed)

On March 7, 2013, ING Life Insurance and Annuity Company (ILIAC) restored \$5,245,087.30, to accounts of plan clients (approximately 1400 plans) negatively affected by ILIAC's practices for the period January 1, 2008 to June 30, 2011. The Department determined that ILIAC failed to disclose a fee it charged to its ERISA-covered plan clients as part of its recordkeeping services. ILIAC's policy was to correct errors in processing transactions by employing "as of" processing. When ILIAC failed to process a transaction on the date all necessary documentation and information had been submitted, or committed an inadvertent error in processing a transaction, ILIAC would reverse the erroneous transaction and process it as of the date the transaction should have occurred. As a result of these later corrections, ILIAC experienced

"gains" and "losses" due to intervening market fluctuations. Though obligated by contract to make up for any "losses" to a plan, ILIAC's practice was to keep any "gains" resulting from error corrections. No aspect of this procedure was disclosed to its plan clients or plan sponsors – neither the fact that ILIAC committed errors and employed an error correction procedure, that there was the potential for "gains" or "losses," that ILIAC retained all resulting "gains," nor that ILIAC netted the "gains" it realized on an omnibus level against all "losses" it experienced (instead of netting "gains" and "losses" within any one affected plan). The Department determined that ILIAC's retention of "gains" constituted an undisclosed fee that it was obligated to disgorge. In addition to requiring the payment of more than \$5 million in March 2013, a December 19, 2012 settlement agreement required ILIAC to pay a civil penalty of \$524,508.73 and to disclose to its current and future plan clients its error correction procedure and its practice of keeping "gains," thereby affording its clients the opportunity to authorize the practice or discontinue ILIAC's services. ILIAC also agreed to provide gain/loss information annually to those plans affected by ILIAC's error correction policy and will report the gains it keeps. ILIAC has complied with these terms. The agreement also resolved a secondary issue, ILIAC's treatment of abandoned plans. ILIAC agreed to undertake efforts to contact the plan sponsors of apparently abandoned plans in order to effect termination; if its efforts prove unsuccessful, ILIAC agrees to serve as those plans' Qualified Termination Administrator. Boston Office

Leimkuehler v. American United Life Ins. Co. (7th Cir.)

This case involves a putative class action brought by plans that invested in mutual funds selected from a menu of options offered by American United Life Insurance ("AUL"). The issues on appeal are whether an entity (AUL) that retains discretionary authority in the selection of mutual fund share classes offered to a plan, while engaging in revenue sharing with those same mutual funds, has fiduciary obligations with respect to mutual fund share class offerings; and whether ERISA § 3(21)(A)(i), which makes a person a fiduciary to a plan "to the extent he exercises any authority or control respecting management or disposition of its assets," requires the person to have discretionary authority or control over those plan assets. The district court held that even if the defendant retained discretionary authority in the selection of mutual fund share classes, and engaged in revenue sharing with respect to such mutual funds, AUL did not incur fiduciary liability concerning share class selection and revenue sharing to the extent it followed plan instructions and did not actively use its discretion to make the selections itself. In addition, the district court held that an individual can never be a functional fiduciary under ERISA § 3(21)(A)(i) unless he exercises discretionary control or authority over plan assets and plan management. The plaintiffs filed their opening brief on May 25, 2012, and the Secretary filed a brief on June 1, 2012. The Secretary's brief argued that AUL's retention of discretionary authority in the selection of mutual fund share classes implicates fiduciary obligations and should have prevented it from setting its own compensation in its revenue sharing arrangements. The brief also argued that, under the plain language of the statute, fiduciary status is conferred on persons who exercise "any authority or control" over plan assets, so that discretion is not an element that needs to be pleaded to survive dismissal. The Secretary participated in oral argument on November 28, 2012. On April 16, 2013, the court issued a mostly adverse decision affirming the judgment of the district court and rejecting the Secretary's argument that retention of the authority to deselect funds make AUL a fiduciary for purposes of the revenue sharing, although the court agreed with the Secretary's position that discretion was not required to make

an entity a fiduciary if it has authority over management or disposition of plan assets. A petition for rehearing was denied on June 27, 2013. 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, the defendants 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. On June 5, 2012, the court entered a default judgment against defendant Salutric requiring him to restore \$1.2 million in losses to the plan. On September 17, 2012, the court entered a consent judgment requiring the remaining defendant, Results One, to restore \$850,000 in losses to the plan. On May 9, 2013, the Supreme Auto Plan filed a motion to intervene. On June 14, 2013, the Secretary filed a memorandum in opposition to the motion to intervene. The motion is pending. Chicago Office

Tri-3 v. Aetna (3d Cir.)

This appeal stems from a putative class action brought by plaintiff Tri3 Enterprises, a medical provider and assignee for participants in ERISA health benefit plans, against Aetna, Inc., an insurer of those ERISA plans, for retroactive denials of coverage for two medical devices that Aetna considers to have been fraudulently or improperly billed and for which Aetna has demanded restitution of the alleged overpayments. The suit alleges that Aetna failed to follow the ERISA claims procedure and thus failed to provide a "full and fair" review of the coverage denial. The district court dismissed the case for failure to state an ERISA claim. The issue on appeal is whether Aetna's demand for restitution from a medical device supplier of previously-paid benefits that Aetna has determined were not covered by the plan is subject to review under ERISA and its accompanying claims regulation. On November 30, 2012, the Secretary filed a brief in support of the appellant medical provider. Oral argument, in which the Secretary participated, was held June 28, 2013. On August 16, 2013, the Third Circuit issued a favorable, non-precedential decision. The decision reversed and agreed with Tri3 and the Secretary that Tri3's claims are well-pleaded ERISA claims, that the district court must presume the truth of its allegations without regard to Aetna's fraud allegations in a motion to dismiss, and that whether Aetna might be able to bring a non-preempted fraud suit in state court does not affect Tri3's ability to bring a valid ERISA claim in federal court. The case was therefore remanded for further proceedings on the plausibility and merits of the claims themselves. Plan Benefits Security Division

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. The complaint alleges that defendants served as fiduciaries to 13 ERISA-covered plans, providing discretionary investment advice and asset management services for a fee, 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 half of all incentive fees LF Global received from GMM that derived from funds invested with GMM on behalf of Zenith clients, including the plans, which were not told of the LF Global arrangement prior to their investing in GMM. On April 5, 2013, the court approved four consent orders as follows: Zenith Capital is liable for a default judgment of \$501,682, attributable to investment losses suffered by Zenith's 13 ERISA plan clients, incentive fees collected by Zenith and lost earnings. Zenith also is liable for the § 502(l) penalty and is enjoined from serving as a fiduciary, including as a Section 3(38) investment manager, or service provider to any ERISA-covered plan. The individual defendants lack financial resources, so the Secretary reduced the demand for relief from them. Tasker's liability of \$403,904, attributable to investment losses and incentive fees, plus the Section 502(l) penalty, is deferred due to his current inability to pay. Smith is required to restore \$15,000 in investment losses and incentive fees to two plans, and defendant Cooper is to restore \$583 in incentive fees to one plan, plus both will pay a Section 502(l) penalty. The consent orders also bar the individual defendants from serving as ERISA Section 3(21)(i) and (iii) fiduciaries to any ERISA-covered plan and from serving as ERISA Section 3(21)(ii) fiduciaries or service providers to any ERISA-covered plan without first complying with protective terms of the consent orders, including internal controls and training requirements.

Plan Benefits Security Division

#### **L. Orphan Plans**

##### Perez v. Aguirre (N.D. Ill.)

On December 16, 2013, the Secretary filed a complaint against Eugene Aguirre and the Sunstrand Electric Company, Inc. Employees 401(k) Profit Sharing Plan and Trust. The complaint alleged that since August 2010, Aguirre, the sole plan trustee, failed to administer the plan. As a result, the plan has not been terminated and account balances, totaling \$100,734, have not been distributed to the participants. The complaint seeks a judgment permanently enjoining Aguirre from violating ERISA in the future, removing Aguirre from his position as plan trustee, removing Sunstrand from its position as plan administrator, permanently enjoining Aguirre and Sunstrand from serving as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to distribute the plan assets and terminate the plan at Aguirre's expense. Chicago Office

##### Solis v. Anderson-McGriff Company (N.D. Ga.)

On March 11, 2013, the Secretary filed a complaint against Anderson-McGriff Company, a defunct Georgia company, and the estate of its owner, John F. Head, III. Before his death, Head served as the company's chief executive officer and sole fiduciary of the company's Profit Sharing and 401(k) Plan. The complaint alleges that the company and Head failed to administer and wind down the plan and seeks the appointment of an independent fiduciary to terminate the plan and distribute its assets. The plan has approximately 19 participants and assets of approximately \$11,511.23. The Secretary engaged in settlement discussions with the attorney representing the Estate of John F. Head, III. An executor of the estate was appointed as the

plan's successor trustee to distribute the plan assets. Once all funds have been distributed and the plan has been wound down, the Secretary will file a voluntary dismissal of the complaint.  
Atlanta Office

Solis v. Atchison (S.D. Ohio)

On May 15, 2012, the Secretary filed a complaint against Mark Atchison and the Zuber Landscape, Inc. Davis-Bacon Turnkey Pension Plan, alleging that Atchison failed to distribute \$18,523.49 to seven participants, engaged in a prohibited transfer of \$22,301.93 of plan assets held by 18 participants, abandoned the plan, and failed to terminate the plan. On March 19, 2013, the court entered a consent order and judgment requiring Atchison to restore \$31,152.48, including lost opportunity costs, to the plan per the payment schedule in the order, removing Atchison as the fiduciary of the plan, permanently enjoining Atchison from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to terminate the plan and distribute its assets. Cleveland Office

Solis v. Avid Sportswear and Golf Corp. (M.D. Fla.)

On March 5, 2013, the Secretary filed a complaint against Avid Sportswear and Golf Corp. and Ann Schmid. The complaint alleges ongoing violations arising from the fiduciaries' abandonment of the company's 401(k) plan. The Secretary sought an order permanently enjoining defendants from serving as fiduciaries and appointment of an independent fiduciary to terminate the plan and distribute its assets. Atlanta Office

Harris v. Bush (S.D. Ind.)

On February 27, 2013, the Secretary filed a complaint against Brandon Bush and Pallett Holdings, LLC., the fiduciaries of the company's 401(k) Plan. On June 19, 2013, the court entered a default judgment against Bush, permanently enjoining him from violating Title I of ERISA, removing him as the fiduciary of the plan, enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to administer and terminate the plan. Pallet Holdings, LLC, the plan sponsor which is no longer in operation, was dismissed from the case. Cleveland Office

Harris v. Celebration Events, Inc. (D. Mass)

On June 18, 2013, the Secretary filed a complaint alleging that Celebration Events, Inc. failed to properly manage plan assets and administer the Celebration Events, Inc. 401(k) Plan. Pursuant to a consent judgment and order, entered on August 5, 2013, Celebration Events, Inc. agreed to have an independent fiduciary appointed by the court to administer the plan and distribute the approximately \$315,159.27 in assets to the 11 remaining participants. Boston Office

Perez v. Commander Carbon Salary Savings Plan (D.N.J.)

On November 8, 2013, the Secretary filed a complaint seeking the appointment of an independent fiduciary for the Commander Carbon Salary Savings Plan, which was orphaned in approximately 2011 when the plan sponsor company ceased operations. The Secretary's complaint seeks the distribution of approximately \$208,348 in plan assets. New York Office

Solis v. Crown Auto, Inc. (C.D. Cal.)

On July 27, 2012, the Secretary filed a complaint against Crown Auto, Inc., seeking the appointment of an independent fiduciary to wind down the company's abandoned 401(k) plan. The company went out of business in 2007, and the only remaining trustee, Wayne Crownover, died in 2009. As of May 19, 2010, the 401(k) plan had 16 participants and \$21,391.53 in plan assets. On February 5, 2013, the Secretary filed a motion for default judgment and requested the appointment of an independent fiduciary. On March 8, 2013, the court granted the Secretary's motion, entered judgment against Crown Auto, and appointed an independent fiduciary to distribute the plan's assets and terminate the plan. Los Angeles Office

Solis v. Custom Patio Rooms, Inc. (W.D. Pa.)

On January 15, 2013, the Secretary filed a complaint against Custom Patio Rooms, Inc., alleging that it failed to appoint a fiduciary to manage and oversee its 401(k) retirement and profit sharing plans after it ceased operations in 2009. The complaint seeks removal of the company as the plans' administrator and an order appointing an independent fiduciary to administer the plans and distribute its assets. As of August 2012, the Profit Sharing 401(k) Plan had 24 participants and about \$289,000 in plan assets, and the Union Employee 401(k) Plan had eight participants and approximately \$12,000 in assets. On May 6, 2013, the court granted the Secretary's motion for alternative service. On July 18, 2013, the clerk of the court entered a default against the defendant. On August 5, 2013, the court granted the Secretary's motion for a default judgment, in which Custom Patio was removed as a fiduciary and an independent fiduciary was appointed to terminate the plans and make distributions to participants. Philadelphia Office

Harris v. David J. Hardy Construction Co., Inc. 401(k) Plan (N.D.N.Y.)

On May 8, 2013, the Secretary filed a complaint against the David J. Hardy Construction Co., Inc., 401(k) Plan, seeking the appointment of an independent fiduciary after plan trustee, David J. Hardy, stopped performing his fiduciary duties after filing for bankruptcy and the company ceased business operations. As of December 31, 2011 the plan had approximately 19 participants and \$270,631.00 in assets. New York Office

Perez v. DTK Computer Inc. (C.D. Cal.)

On August 5, 2013, the Secretary filed a complaint, seeking the appointment of an independent fiduciary to distribute plan assets and terminate the DTK Computer Inc. 401(k) Plan. As of May 5, 2013, the plan had 25 participants and \$33,610.99 in assets. The company ceased operations in 2002. On September 18, 2013, the clerk entered default and, on October 30, 2013, the Secretary filed a motion for default judgment. On November 25, 2013, the court granted the Secretary's motion, entered default judgment against DTK Computer, and appointed an independent fiduciary. Los Angeles Office

Harris v. Emergystat (N.D. Ala.)

On September 12, 2013, the Secretary filed a complaint against Emergystat Inc. and Larry N. Lunan, asserting claims related to the abandonment of the company's 401(k) Profit Sharing Plan. Lunan agreed to the appointment of an independent fiduciary on November 29, 2013 in exchange for a dismissal of the civil action against him. The independent fiduciary will terminate the plan and distribute more than \$300,000 in plan assets. Atlanta Office

Solis v. Explore, Inc. (D. Md.)

On October 11, 2012, the Secretary filed a complaint against Explore, Inc., alleging that the company failed to appoint a fiduciary to manage and oversee the company's 401(k) retirement plan after it ceased operations in 2001. The complaint seeks removal of the company as the plan administrator and an order appointing an independent fiduciary to administer the plan and make distributions. As of April 2011, the plan had three participants and over \$4,000 in plan assets. On January 25, 2013, the Secretary filed a motion for entry of default against Explore, which was granted. On March 25, the Secretary filed a motion for default judgment. On April 16, 2013, the court entered the default judgment, which appoints an independent fiduciary to terminate the plan and make distributions. Philadelphia Office

Harris v. Gaines (W.D. Tenn.)

On September 26, 2013, the Secretary filed a complaint against Ben J. Gaines, alleging the abandonment of the New Generations Employee Savings & Retirement Plan and seeking the appointment of an independent fiduciary to administer the plan. Concurrently, the parties submitted a consent judgment and order appointing an independent fiduciary for the plan. It was approved by the court on October 31, 2013. Atlanta Office

Harris v. GEI International, Inc. (E.D. Pa.)

On March 5, 2013, the Secretary filed a complaint against GEI International, Inc., alleging that the company failed to appoint a fiduciary to manage and oversee the company's 401(k) retirement plan after it ceased operations in or about 2003. As of December 2011, the plan had 5 participants and over \$150,000 in plan assets. On August 2, 2013, the court entered a default judgment appointing an independent fiduciary to make distributions to plan participants and terminate the plan. Philadelphia Office

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

On October 10, 2012, the Secretary filed a complaint against Gautam Gupta, alleging that he failed to administer and terminate the Gautam Gupta MD d/b/a Nutrition Clinic 401(k) Plan. The relief requested would allow for the distribution of approximately \$522,000 in retirement funds to 26 participants. The Secretary filed a motion for default judgment on January 23, 2013. On January 30, 2013, the judge entered a default judgment against Gupta ordering him removed as a fiduciary of the plan, permanently enjoining him from violating ERISA, permanently enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to administer and terminate the plan. Chicago Office

Perez v. Hellman (S.D. Ind.)

On July 2, 2013, the Secretary filed a complaint against Theresa Hellman, the trustee of the Specialty Staff, Inc. 401(k) Plan, Specialty Staff, the plan sponsor and principal administrator, and Robin Polin, the alternate administrator, alleging that they abandoned their administration of the plan after the company ceased operations in December 2010. The complaint sought the removal of the defendants, as plan fiduciaries, their preclusion from serving as fiduciaries of other ERISA-covered plans, and the appointment of an independent fiduciary to distribute slightly more than \$44,000 in plan assets and to terminate the plan. On December 5, 2013, the court granted the Secretary's motion for default judgment against Specialty Staff, Hellman, and

the plan and judgment on the pleadings against Polin for all of the relief sought. Cleveland Office

Perez v. Intelligent System Solutions 401(k) Plan (N.D.N.Y.)

On June 12, 2013, the Secretary filed a complaint against the Intelligent System Solutions 401(k) Plan, seeking the appointment of an independent fiduciary after the plan trustee, Jeffrey Bazinet, was barred from acting as a fiduciary because of a criminal conviction. As of December 19, 2011, the plan had approximately 18 participants and \$47,486.58 in assets. On January 28, 2014, the court granted the Secretary's request for a default judgment and appointed an independent fiduciary to administer the plan and distribute its assets. New York Office

Solis v. Invenio Technologies Corporation (D. Mass.)

On January 18, 2013, the Secretary filed a complaint alleging that Invenio Technologies Corporation failed to properly manage plan assets and administer its 401(k) Savings Plan. Pursuant to a default judgment entered on October 11, 2013, an independent fiduciary was appointed to administer the plan and distribute approximately \$116,579.94 in assets to the 12 remaining participants. Boston Office

Harris v. Investment Group (N.D. Ill.)

On June 10, 2013, the Secretary filed a complaint against The Investment Group Inc., Alex Bulmash and the company's 401(k) Sharing Plan. The complaint alleged that Bulmash and company are the only persons legally authorized to direct the disbursement of the plan assets and that Bulmash, having been convicted of wire fraud, cannot serve as a fiduciary to make the necessary distributions, pursuant to ERISA Section 411(a)(1). On August 27, 2013, the court entered a consent judgment ordering the defendants removed as plan fiduciaries, permanently enjoining them from violating ERISA and from acting as a service provider or fiduciary to any ERISA-covered plan, appointing an independent fiduciary to make final distributions to plan participants and terminate the plan, and reallocating \$750 from Bumash's own plan account balance to a plan account solely to be used to pay the independent fiduciary. Chicago Office

Solis v. J.M. Singley & Associates, Inc. (E.D. Pa.)

On October 23, 2012, the Secretary filed a complaint against J.M. Singley & Associates, Inc., alleging that the company failed to manage and oversee the company's 401(k) retirement plan after the company ceased operations in 2010. The complaint seeks removal of the company as plan administrator and an order appointing an independent fiduciary to administer the plan and make distributions to participants. As of May 2012, the plan had eight participants and over \$17,000.00 in plan assets. On January 20, 2013, the Secretary filed a motion seeking permission to serve the corporation by publication, which motion was granted on July 10, 2013. Thereafter, the Secretary served the defendant by publication, and the defendant failed to answer the complaint. On August 28, 2013, at the request of the Secretary, the clerk of court entered a default against the defendant. On August 30, 2013, the court granted the Secretary's motion for default judgment appointing an independent fiduciary to terminate the plan and make distributions to plan participants. See also Solis v. Singley and Associates, Inc., Section B.1. Collection of Plan Contributions and Section M. Contempt and Subpoena Enforcement. Philadelphia Office

Solis v. Kreager (D. Minn.)

On October 25, 2012, the Secretary filed a complaint against Valerie Kreager for failing to administer and terminate the Nationwide Wash Systems, Inc. 401(k) Plan. As of December 31, 2011, the plan had ten participants and \$29,146 in assets. On April 10, 2013, the judge entered a default judgment against Kreager ordering her removed as a fiduciary of the plan, permanently enjoining her from violating ERISA, permanently enjoining her from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to administer and terminate the plan. Chicago Office

Solis v. Maximus Multimedia International, LLC (C.D. Ill.)

On June 27, 2012, the Secretary filed a complaint against Maximus Multimedia International, LLC and the company's 401(k) Savings Plan, for failing to terminate the plan or distribute the plan's assets when the company ceased doing business in 2010. The plan had 160 participants with total assets of \$893,510.38 as of January 28, 2013. On February 1, 2013, the court entered a default judgment removing Maximus as a fiduciary to the plan, and appointing an independent fiduciary to terminate the plan and distribute the plan assets to the participants. Chicago Office

Solis v. Merritt (S.D. Ohio)

On July 27, 2012, the Secretary filed a complaint against Gary L. Merritt and Bemcore, Inc., fiduciaries of the company's Employee Incentive Plan, alleging that they failed to administer and terminate the plan. Merritt was ineligible to act as a fiduciary after he pled guilty to embezzlement and theft from an employee benefit plan, but he failed to appoint a new fiduciary. He had been ordered to pay restitution in the amount of \$182,070.56. On January 22, 2013, the Secretary secured a judgment appointing an independent fiduciary to administer and terminate the plan. Cleveland Office

Harris v. M.S. Farrell & Company (S.D. Fla.)

On April 3, 2013, the Secretary filed a complaint against Douglas Gass and Martin Schacker, trustees of the M.S. Farrell & Company 401(k) Plan, seeking the appointment of an independent fiduciary to the plan. Atlanta Office

Solis v. Multicultural and Literacy Institute (E.D. Pa.)

On January 11, 2013, the Secretary filed a complaint against Multicultural and Literacy Institute, alleging that it failed to appoint a fiduciary to manage and oversee its 401(k) retirement plan after it ceased operations in August 2010. The complaint seeks the removal of the Institute as the plan administrator and an order appointing an independent fiduciary to administer the plan and make distributions to plan participants. At the time the complaint was filed, the plan had six participants and over \$5,000 in plan assets. On January 23, 2013, the Secretary filed a Motion for Permission to Serve the Pennsylvania Department of State in Lieu of the Defendant, which the court granted on February 8, 2013. On March 11, 2013, the plan's asset custodian agreed to serve as a Qualified Termination Administrator, with responsibility for administering and terminating the plan. As a result, on September 25, 2013, the Secretary moved to voluntarily dismiss the case, which the court granted on October 28, 2013. Arlington Office

Harris v. NW Systems, Inc. (D. Md.)

On February 14, 2013, the Secretary filed a complaint against NW Systems, Inc., Nathan Williams and Jesus Rivera, alleging that they failed to take responsibility for the operation and administration of the NW Systems, Inc. 401(k) Plan and its assets as a result of a dispute over the ownership of the Company that began in November 2012. As of December 31, 2012, the plan had 135 participants and \$2,629,916 in assets. The complaint sought the removal of the defendants from their fiduciary positions and appointment of an independent fiduciary. The Secretary's claims were resolved through the entry of a consent judgment, also filed on February 14, 2013, whereby the parties agreed to and the court approved the removal of the defendants as plan fiduciaries and the appointment of an independent fiduciary to administer and oversee the plan. Arlington Office

Perez v. People of Color in Crisis 403(B) Retirement Plan (E.D.N.Y.)

On June 12, 2013, the Secretary filed a complaint against the People of Color in Crisis 403(B) Plan, seeking the appointment of an independent fiduciary. As of September 30, 2012, the plan had five participants and \$39,133.41 in assets. New York Office

Solis v. Polaris America, LLC (S.D. Ohio)

On July 29, 2013, the Secretary filed a complaint against Polaris America, LLC, Christopher Filos, and the Polaris America, LLC 401(k) Profit Sharing Plan, alleging that Filos failed to distribute \$16,072.37 to three participants, abandoned the plan, and failed to terminate the plan. On November 4, 2013, the court entered a consent order and judgment removing Filos as the fiduciary of the plan, permanently enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary to terminate the plan and distribute its assets. Cleveland Office

Harris v. Progressive Machine Company, Inc. 401(k) Plan (D.N.J.)

On November 29, 2012, the Secretary filed a complaint seeking the appointment of an independent fiduciary to distribute \$81,463.00 in plan assets of the Progressive Machine Company, Inc. 401(k) Plan. Due to a criminal conviction in 2010, the plan's last known fiduciary has been barred from administering or operating the plan. Service was made on the New Jersey Division of Revenue in early February 2013. The Secretary moved for a default judgment on March 27, 2013. On May 30, 2013, the court granted the Secretary's default motion and appointed an independent fiduciary for the plan. New York Office

Harris v. Railpower Hybrid Technologies Corp. (W.D. Pa.)

On May 15, 2013, the Secretary filed a complaint against Railpower Hybrid Technologies Corp., alleging that the company failed to appoint a fiduciary to manage and oversee the company's 401(k) retirement plan after it ceased operations in or about 2009. As of May 2013, the plan had 5 participants and approximately \$70,000 in plan assets. On November 15, 2013, the court entered a default judgment appointing an independent fiduciary to make distributions to plan participants and terminate the plan. Philadelphia Office

Harris v. Rape and Victim Assistance Center of Schuylkill County (M.D. Pa.)

On April 2, 2013, the Secretary filed a complaint against the Rape and Victim Assistance Center of Schuylkill County, alleging that the organization failed to appoint a fiduciary to manage and

oversee the company's 401(k) retirement plan after it ceased operations in or about 2009. As of April 2013, the plan had 5 participants and over \$10,000 in plan assets. On August 6, 2013, the court entered a default judgment appointing an independent fiduciary to make distributions to plan participants and terminate the plan. Philadelphia Office

Harris v. Samoa Aviation, Inc. 401(k) Savings Plan (C.D. Cal.)

On April 30, 2013, the Secretary filed a complaint against the defunct Samoa Aviation, Inc., seeking the appointment of an independent fiduciary to terminate the company's 401(k) Savings Plan and distribute its assets. As of June 30, 2013, the plan had 53 participants and \$235,693 in assets. On October 18, 2013, the Secretary filed a motion for default judgment. On November 21, 2013, the court entered default judgment against Samoa Aviation and appointed an independent fiduciary. Los Angeles Office

Harris v. Shoplink.com, Inc. (D. Mass.)

On July 9, 2013, the Secretary filed a complaint alleging that Shoplink.com, Inc. failed to properly manage plan assets and administer the Shoplink Incorporated Employee 401(k) Plan. Pursuant to a consent judgment and order, entered on October 15, 2013, Shoplink.com agreed to have an independent fiduciary appointed by the court to administer the plan and distribute the approximately \$29,055.00 in assets to the 30 remaining participants. Boston Office

Perez v. Spruce Printing Company 401(k) (N.D. Tex.)

On June 13, 2013, the Secretary filed a complaint against the Spruce Printing Company 401(k) Plan, seeking the appointment of an independent fiduciary to direct the termination of the plan and the distribution of \$5,849.60 owed to four plan participants. On October 23, 2013, the Secretary filed a motion for entry of default judgment and on December 11, 2013, filed a motion for default judgment. The court granted the Secretary's motion and issued an order appointing an independent fiduciary on December 16, 2013. Dallas Office

Perez v. Staffnet Inc. 401(k) Retirement Savings Plan (N.D. Tex.)

On September 16, 2013, the Secretary filed a complaint against Staffnet Inc. 401(k) Retirement Savings Plan, seeking the appointment of an independent fiduciary to direct plan termination and distribution of \$31,496.45 owed to eight participants. On December 5, 2013, the court signed and approved a consent judgment that removed the named plan trustee and appointed a successor fiduciary. Dallas Office

Harris v. Stephen Bosniak, MD, PC, Profit Sharing Plan (E.D.N.Y.)

On April 5, 2012, the Secretary filed a complaint against the Stephen Bosniak, MD, PC, Profit Sharing Plan, alleging that the plan had been abandoned after Bosniak, its trustee, died in February 2007. On October 25, 2012, the Secretary filed a motion for default judgment and the appointment of an independent fiduciary to wind down the plan and distribute its assets. On May 8, 2013, the magistrate judge issued a report recommending that the Secretary's motion be granted and an independent fiduciary be appointed. On August 6, 2013, default judgment was entered, and an independent fiduciary was appointed to distribute approximately \$62,776 in assets to one participant. New York Office

Harris v. Sunrise Enterprises 401(k) Profit Sharing Plan (N.D.N.Y.)

On March 8, 2013, the Secretary filed a complaint against the Sunrise Enterprises 401(k) Profit Sharing Plan, seeking the appointment of an independent fiduciary after the plan trustees, Mitchell Near and Kurt Rychcik, stopped performing their fiduciary duties without ensuring the appointment of a new fiduciary to oversee distribution of the plan assets. As of January 2012, the plan had approximately \$61,777.99 in assets. On May 16, 2013, the court approved a consent order, signed by Mitchell Near, appointing an independent fiduciary to administer the plan and distribute its assets. New York Office

Perez v. Van Buren Automotive Products 401(k) Profit Sharing Plan (E.D.N.Y.)

On August 2, 2013, the Secretary filed a complaint against the Van Buren Automotive Products 401(k) Profit Sharing Plan, seeking the appointment of an independent fiduciary after the death of the plan trustee, Anthony Spagnolo. As of March 4, 2013 the plan had \$102,582.34 in assets. On January 14, 2014, the court granted the Secretary's request for a default judgment and appointed an independent fiduciary to administer the plan and distribute its assets. New York Office

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

On March 12, 2012, the Secretary filed a complaint against the fiduciaries of the Vanguard Corporation of America 401(k) Plan. In 2008, the plan sponsor ceased operations and abandoned the plan, which had approximately 26 participants and assets of \$244,099.27. The complaint seeks the appointment of an independent fiduciary to distribute plan assets and injunctive relief against the fiduciaries. The Secretary is pursuing default judgment. Atlanta Office

Perez v. Windswept Environmental 401(k) Plan c/o Windswept Environmental Group, Inc. d/b/a Trade-Winds Environmental Restoration Inc. (E.D.N.Y.)

On December 17, 2012 the Secretary filed a complaint against the Windswept Environmental 401(k) Plan, seeking the appointment of an independent fiduciary to distribute \$119,944.10 in assets to 12 participants. The plan was abandoned when its sole trustee passed away in 2008. The Secretary moved for a default judgment on May 6, 2013. On October 7, 2013, the court granted the default motion and appointed an independent fiduciary. New York Office

Solis v. Zohouri Group (N.D. Ga.)

On September 5, 2012, the Secretary filed a complaint against Zohouri Group, LLC, Farbod Zohouri, and Lynn Schaeffer, alleging the abandonment of a plan and its participants. The company was dissolved in 2008. The complaint 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. The plan currently has approximately 22 participants and assets of approximately \$47,390.67. Atlanta Office

**M. Contempt and Subpoena Enforcement**

Perez v. Cincy Fireprotection, Inc. (S.D. Ohio)

On August 21, 2013, the Secretary filed a subpoena enforcement action against Cincy Fireprotection, Inc., the sponsor of a 401(k) Savings Plan. On October 28, 2013, the parties

appeared before the court for a hearing on the Secretary's motion to compel. Based on testimony entered by Cincy president, Donald Shearer, the court granted Cincy additional time to comply with the subpoena. Shearer and Cincy eventually provided the requested documents. The Secretary represented to the court that Cincy had complied with the subpoena, whereupon the court denied the Secretary's motion as moot and closed the case. Cleveland Office

Solis v. Garlick and Tack, Inc. dba Cogent Valuation (C.D. Cal.)

On February 19, 2013, the Secretary filed an opposition to Garlick and Tack, Inc. dba Cogent Valuation's motion to quash subpoena and filed a cross-petition to enforce subpoena. The Secretary's subpoena, issued in December 2012, sought documents and records for all ERISA-covered plans for which Cogent Valuation provides valuation services. On March 27, 2013, the court rejected Cogent Valuation's myriad arguments, including: Cogent Valuation should not have to comply with the subpoena because it's not a fiduciary; Cogent Valuation should only have to produce records for clients for whom it served as a fiduciary (and it says none); the Secretary exceeded her congressional authority in issuing the subpoena; that the Secretary needs to show probable cause to have the subpoena enforced; that the Secretary violated the Tax Reform Act in issuing the subpoena; and that the Secretary was obligated to follow the agency's internal enforcement manual. On April 16, 2013, the Secretary appeared before the court to participate in a court-ordered meet-and-confer related to Cogent Valuation's objections that the subpoena was overly broad and placed an undue burden on the business. Following the meet-and-confer, the court ordered Cogent Valuation produce documents in response to all sixteen demands in the subpoena. The parties were able to agree on limiting the years in which documents were required to be produced, and the court ordered a certain protocol for electronically stored information. Los Angeles Office

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

On April 30, 2013, the Secretary filed a petition to enforce an administrative subpoena against Ralph E. Grabowski, RG Benefit Services, Inc. and the firm's 401(k) Profit Sharing Plan. A show cause hearing was scheduled and continued on several occasions, while the respondents worked to comply with the subpoena. The respondents produced responsive documents, and the Secretary withdrew the petition on July 30, 2013. Philadelphia Office

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

On January 24, 2013, the Secretary filed a petition for adjudication of civil contempt asking the Court to find Joel Graves, president of Graves Electric, Inc., in contempt for failing to comply with the terms of the consent judgment and order, entered May 18, 2011, which required him to pay \$20,003 to the Graves Electric SIMPLE IRA Plan. On November 18, 2013, the court entered a consent purge order holding Graves in contempt of the court's 2011 order. The purge order requires Graves to pay installments to the plan investment accounts of plan participants on a pro-rata basis and to notify each participant of this action. Should Graves fail to pay any of the installments, in the full amounts, on or before the 15th day of each month, the entire amount of the remaining principal balance will become immediately due and payable together with post judgment interest. If Graves does not comply with this purge order, he will be subject to further sanctions. Cleveland Office

Perez v. Harrison (D.N.J.)

On December 3, 2013, the Secretary filed a petition to enforce a subpoena *ad testificandum* issued to Mark S. Harrison, trustee and administrator of the Mark S. Harrison, Esq. 401k plan. On January 7, 2014, the court granted the Secretary's petition, requiring Harrison to comply within 10 days of the court order and tolling the statute of limitations from August 16, 2013, when the subpoena was issued, until compliance on January 21, 2014. New York Office

Solis v. Insight Research (N.D. Ga.)

On February 11, 2013, the Secretary filed a motion for contempt in an effort to compel the defendants to pay two judgments, totaling over \$160,000, that the Secretary obtained in two previous actions against defendants Insight Research, Inc. and Allen McMillon. In those actions, the Secretary alleged that the defendants failed to remit employee contributions to the company's 401(k) Plan and then used plan assets to pay the company's operating expenses. After a hearing on May 9, 2013, the court held McMillon in contempt, and after hearing evidence of his financial situation, ordered him to pay \$100 per night. Atlanta Office

Solis v. Jackson Home Medical Equipment, Inc. (E.D. Mich.)

On March 27, 2012, the Secretary filed a subpoena enforcement action against the fiduciary of the Aumack Co. 401(k) Plan. On January 17, 2013, the fiduciary appeared before the Department and said he had none of the subpoenaed documents. The Secretary moved to dismiss this action and an order of dismissal was entered April 8, 2013. Cleveland Office

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

On February 28, 2013, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was significantly delinquent under the terms of the payment plan provided for in the consent judgment. On March 14, 2013, the Secretary withdrew the petition for civil contempt following Sampson's tender of approximately \$11,000 that was past due. The Secretary's district court complaint, filed on November 15, 2010 against Kineticsware, Inc., Jeffrey Sampson and Richard Barnett, alleged that they 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 Sampson's Chapter 7 bankruptcy case, 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 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. See also Solis v. Kineticsware, Inc., Solis v. Sampson (In re Sampson), B.1. Collection of Plan Contributions. Seattle Office

Harris v. Parella (E.D. Pa.)

On March 7, 2013, the Secretary filed a petition to enforce an administrative subpoena against Michael Parella and the Valley Forge Publishing Group, Inc. 401(k) Plan. On March 19, 2013 the court issued a show cause order and set a hearing on April 23, 2013. At that hearing, the court granted the Secretary's petition and ordered the respondents to produce documents to the

Secretary within seven days. The respondents failed to comply with that order, and the Secretary filed a motion for contempt on May 20, 2013. The court held a hearing on that motion on June 18, 2013 and ordered respondents to produce responsive documents by June 21, 2013. Thereafter, respondents produced responsive documents and on July 17, 2013, the Secretary withdrew his motion for adjudication of civil contempt, which the court granted without prejudice. Philadelphia Office

Perez v. RMRF Enterprises, Inc. (N.D. Cal.)

On March 21, 2013, the Secretary filed a petition to enforce a subpoena against RMRF Enterprises, Inc. The Secretary's subpoena requested documents related to the administration of the plan and its investments. While the president of the company provided some documents, a large number remained outstanding. On May 14, 2013, the court entered a show cause order to RMRF Enterprises, Inc. The hearing on the order to show cause was set for June 27, 2013 and later re-set to July 26, 2013. On July 31, 2013, the court granted the Secretary's petition and enforced the subpoena. On December 20, 2013, because RMRF failed to comply with the court's order enforcing the subpoena, the Secretary filed a motion for civil contempt against RMRF Enterprises, Inc. for violating the court order. San Francisco Office

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

On August 15, 2011, the Secretary filed a complaint against J. Brant Singley, J.M. Singley & Associates Inc., and Bradley Weiss for failing to remit in excess of \$20,000.00 in employee contributions to the company's 401(k) Plan and for remitting certain contributions late and without interest. Singley and Weiss were plan trustees and the company is the plan sponsor and administrator. On March 20, 2012, the court entered a consent order and judgment requiring Singley to restore over \$23,000 in unremitted contributions and lost opportunity costs to the plan, and a default judgment and order finding Weiss liable for over \$26,000 in plan losses and the cost of an independent fiduciary. Pursuant to the court's order, an independent fiduciary was appointed and Weiss was removed as trustee and permanently barred from serving in a fiduciary capacity to any ERISA-covered plan. On August 8, 2012, the Secretary filed a motion for contempt against Singley for his failure to pay restitution to the plan. In October 2012, Singley died. On November 19, 2012, the Secretary filed a Statement Noting a Party's Death, informing the court of Singley's death. On February 15, 2013, the Secretary filed a Notice of Withdrawal Without Prejudice of Motion for Adjudication of Civil Contempt. See also Solis v. Singley and Associates, Inc., Section B.1. Collection of Plan Contributions and Solis v. J.M. Singley and Associates, Inc., Section L. Orphan Plans. Philadelphia Office

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

On April 30, 2013, the court granted the Secretary's March 28, 2013 motion requesting an order to show cause why Moshe Klein should not be held in contempt for failure to repay approximately \$9,500 to the plan, including interest. Based on documentation received after the show cause filing, the Secretary's notice to withdraw the motion for contempt was filed on July 24, 2013 and entered by the court on July 25, 2013. On February 22, 2012, the Secretary obtained a consent judgment against Sophisticated Technologies and Moshe Klein, requiring them to pay \$48,857.78 to the SophTech 401(k) Plan, pay the Section 502(l) penalty, and pay the costs of an independent fiduciary. The Secretary's complaint, filed on November 15, 2010, alleged that, between January 2001 and 2003, Klein and the company failed to remit to the plan

\$26,825 in salary deferrals. See also Solis v. Sophisticated Technologies, Inc., Section B.1. Collection of Plan Contributions. San Francisco Office

Solis v. UnitedHealth Group, Inc. (D. Minn.)

On January 15, 2013, the Secretary filed a subpoena enforcement action asking the court to order United Healthcare Group (UHG) to comply with an administrative subpoena issued on August 31, 2012. The Department is investigating UHG, a nationwide company that provides health care insurance and services to health care plans to approximately a quarter of the population in the United States, to determine whether UHG is complying with its fiduciary responsibilities and the claims adjudication regulations, including processing claims in a timely manner. The primary focus of the subpoena is the production of the raw data regarding claims in electronic format. UHG has objected to the scope of the Department's subpoena. On February 5, 2013, this action was consolidated with the enforcement action the Secretary filed to enforce a December 23, 2009 subpoena. The earlier enforcement action, filed on November 27, 2012, asked the court to order UHG to comply with the 2009 administrative subpoena with respect to five specific items relating to processing claims and appeals of ERISA-covered plans performed by UHG or employer groups sponsoring an Administrative Services Only (ASO) Plan. For example, audits are among the items requested. UHG had advised the Secretary that internal audits exist but has refused to provide them. On January 14, 2013, the Secretary filed a memorandum in support of his petition to enforce the December 23, 2009 subpoena. On February 15, 2013, the Secretary filed a memorandum in support of his petition to enforce the August 31, 2012 subpoena. On September 25, 2013, the parties engaged in a settlement conference before Magistrate Judge Keyes and reached a settlement in principle. Chicago Office

Perez v. Walton (N.D. Okla.)

On August 1, 2013, the Secretary filed a subpoena enforcement action against Susan L. Walton, in her capacity as custodian of records for Walton Transport, LLC. The petition alleges the Walton Transport failed to appear and to provide responsive documents in response to a valid administrative subpoena regarding its Contractors Retirement Plan. On December 2, 2013, the court held the show cause hearing. On December 9, 2013, the court ordered the respondent to produce the requested documents in a rolling production to commence on December 11, 2013. Dallas Office

**N. Bankruptcy**

Solis v. Gleave (In re Gleave) (Bankr. D. Ariz.)

On April 15, 2013, the Secretary dismissed the adversary complaint that was filed on October 16, 2012 in Randall Gleave's Chapter 7 bankruptcy. The adversary complaint alleged that Gleave, as the plan trustee, committed defalcation when he failed to remit and untimely remitted employee contributions and participant loan repayments to the Empro Professional Employer Services, LLC 401(k) Plan. The records that the Secretary requested prior to initiating the adversary proceeding were provided after the complaint was filed. The documents demonstrated that there were no outstanding payments due the plan. Gleave filed for bankruptcy on June 7, 2012. Los Angeles Office

Solis v. Leal (In re Leal) (Bankr. C.D. Cal.)

On August 24, 2012, the Secretary obtained an order from the bankruptcy court, declaring that the \$55,947.00 owed by Dennis Leal to the Nickson's Machine Shop 401(k) Plan is a non-dischargeable debt. From July 2006 through July 2011, Leal failed to remit and untimely remitted employee contributions and loan participant payments. Leal filed for protection under Chapter 7 on May 2, 2012. Los Angeles Office

Solis v. Lippmann (Bankr. Utah)

On October 5, 2012, the Secretary filed an adversary complaint in Kenneth Lippman's Chapter 11 bankruptcy proceeding, alleging that Lippmann, trustee of the Hi-Grade Meats, Inc. Profit Sharing Plan, committed defalcation under the Bankruptcy Code when, from 2004 to 2011, he caused the plan to engage in a series of prohibited transactions by lending the \$1.3 million of the plan's assets to himself and the company. Although Lippmann caused the full repayment of those prohibited loans, the company repaid up to \$174,034.53 within 90 days of the company's Chapter 11 bankruptcy filing. Accordingly, up to \$174,034.53 in payments back to the plan are at risk of being voided (voidable preference) and returned to the company's bankruptcy estate. The adversary complaint alleges that, to the extent such amount is reclaimed by the company's bankruptcy estate, such amount should be declared a non-dischargeable debt in Lippmann's personal bankruptcy. On October 16, 2012, the bankruptcy court entered a stipulated judgment, ordering that if the Secretary can obtain a judgment against Lippmann based on those allegations, the resulting debt would be non-dischargeable. San Francisco Office

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 trustee and Citibank N.A. regarding an adversary complaint that the 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, after which Citibank allegedly initiated a post-petition transfer of funds from Citizen's Bank, which had extended a revolving line of credit with the debtor. Thereafter, the trustee sued Citibank for the return of these funds. The trustee and Citibank entered into a partial proposed settlement whereby Citibank would transfer \$292,361.32 to the trustee. The Secretary filed the limited objection to assert that a portion of the funds may contain plan assets. On October 29, 2009, the bankruptcy court adopted a stipulation between the Department, the Chapter 7 trustee, and Citizen's Bank whereby the \$292,361.32 would be held in escrow pending the Department's investigation of the debtor's plan. On December 29, 2011, the trustee filed a Rule 9019 motion and proposed order, seeking court approval of the parties' settlement agreement. The agreement provides that the bankruptcy estate, along with the secured creditor, will release \$122,000 to establish a special health claims account that will go towards payment of outstanding health claims by former plan participants and the costs associated with administering the claims. An independent third party will provide notice to all former participants that they may seek relief from this special account, either through satisfaction of a debt they owe or by direct reimbursement for a claim they already paid. By virtue of this special account and related procedures, former participants can seek a recovery far outside the proof of claims deadline of May 2008 and will have priority over any that would be accorded under the Bankruptcy Code. If the eligible claims submitted exceed the amount in the special

account, former participants can make claims against the bankruptcy estate. Because the trustee is unilaterally seeking, through his Rule 9019 motion, to have the IRS be bound to the parties' agreement, the Department contacted the IRS to ensure proper and timely notice. On January 11, 2012, the IRS filed an opposition to the motion. The IRS and the trustee reached a resolution and on May 9, 2012, the bankruptcy court approved the Department's agreement with the trustee and Citizens. An independent fiduciary has been engaged to pay the outstanding health claims. . The funds for the health plan account were transferred to the independent third fiduciary on November 2012 and notices were issued to participants. During 2013, the independent third party received and reviewed the claims. The claims were either paid or waivers were negotiated with service providers. Boston Office

In re Ormet Corporation (Bankr. Del.)

On November 15, 2013, the Secretary filed two objections in the Ormet Corporation Chapter 11 bankruptcy proceeding. Ormet was an Ohio corporation with four affiliated companies. It had approximately 14 employee benefit plans, some of which were subject to ERISA. The Secretary's first objection involved the debtors' motion for the approval of the sale of all of its assets relating to one of its facilities, including the transfer of employee benefit plans. The Secretary objected to the motion because the debtors' filings failed to include sufficient information for the Secretary to determine whether the sale would violate any provisions of ERISA, including its COBRA provisions, or to determine whether the buyer would incur any successor liability. The Secretary also objected based on the debtors' attempt to disclaim all ERISA liability with respect to the buyer and non-debtor third parties. In addition, the Secretary also objected to the debtors' second emergency motion, which sought relief from its current obligations to several ERISA-covered plans and attempted to disclaim all COBRA obligations and some of its plan payment obligations. Chicago 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 debtor's 401(k) plan. On October 26, 2010, the bankruptcy court held that it had core jurisdiction to rule on the fee requests, but avoided ruling on whether it had 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 2010 Order, and refused the trustee's request to rule on what amounts were payable by the plan. On December 11, 2011, the Secretary filed an objection to the 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. On August 20, 2012, the bankruptcy court overruled the Secretary's objections and granted the fee applications. Departing from the terms of the 2010 Order, which had stated that "[a]ny order awarding fees would contain no determination of whether Plan funds could be used to satisfy the award," the bankruptcy court expressly provided in the August 2012 decision that the trustee could use plan funds to pay the professionals, thereby effectively asserting jurisdiction over the ERISA plan and its assets. The interim fee award to the trustee of \$132,378.24 resulted in an effective hourly rate of approximately \$2,000 per hour. As a portion of the relief granted in the 2012 decision was interlocutory, on September 4, 2012, the Secretary filed a motion for leave to appeal to the district court. On September 14, 2012, the trustee filed an opposition to the

Secretary's motion. On September 27, 2012, the Secretary filed a motion for leave to file a reply brief, to which the trustee filed an opposition on October 4, 2012. On April 9, 2013, rather than rule on the Secretary's request to file a reply brief, the district court granted the Secretary's request to appeal solely that portion of the August 2012 decision that asserted the bankruptcy court's jurisdiction to order the payment of fees from plan assets; it determined that the issues regarding the amount of the compensation of the trustee and his law firm would be appealable at a later date when final orders of compensation were issued in the bankruptcy case. The Secretary filed its appeal brief on April 30, 2013, and the trustee filed an opposition on May 15, 2013. The district court has not yet issued an opinion. Plan Benefits Security Division

In re Saetveit (Bankr. D. Colo.)

The Secretary filed a joint stipulation as to non-dischargeability of debt in December 2013 in the bankruptcy case of William Roger Saetveit, a fiduciary responsible, along with others, for committing a series of ERISA violations in the course of investing plan assets and allowing plan participants to direct their plan account assets into a hedge fund that later was revealed to be a Ponzi scheme. Saetveit, the fiduciary debtor, was grossly negligent with regard to his responsibilities as a plan fiduciary and thus committed defalcation. Denver Office

Schoenfeld v. Perez (9th Cir.)

This is an appeal from a case brought by the Secretary in which the Secretary successfully argued that fiduciaries breached their duties to an ESOP by allowing the corporate sponsor to withdraw funds from the ESOP to pay corporate expenses and that the debt is non-dischargeable under the bankruptcy code because of defalcation. The appellants filed their brief on August 20, 2013, and the Secretary filed a response brief on extension on October 25, 2013. San Francisco Office and 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 ERISA-covered 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. On or about July 13, 2010, the 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 motions on January 13, 2011, and October 13, 2011, seeking: (i) authorization to terminate the plans; (ii) authorization for the plans to pay for services provided by professionals retained by the trustee; (iii) the retention of an independent fiduciary to terminate the plans and pay retained professionals from plan assets; and (iv) to quash an administrative subpoena issued by the Secretary to the trustee. On March 17, 2011, and February 10, 2012, the Secretary objected to the jurisdiction of the bankruptcy court to approve the payment of the fees and expenses of Fox and the other professionals, the appointment of the independent fiduciary, and the quashing of the subpoena. On October 20, 2011, the PBGC filed an objection to the appointment of an independent fiduciary and the failure of the trustee to sign a trusteeship agreement for the transfer of the defined benefit plan to the PBGC for termination. On May 17, 2012 a consensual order was entered by the district court providing for, among other things: (i) a withdrawal of the reference of the motions from the bankruptcy court to the district court; (ii) the appointment of an independent fiduciary for the cash balance and the 401(k) plans to terminate those plans and to pay the plan professionals

(including Fox); (iii) fixing Fox's fees at \$125,000, less than half of what Fox would have claimed; (iv) the assignment of the defined benefit plan to the PBGC; and (v) the Secretary's release of her prohibited transaction claims and certain other claims against the trustee and Fox. The independent fiduciary is now in the process of terminating the cash balance and 401(k) plans; termination of the 401(k) plan is near completion. Plan Benefits Security Division

## **O. Miscellaneous**

### Arendt v. Solis (9th Cir.)

On January 11, 2012, the Secretary filed a motion to dismiss and an answer to a complaint, which seeks a judgment that the Pension Protection Act of 2006 (PPA) is unconstitutional to the extent that it permits underfunded multiemployer plans in critical status to eliminate certain early retirement benefits. The plaintiffs, who had not yet qualified for retirement, filed a response on January 31, 2012, arguing against the Secretary's motion to dismiss on the bases that the PPA violates equal protection and due process. On February 14, 2012, the Secretary filed a reply arguing that the suit is meritless. On March 19, 2012, the district court granted the Secretary's motion, holding that plaintiffs failed to show either a statutory basis for the suit or a state action predicate for the constitutional challenges. On appeal, the appellants filed their opening brief on July 5, 2012, and the Secretary filed a response brief on August 16, 2012. Oral argument is scheduled for May 6, 2013. Plan Benefits Security Division

### Cozen O'Connor v. Tobits (E.D. Pa.)

This interpleader action involves competing claims for pension plan benefits by, on the one hand, Jennifer Tobits, the same-sex spouse of Sarah Farley, and, on the other hand, Sarah Farley's parents. Before her death in 2010, Farley was a lawyer at Cozen O'Connor P.C and a participant in the firm's pension plan. She and Tobits were married in Canada on February 17, 2006 and thereafter resided in Illinois, where Farley worked for Cozen. Tobits claims benefits under a plan provision that says that a participant's spouse is entitled to survivor benefits where there is no designation of beneficiary on file. The plan does not define "spouse" except to say that to be entitled to benefits as a spouse, the marriage must have been at least one year in length (as this one was). The parents (and Cozen) claim, among other things, that section 3 of the Defense of Marriage Act (DOMA) precludes the plan from defining marriage for these purposes to include a same-sex spouse. Tobits claims that section 3 is inapplicable because it only precludes federal laws from defining spouse in that way and that even if section 3 applies, it is unconstitutional. The court asked for briefing on the constitutionality of DOMA. Tobits' attorney approached the Secretary about whether the government would also address the preliminary question concerning the applicability of section 3. The Justice Department filed a brief on December 30, 2011, which the Secretary reviewed, noting briefly that the plan may define spouse for purposes other than the QJSA and QPSA, such as under a default beneficiary provision, to include same-sex spouses, and stating that the government was not addressing whether the plan at issue here did so. The Justice Department presented argument on March 12, 2012. On July 29, 2013, the court entered judgment for Tobits based on the Supreme Court's Windsor decision. Plan Benefits Security Division

Fulghum v. Embarq Corp. (10th Cir.)

The merits issue in this case is whether participants were promised and are entitled under the employer's plan to certain lifetime medical and life insurance benefits upon retirement. The district court dismissed the case as untimely, agreeing with the majority of courts that hold that the "fraud or concealment" exception to the ERISA section 413's six-year statute of limitations requires an affirmative act of "fraudulent concealment" separate from the underlying misrepresentation constituting the alleged breach of fiduciary duty. It also decided the claims were untimely because they accrued at the time of the misrepresentation of lifetime benefits, more than six years before suit was brought. The court issued its initial decision on February 14, 2013, and it issued a decision denying reconsideration on July 16, 2013. A notice of appeal was timely filed on September 17, 2013. On December 18, 2013, the Secretary filed an amicus brief arguing that the district court erred in concluding that the "fraud or concealment" standard for statute of limitations purposes only applies when a fiduciary takes steps in additional affirmative steps to conceal the fiduciary misrepresentation. Plan Benefits Security Division

Fuller v. Sun Trust Banks (11th Cir.)

This case involves both the three-year and six-year statutes of limitations under section 413 of ERISA. Appellant's brief was filed on February 12, 2013, and the Secretary filed an amicus brief in support of the plaintiff-appellant on March 12, 2013. The brief argued, with respect to the three-year actual knowledge standard, that the district court wrongly applied a constructive knowledge standard by relying on certain documents attached to the motion to dismiss that plaintiff never saw, and that she would not have had actual knowledge of all the elements of the alleged fiduciary breach even if she had reviewed those documents. The brief did not address the six-year statute of limitations issues. Oral argument, in which the Secretary participated, was held on November 7, 2013. Plan Benefits Security Division

Hi-Lex Controls, Inc. v. Blue Cross and Blue Shield of Michigan (6th Cir.)

In this private action, the court found that Blue Cross violated its fiduciary duties by charging health care plans sponsors hidden administrative fees and ordered Blue Cross to reimburse the sponsor \$5.1 million. The court held that the claims were not time-barred under ERISA's three or six-year statute of limitations because ERISA's "fraud or concealment" exception to the normal statutory period applied. In so holding, the district court relied on a Second Circuit decision construing the exception more leniently than the construction applied by other circuits. On December 10, 2013, the Secretary filed an amicus brief agreeing with the court's analysis of the statute of limitations issue, and also taking the position that the court was correct in deciding that Blue Cross acted as a fiduciary and committed a fiduciary breach in collecting the hidden fees from the plan assets it controlled. Plan Benefits Security Division

In re Revstone Casting Fairfield (N.D. Tex.)

On February 25, 2013, the Secretary obtained an inspection warrant that allowed the Department and an appraiser entry on to property owned by the Revstone Casting Fairfield Plan, in order for the appraiser to prepare a valuation of the property. See also Perez v. Hofmeister, Section K. Financial Institution and Service Provider Cases. Dallas and Chicago Offices

Solis v. Rice (N.D. Ohio)

On January 23, 2013, the court entered an amendment to a consent order and judgment, entered on November 25, 2003, involving the Ohio Industries, Inc. Group Medical, Dental and Weekly Disability Income Plan and the Ohio Locomotive Crane Co., Inc. Savings Investment Plan. The amendment, which appoints a new independent fiduciary to replace the one who withdrew, provides for the new fiduciary to accept \$29,562.83 in funds (\$25,314.46 for the Group Medical, Dental and Weekly Disability Income Plan and \$4,248.37 for the Savings Investment Plan) distributed from Ohio Industries' bankruptcy case. In addition, the independent fiduciary is to secure unclaimed funds in the name of the plans from the State of Ohio and distribute these assets, along with the bankruptcy funds, to the plans' participants. Cleveland Office

Smith v. Aegon (6th Cir.)

This is an appeal from a district court decision dismissing an ERISA pension benefits case brought in Kentucky based on a forum selection clause that was incorporated into the plan more than seven years after the participant retired, which clause required him to file suit in Ohio rather than Kentucky. The plaintiff filed his opening brief on July 22, 2013. On August 12, 2013, the Secretary filed an amicus brief arguing that ERISA invalidates the forum selection clause. Plan Benefits Security Division