

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

CALENDAR YEAR 2014

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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. The parties filed motions for summary judgment on the merits. 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 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. 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. A 19-day bench trial was held in August 2014. On October 26, 2014, the court issued a decision, ruling for the Secretary and the private plaintiffs and awarding a judgment of \$6.48 million. The court based its monetary award of an average of the expert witness' testimony plus interest, rather than the Secretary's proposed remedy of rescission, which would have resulted in recovery of \$8.78 million plus interest. The defendants have filed a notice of appeal and the Secretary has cross-appealed on the issue of damages. As the defendants did not post a bond, post-trial discovery of assets is being conducted. 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 against California Pacific Bank and its CEO and Directors, who were trustees of the Bank's 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. In addition to the Bank, defendants include 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. Parties filed cross-motions for summary judgment at the end of 2014 and are waiting for rulings on those motions. 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. On January 10, 2014, the Secretary filed a motion for reconsideration of the court's decision to tax costs against the Secretary and for reconsideration of the ruling that the complaint did not give the defendants sufficient notice of the claims against them or, in the alternative, for leave to amend the complaint. The court granted in part and denied in part the Secretary's motion for reconsideration. The court amended the earlier order and ruled that the costs are non-recoverable but denied the other aspects of the Secretary's motion. 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 company's 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. 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*. The Secretary responded to the defendants' motion to dismiss based on the statute of limitations (the same arguments made in the Bruister litigation, represented by the same counsel). The Secretary filed a motion to strike defendants' counter claim against the plan for indemnification and offset of money that defendants allege the plan owes them, as well as a motion to strike three of defendants' affirmative defenses. Court-ordered mediation took place on April 25, 2014 and resulted in a settlement agreement with the Digital Satellite Services' defendants. Those defendants agreed to pay \$650,000 and agreed to a permanent bar from acting as ERISA fiduciaries, or alternatively, to complete 80 hours of required fiduciary education. The court approved a consent judgment and order with respect to James Roorda, the independent qualified accountant, who agreed to pay \$25,695.63, \$20,000 of which represents his fees along with lost earnings. The payments have been made as required.

Atlanta Office

Dudenhoeffer 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, 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. Fifth Third petitioned for certiorari, and the Supreme Court invited the government's views. The Court granted cert. on the Moench issue. The government filed its merits brief on March 5, 2014, and oral argument, in which the government participated, was held on April 2, 2014. The Court

issued a favorable decision, holding 9-0 that no such presumption applies and remanding the case. 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. First Bankers, as the ESOP's trustee, allegedly 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, adding 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 they failed 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. On April 23, 2014, the court denied a motion for judgment on the pleadings filed by Greenberg and Huang, in which they argued, among other things, that they were not ERISA fiduciaries. 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. Defendants filed separate motions to dismiss, which the Court denied on May 31, 2013. Thereafter, the parties engaged in extensive fact and expert discovery, including the taking of 15 depositions. Discovery closed on December 9, 2014. New York Office

In re Investigation of WM Putnam Co. Employee Stock Ownership Plan (not filed)

On May 7, 2014, the plaintiff's representative, Secretary of Labor, defendants' representative, and the insurance carrier, engaged in a settlement conference regarding alleged fiduciary breaches relating to the WM Putnam Co. ESOP. The two alleged fiduciary breaches that concerned the Department involved the ESOP paying more than fair market value when it purchased company shares in 2008 and the ESOP failing to issue the appropriate amounts in distributions in 2011 by failing to correctly interpret the price protection provision in the plan document. Both issues were raised in a private action brought by the ESOP participants in the Central District Court of Illinois against eight individual fiduciaries and the corporation. The first issue involved the ESOP's purchase of 60,000 shares of company stock at \$56.67 per share from two company directors in July 2008. The plaintiffs alleged that the appraisal was based on overinflated projections of future sales and relied on company financials that were not audited using Generally Accepted Accounting Principles. During the settlement negotiations, the Secretary pointed out that the fiduciaries relied on an independent fiduciary, who at the time he was selected, was involved in a separate ERISA action where he was accused of a serious ERISA violation which resulted in millions of dollars of losses to an ESOP. Yet, despite that fact, the fiduciaries relied on his one page resume, with three paragraphs identifying his qualifications, and engaged in no additional scrutiny. As a result of the discussions, the parties agreed to resolve the litigation for \$650,000, the current insurance policy limits. The Department agreed with the settlement proposal. On August 21, 2014, the plaintiff filed a notice of proposed settlement. In addition, WM Putnam Co. filed for Chapter 11 bankruptcy protection, so the Secretary filed a proof of claim for the losses owed by the company's alleged fiduciary breaches. As the bankruptcy trustee challenged the proof of claim, the Secretary and the bankruptcy trustee entered into a settlement agreement on June 3, 2014. The agreement provided that the harmed ESOP participants' proof of claim totals \$51,920.59. Chicago Office

Perez v. Jacobson (not filed)

On January 16, 2014, the Secretary reached a \$10 million settlement agreement with People Care Holdings Inc. and its former owners, Bruce Jacobson and Jerry Lewkowitz, in connection with the sale of their company to their employees through the creation of an ESOP. The Secretary contended that the ESOP purchased People Care stock for more than its fair market value. In particular, the Department's investigation found that People Care, Jacobson and Lewkowitz failed to correct unrealistically optimistic projections of the company's future earnings, even after the company lost a key municipal contract. The Department also contended that the stock purchase agreement's indemnification provision was invalid because it would require People Care, which is entirely owned by the ESOP, to pay any costs incurred by Jacobson and Lewkowitz in connection with an investigation or litigation. Under the terms of the settlement agreement, Jacobson and Lewkowitz paid \$9,090,910 to the ESOP and a civil penalty of \$909,090. Plan Benefits Security Division

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. The parties have reached an agreement in principle requiring the defendants to pay full restitution to the plan, terminate the plan and distribute the plan assets to the non-fiduciary plan participants, and be enjoined from acting as fiduciaries in the future. The court has stayed discovery while the parties complete the settlement process. Defendants have named their counsel as an additional fiduciary to the plan. The new fiduciary is in the process of making restitution to the plan and distributing the restitution to the non-fiduciary plan participants. 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, which was granted and remanded in light of Dudenhoeffer on July 20, 2014. 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. The plaintiffs filed a petition for cert. on January 8, 2014. The Supreme Court vacated and remanded to the Second Circuit in light of its decision in Fifth Third. Plan Benefits Security Division

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

On November 18, 2013, the Secretary filed a complaint against the fiduciaries of the Omni Resources, Inc. ESOP in connection with the ESOP's \$13.7 million purchase of the company's 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. On May 19, 2014 the court rejected defendants' motion to dismiss the Secretary's complaint and ruled that (a) the three-year limitation period in ERISA was not jurisdictional and that it may be tolled by agreement and (b) ERISA prohibited both direct and indirect sales of shares (rejecting defendants' argument that by first selling their shares to the company and then having the ESOP buy the shares from the company, they had avoided engaging in a prohibited transaction). On October 15, 2014, the court granted the Secretary's motion to strike certain affirmative defenses that the Secretary argued, and the court found, to be legally infirm. Kansas City Office and Plan Benefits Security Division

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, with respect to the company's ESOP. Nohl Crest Homes (NCH) is a defunct Florida corporation. Peter Tibma and Kenneth Emery 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 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. Tibma filed a cross-claim against Emery and a third party claim against company's former chief financial officer, Jose Fernandez. On September 22, 2014, the court entered a consent judgment and order appointing an independent fiduciary and permanently enjoining Tibma and Emery from violating Title I of ERISA and from serving as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. Tibma agreed to make restitution to the plan of \$275,000 within 20 calendar days of entry of the court's order by delivering a check to the independent fiduciary, and \$35,000 in other assets will be transferred to the custody of the independent fiduciary. As part of the settlement, Tibma also agreed to dismiss his cross claim against Emery without prejudice and his third party claim against Fernandez with prejudice. Emery, who is currently unable to make restitution to the plan, will make financial disclosures to the Department for several years. The Department will revisit possible restitution from Emery if and when his financial condition changes. See also Harris v. Nohl Crest Homes Inc., Section B.3. Miscellaneous. Atlanta Office

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

On December 26, 2013, the Secretary filed a complaint against PBI Bank, Inc., the named trustee of the Miller's Systems, Inc. ESOP, in connection with the ESOP's \$40 million purchase of the company's 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. On November 20, 2014, the court issued an order rejecting defendant's argument that the six-year statute of limitations in ERISA §413 was a jurisdictional bar. Chicago Office and Plan Benefits Security Division

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

On August 29, 2014, the Secretary filed another complaint against PBI and Dr. Michael A. Evans, in connection with the AIT Laboratories ESOP's \$90 million purchase of AIT stock from Evans and others on June 30, 2009. The complaint seeks restoration of losses to the ESOP from PBI and a permanent bar against PBI from acting as a fiduciary or service provider to plans in the future. PBI and Dr. Evans filed answers to the complaint on November 3, 2014. On November 25, 2014, the Secretary filed motions to strike some of the affirmative defenses contained in each of the Answers. Defendants obtained an extension to respond to the Secretary's motions until December 23, 2014, and the Secretary was granted an extension to reply. 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

Tatum v. RJ Reynolds (4th Cir.)

This is an appeal from a district court decision, following an earlier remand from the Fourth Circuit, holding that plan fiduciaries violated their procedural duties of prudence by selling stock in Nabisco after a corporate spin-off, but also holding 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 appealed to the Fourth Circuit. The plaintiffs filed an opening brief on May 27, 2013, and the Department filed an amicus brief in support on June 25, 2013. Oral argument, in which the Secretary participated, was held on March 18, 2014. The court, over a dissent, issued a favorable decision on August 4, 2014. On August 18, 2014, the defendants filed a petition for rehearing en banc, which the court denied on September 2, 2014. On December 1, 2014, the defendants filed a petition for cert. Plan Benefits Security Division

Perez v. TPP Holdings Inc. (W.D.N.C.)

On December 30, 2014, the Secretary filed a complaint against TPP Holdings Inc. and TPP's owner and chief executive officer Robert Nicholas Preston, involving the company's ESOP. The Secretary alleges that the ESOP fiduciaries: (1) authorized the ESOP to make company stock purchases in 2006 and 2008 for more than adequate consideration; (2) failed to act solely in the participants' interests; (3) failed to follow ESOP documents; and (4) engaged in self-dealing. The fiduciaries also allegedly permitted improper co-mingling of ESOP and corporate funds. The complaint also alleges that the ESOP did not exercise its voting rights in company decision-

making, did not release the proper number of shares, and did not make the proper distributions to ESOP participants. Atlanta Office

## **B. Financing the Employer**

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

#### 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. On December 13, 2013, the Secretary filed a motion for default judgment against the defendants. On January 15, 2014, the Secretary appeared before the court for a further case management conference, with Carter appearing at the hearing and re-appearing in the proceedings. On March 26, 2014, the Secretary withdrew the motion for default judgment. Finally, on October 26, 2014, the court approved a consent judgment, which noted that Michael Carter had restored approximately \$70,000 to the plan during the pendency of the Secretary's lawsuit, and further required him to pay an adjusted amount to the plan of approximately \$65,000 (with Carter waiving collecting amounts due him under the plan), and to pay an independent fiduciary approximately \$6,200 in fees to wind-down and terminate the plan. The consent judgment also permanently enjoins Carter from future service as a fiduciary of, or service provider to, any ERISA-covered employee benefit plan. San Francisco Office

#### Perez v. Allen Elder and Family Law P.A. (M.D. Fla.)

On April 25, 2014, the Secretary filed a complaint against Allen Elder and Family Law, P.A. and Karla C. Allen, alleging that from August 2009 through March 2011, they failed to remit \$9,140.81 in employee contributions to the firm's 401(k) Plan. The court entered a consent judgment and order on November 17, 2014, requiring the defendants to restore \$10,659.17 to the plan and enjoining them from acting as fiduciaries to any ERISA-covered plan and from further violations of ERISA. Atlanta 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. On September 22, 2014, the court entered an order on default judgment against the company and Daryl Sorensen, permanently enjoining them from acting as fiduciaries to any ERISA-covered plan. The court dismissed the plan and Monica Sorensen from the suit without prejudice. Atlanta Office

Perez v. Aware Environmental Inc. (W.D.N.C.)

On December 23, 2014, the Secretary filed a complaint against Aware Environmental Inc. and Michael Omstead Smith, alleging that between January 8, 2010 and April 16, 2011, they failed to remit \$26,155.76 in employee contributions to the company's 401(k) Profit Sharing Plan and failed to timely remit amounts withheld from employee paychecks as soon as they could reasonably be segregated from company assets. In addition, from September 5, 2006 through March 20, 2007, the defendants failed to remit participant loan repayments to the plan. As a result, one participant loan was deemed in default and suffered tax consequences. The complaint seeks an order requiring defendants restore all losses to the plan, including interest or lost opportunity costs, requiring the plan to set off the individual account of Smith against the amount of the losses, appointing a successor fiduciary or administrator, at the defendants' expense, and permanently enjoining the defendants from serving as a fiduciary, administrator, officer, trustee, custodian, agent, employee representative, or having control over the assets of any ERISA-covered plan. The complaint also requests that defendants be enjoined from engaging in any further action in violation of Title I of ERISA. Atlanta 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. On June 25, 2014, the court signed a consent judgment permanently enjoining Evans from acting as a fiduciary to any ERISA-covered plan and appointing an independent fiduciary. Defendant Evans' financial affidavit and tax returns indicated that defendants were unable to make full restitution to the plan. As part of the judgment, the Secretary reserves the right to seek immediate recovery if and when defendants' financial condition changes. Atlanta Office

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

On August 26, 2014, the Secretary filed suit against Kelly Bailey, former owner of SCK Management, Inc. dba PROS Rehabilitation (SCK Management), for failing to forward \$136,484.67 in employee contributions to the PROS Rehabilitation 401(k) Plan from January 5, 2010, through May 21, 2012, and for failing to properly administer the plan by using the plan's assets to benefit herself. The Secretary seeks a court order to restore all losses, with interest, to the plan, to have an independent fiduciary appointed to administer disbursements, and to permanently bar Bailey from serving as a fiduciary to any ERISA-covered plan in the future. Dallas Office

Perez v. Bay Tank & Fabricating Co. (N.D. Fla.)

On January 9, 2014, the Secretary filed a complaint against Bay Tank & Fabricating Co. Inc. and Terrance Wyatt, alleging that they failed to remit \$76,543.43 in employee contributions and participant loan repayments to the company's 401(k) plan, and at other times, failed to timely remit the employee contributions. 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 company's two SIMPLE IRA Plans between June 2008 and April 2010. Representatives of the Secretary participated in an initial scheduling conference with the court on February 26, 2014 and the trial was set for September 30, 2014. On July 31, 2014, the court entered a consent judgment which provides for full restitution of \$12,713.07 to the plans. Philadelphia Office

Perez v. Boschwitz (D. Minn. and Bankr. D. Minn.)

On December 19, 2013, the Secretary filed a complaint in district court against Gerald Boschwitz, Thomas Boschwitz and Home Valu, Inc., d/b/a Home Value Interiors, fiduciaries to the company's Employee Benefit Plan, Self-Insured Voluntary Dental Plan, Group Insurance Plan and 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 plans. The total loss to the plans was approximately \$44,000. On August 15, 2014, the court entered a consent order and judgment ordering Gerald Boschwitz and Thomas Boschwitz to restore \$49,994.58 in employee contributions to the Health, Dental, and Life Insurance Plans as well as the remaining balance in employee accounts for the Flexible Spending Reimbursement Plan. The judgment also prohibits the defendants from serving as fiduciaries or service providers to any ERISA-covered plan for a period of 18 months after entry of the consent judgment. The Secretary dismissed with prejudice bankrupt defendant Home Value, Inc. from the district court action. On January 29, 2010, three creditors of Home Value, Inc. filed an involuntary petition for Chapter 7 bankruptcy protection against the company. On March 25, 2013 and May 9, 2013, the Secretary filed proofs of claim to protect debts owed to the plans. On October 10, 2014, the Secretary and the bankruptcy trustee entered into a joint stipulation in bankruptcy court to allow the proofs of claim for the Health and Dental Plans and to dismiss the proofs of claim for the Life Insurance and Flexible Spending Reimbursement Plans. 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. After Botes was released from prison in 2014, a trial date was set for August 14, 2014. Botes represented that he had been deported, was no longer living in the United States, and could not practicably return to the U.S. to participate in trial. In light of these circumstances, on October 6, 2014, the Secretary filed a motion to dismiss the case without prejudice. On October 7, 2014, the court granted the Secretary's motion. Atlanta Office

Perez v. Brewer (D. Mass. and Bankr. D. Mass.)

On January 30, 2014, the Secretary filed a complaint in district court against Thomas R. Brewer, owner and Director of the now-defunct company, Mathewson Corp., Inc., for failing to ensure that withheld employee contributions, totaling \$17,071.00, were remitted to the company's 401(k) Profit Sharing Plan. The company filed for Chapter 7 bankruptcy protection on June 15, 2012. When defendant failed to answer, the Secretary filed a motion for default judgment, which was entered by the court on May 13, 2014. The defendant has provided a financial affidavit which currently reflects his inability to pay the debt to the plan. The defendant and the Department are in the process of negotiating an installment payment plan. Boston Office

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

On April 1, 2014, the Secretary filed a complaint against Venice Catering of Berlin, Inc., and its Chief Operating Officer Robert Campbell, to recover money withheld from participants' paychecks but not forwarded to the company's 401(k) Plan. The Secretary's complaint alleged that from January 1, 2007 through December 31, 2010, defendants failed to ensure the deposit of an estimated \$22,474.20 of elective contributions into the plan's trust. On July 17, 2014, the parties entered into a consent judgment and order in which defendants agreed to pay \$28,358.07 plus lost opportunity costs. New York 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 Secretary properly served the defendants on March 24, 2014. When the defendants failed to respond, the Secretary moved for default judgment against them. On August 14, 2014, the court ordered defendants to restore \$8,774.09 in losses and enjoined the defendants from violating ERISA and from serving as fiduciaries for any ERISA-covered plan in the future. Atlanta Office

Perez v. Cargill Heating & Air Conditioning Co., Inc. (W.D. Wis.)

On March 25, 2014, the Secretary filed a complaint against Cargill Heating & Air Conditioning Co., Inc. and Michael Earl Galstad, fiduciaries of the Cargill Heating & Air Conditioning Co.,

Inc. Savings Plan, alleging that they failed to remit employee contributions and wage rate contributions to the plan between May 31, 2008 and April 30, 2012. Chicago Office

Perez v. Carolina Steel & Stone Inc. (W.D.N.C.)

On December 23, 2014, the Secretary filed a complaint against Timothy W. Davis and Carolina Steel and Stone Inc. alleging that during 2008, 2009, and 2010, they failed to remit employee contributions and failed to collect and remit matching employer contributions to the company's 401(k) retirement plan. Davis and Carolina Steel voluntarily restored missing contributions with lost earnings to the plan. However, they failed to direct the plan's custodian regarding allocation of the missing funds to the participant accounts. In addition, they stopped administering the plan, leaving plan participants unable to secure their retirement benefits. The Secretary seeks a court order that will require the defendants to restore all losses, including interest or lost opportunity costs, to the plan, will permanently enjoin the defendants from serving as fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or having control over the assets of any ERISA-covered plan, and will appoint a successor fiduciary, at the defendants' expense, to terminate the plan and distribute its assets. Atlanta Office

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

On December 26, 2014, the Secretary filed a complaint against AARC Environmental, Inc. (AARC) and Kishore Chainani, AARC's sole owner, alleging that they failing to forward employee contributions and loan repayments to the plan since December 29, 2007. Plan losses exceed \$60,000. Dallas 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. On April 22, 2014, the court approved a consent judgment and ordered the defendants to restore to \$30,878.20 to the plan, appointed an independent fiduciary to administer and terminate the plan, and ordered Clark's individual plan account balance to be forfeited to offset against the plan's losses, including the costs of an independent fiduciary. The court also permanently enjoined the defendants from serving as fiduciaries to any ERISA-covered plan. Philadelphia Office

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

On April 29, 2014, the Secretary filed a complaint against Peter Connor, Gordon Connor, WD Flooring, LLC, Nicolet Hardwoods Corporation and the Connor Companies Health and Welfare Plan. The complaint alleged that from January 1, 2009 to December 31, 2010, the fiduciaries failed to collect and remit \$59,682 in employer contributions to the three companies' co-sponsored and self-funded health plan. On July 8, 2014, the court entered a consent order and judgment finding the fiduciaries jointly and severally liable for \$59,102 in losses owed to the plan to pay for unpaid participant health claims. After the defendants restored all the monies owed pursuant to the judgment, on September 14, 2014, the Secretary filed a Satisfaction of Monetary Portion of Judgment. Chicago 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 appointed an independent fiduciary to administer the plan and has been working with the independent fiduciary to ensure the distribution of account balances to plan participants. Atlanta 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. On February 4, 2014, the court entered a consent order and judgment ordering the restoration of \$36,280.45 to the plan, termination of the plan, and permanently enjoining the defendants from serving as a fiduciary or service provider to any ERISA-covered plan. Chicago 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 participants 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, the president, owner and operator of the company and trustee of the 401(k) plan, failed to forward \$6,965 in employee contributions in 2012 and 2013 before the business shut down, causing \$3,724 in lost earnings. He 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, and 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. Kansas City 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. The Secretary obtained a clerk's entry of default against DeBusk. On December 18, 2014, the court entered a consent judgment with

Cotter, requiring him to restore \$7,447.16 in losses to the non-fiduciary participants, through a 12-month payment plan, and enjoining him from serving as a fiduciary to any ERISA-covered plan in the future (except for limited purposes related to distributions required under the order).  
Atlanta 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 is 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. On January 14, 2014, the court approved the consent judgment. On January 28, 2014, the court entered default judgments against defendants Sun Control Systems and Thomas Buckingham, removing them as fiduciaries, appointing an independent fiduciary to administer and terminate the plans, and requiring these two defendants to restore principal, interest and independent fiduciary fees to the plans. See also Solis v. Estate of John Buckingham, Section B.3. Miscellaneous. Philadelphia Office

Perez v. Estate of Richard Talley (D. Colo.)

On June 27, 2014, the Secretary filed a complaint against American Title Services Company, Inc. (ATSC) and the estate of its owner, the late Richard M. Talley, for failure to remit and for untimely remitting employee contributions owed to the plan. From January 2008 through July 2013, ATSC and Talley withheld funds from the eighteen employees' wages intended for remittance to the employee benefit plan but failed to forward those funds. ATSC ceased operations on February 7, 2014 after Talley's death. The Secretary is seeking principal plan losses of about \$63,000 plus lost opportunity costs of about \$40,000. Denver 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. On May, 19, 2014, the court entered a consent order and judgment requiring Fahnlander to pay \$26,109.37, representing \$20,743.75 in employee contributions and \$5,365.62 in related lost earnings and requiring Hanson to restore \$2,500 to the plan, representing lost earnings. The judgment also permanently enjoined Fahnlander from serving as a fiduciary or service provider to any ERISA-covered 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. On October 10, 2014, the court entered a default judgment against the defendants, requiring them to restore \$52,687.05 in total plan losses, enjoining them from serving as fiduciaries or service providers to any ERISA-covered employee benefit plan, reallocating \$14,860.22 from Ferguson's own plan account to offset the losses of plan participants, and appointing an independent fiduciary to terminate the plan. On July 22, 2014, the Secretary filed an adversary complaint against Ferguson, seeking an order from the bankruptcy court finding his debt to the plan non-dischargeable. On December 10, 2014, the bankruptcy court entered a consent order and judgment finding Ferguson's debt of \$52,687.05 non-dischargeable. 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 was made, Fernandes would have been removed as fiduciary of the plan and would be permanently enjoined from service as a fiduciary or service provider to any ERISA-covered plan. However, payment was never made so, on March 27, 2014, the Secretary filed a contempt petition against Fernandes. See also Perez v. Fernandes, Section L. Contempt and Subpoena Enforcement. Cleveland Office

Perez v. Fletcher (D. Minn.)

On July 22, 2014, the Secretary filed a complaint against Gregory Fletcher alleging that from April 16, 2010 to October 5, 2011, he failed to ensure all employee contributions were remitted to the SLP Machine SIMPLE IRA Plan. Chicago Office

Perez v. Fletcher-Thompson and Michael S. Marcinek (D. Conn.)

The Secretary filed a complaint on June 9, 2014 against Fletcher-Thompson and Michael S. Marcinek, president, managing partner, and majority owner of the company, for failing to remit

employee deferred contributions and loan repayments to the company's Savings Plan. The company, which is currently operational, became delinquent in remitting employee deferrals and loan repayments to the plan beginning in 2008, and ceased remitting anything at all as of May 2012; nevertheless, it continued to withhold contributions and loan repayments from participants' pay. The total amount outstanding, including lost interest, was \$485,560.77. Rather than answer, the defendants agreed to enter into a consent judgment which requires that defendants restore the total amount due and owing to the plan through a one-year installment payment arrangement, with post-judgment interest accruing on the unpaid balance. It also bars Marcinek from serving as a fiduciary in the future to any ERISA-covered plans. Boston 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 company's Prevailing Wage Plan, alleging that they failed to take measures to collect prevailing wage fringe benefit contributions due to the plan. On March 14, 2014, the defendants restored \$1,000 to the plan. On April 30, 2014, the parties executed a consent judgment ordering defendants to restore \$15,109.44, representing the remaining principal balance and accrued interest, in accordance with a monthly installment payment schedule. The consent judgment was entered on May 5, 2014. Boston 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 sought 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. On December 12, 2013, the Secretary obtained the clerk's entry of default, and on April 30, 2014, the court entered a default judgment ordering the defendants to restore losses of \$16,111.41 to participants within thirty days and authorizing the Secretary to identify a successor fiduciary for subsequent court appointment. Dallas 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 sought recovery of plan losses associated with the unremitted employee contributions as well as unnecessarily incurred administrative fees. After filing a motion for summary judgment on September 21, 2014, the Secretary obtained a consent order and judgment on December 1, 2014 ordering full restitution of \$18,000, affirming all violations, appointing a successor fiduciary to

terminate the plan and effect account distributions or rollovers, and permanently enjoining the defendants from serving as ERISA fiduciaries. Denver 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. On June 12, 2014, full restitution was made to the plan. New York Office

Perez v. Gulf Shores Marina LLC (M.D. Fla.)

On September 16, 2014, the Secretary filed a complaint against Gulf Shores Marina LLC, Laura M. Prioli, and Stephen C. Main, alleging that from October 9, 2009 through September 21, 2012, defendants failed to remit \$67,600.46 in employee contributions and untimely remitted \$111,211.13 in employee contributions and \$16,745.32 in participant loan repayments to the company's 401(k) Plan. Additionally, during this same time period, the defendants caused or allowed the contributions and loan repayments to be commingled with the general assets of the company and used them for the company's purposes and obligations rather than for the exclusive benefit of the plan and the participants. The Secretary is asking the court to order the defendants to restore to the plan all losses, including interest or lost opportunity costs, appoint an independent fiduciary, enjoin defendants from violating Title I of ERISA, and permanently enjoin them from serving as a fiduciary to any ERISA-covered plan. Atlanta Office

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

On September 19, 2014, the Secretary filed a complaint against Hanco, Inc. d/b/a Classico Seating, Harry T. Richardson Jr., the Hanco, Inc. 401(k) Plan, Health Plan, and Dental Plan, alleging that from October 14, 2011 through February 17, 2012, defendants failed to remit \$5,242.08 in employee contributions to the 401(k) Plan, from August 5, 2011 through September 30, 2011, defendants failed to remit \$22,863.09 in employee insurance premium contributions to the Health Plan, and from February 4, 2011, through May 20, 2011, defendants failed to remit \$2,282.60 in employee insurance premium contributions to the Dental Plan. Chicago Office

Perez v. Harms (D. Kan.)

On July 31, 2014, the Secretary filed a complaint against the fiduciaries of the Integrity Interiors, Inc. 401(k) Plan, Desmond D. Harms and Haldor F. Harms, for failing to forward \$9188.03 in employee salary deferrals into the company's 401(k) Plan at varying times from August 7, 2010 through December 22, 2011. In a separate criminal proceeding, on September 29, 2014, Desmond Harms entered into a diversion agreement pursuant to which he paid the full amount of unremitted employee contributions owed to plan participants. Accordingly, the civil case was dismissed on November 12, 2014. Kansas City 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. On June 18, 2014, the Secretary filed a motion for summary judgment and a motion to strike Harris's affidavit. Chicago Office

Solis v. Hartmann (N.D. Ill. and 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 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. On January 29, 2014, the district court entered a consent order and judgment finding Bruce Hartmann liable for \$75,416.72 in unremitted contributions to the 401(k) Plan, ordering him to restore \$50,000 to the 401(k) Plan, and enjoining him from being a service provider or fiduciary to any ERISA-covered plan. The judgment also found Bruce Hartmann liable for \$3,983,980 in losses to the Health Plan and required that any lump sums he receives over \$5,000, prior to June 1, 2023, shall be used to address his liability to the Health Plan. On January 29, 2014, the district court entered an order requiring Terry Hartmann to restore \$75,416.72 to the 401(k) Plan. On March 4, 2014, the bankruptcy court entered an order finding Bruce Hartmann's debts to the 401(k) Plan and the Health Plan non-dischargeable. 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. Before the complaint was filed, 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. It requires the company to retain at its expense an independent fiduciary with responsibility for monitoring employee contribution remittances for a minimum of five years and requires all future employee contributions 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 participants. The consent judgment also removes Bernabei and Walton as fiduciaries and permanently enjoins them from serving as ERISA fiduciaries. On February 24, 2014, the defendants filed a motion seeking court approval for the replacement of the independent fiduciary with another independent fiduciary. The Secretary did not oppose defendants' motion, which the court granted on March 17, 2014. Philadelphia Office

Perez v. Hassell (D. Mass. and Bankr. D. Mass.)

On September 19, 2008, the Secretary filed a complaint in district court alleging that Stephen Hassell, the functional fiduciary of the Collaborative Engineers, Inc. 401 (k) Plan, failed to ensure that \$37,632.88 in employee contributions were deposited to the plan from March 2, 2007 through February 18, 2008. On March 4, 2009, the Secretary filed a motion for entry of default which was granted on June 27, 2009. On July 23, 2009, the Secretary filed a motion for default judgment. On October 15, 2009, the district court entered a default judgment against Hassell for \$42,012.94, representing unremitted contributions plus prejudgment interest. On June 17, 2014, Hassell filed for protection under Chapter 7 of the Bankruptcy Code. On September 22, 2014, the Secretary filed an adversary complaint in the bankruptcy, alleging that Hassell's debt to the plan is non-dischargeable. On November 7, 2014, the Secretary filed a motion to approve a stipulation in which the parties agreed that Hassell's debt to the plan is non-dischargeable. The court approved the stipulation on December 5, 2014 and held that Hassell's debt to the plan of \$37,632.88 plus appropriate interest is non-dischargeable. Boston 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. On January 23, 2014, the Secretary obtained an order of default against Hathaway. The Secretary filed a motion to enter default judgment against Hathaway on March 28, 2014, and the court granted that motion on April 1, 2014. The default judgment requires Hathaway to restore to the plan \$46,030.07, pay \$14,720.10 in pre-judgment interest to the plan, and reimburse the plan for all costs associated with the implementation of the default judgment. The default judgment also removes Hathaway as a fiduciary to the plan and permanently enjoins him from serving as a fiduciary to any ERISA-covered plan. Arlington Office

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

On October 8, 2013, the Secretary filed an adversary complaint in the bankruptcy case of Clark Hayes, alleging that losses to the Applied Technology Systems, Inc. Retirement Plan resulting from Hayes' failure to remit employee contributions to the plan are non-dischargeable in bankruptcy. On March 20, 2014, the bankruptcy case was dismissed, and on April 9, 2014, the bankruptcy court closed this adversary proceeding. On January 29, 2014, the Secretary filed a complaint in district court to recover unremitted employee contributions, to bar Hayes and Applied Technology from being fiduciaries or service providers to any ERISA-covered plan, and to appoint an independent fiduciary to take over the plan. Since the defendants did not answer the complaint, on June 18, 2014, the Secretary moved for a default judgment. Cleveland Office

Perez v. HC Watson Corp. d/b/a Interim Healthcare (D. Mass.)

On October 6, 2014, the Secretary filed a complaint against H.C. Watson Corp., its president and CEO, and former COO, alleging that, from 2011 to 2014, the fiduciaries failed to remit approximately \$122,000 in employee contributions and \$30,000 in loan payments to the company's 401(k) Plan. Boston Office

Perez v. Heatech, Inc. (D. Mass.)

The Secretary filed a complaint on March 28, 2014, alleging that between 2009 and 2011, Heatech, Inc., and Michael Fitzmeyer, the company's owner and president, failed to ensure that withheld employee contributions totaling \$19,881 and employer contributions totaling \$16,937, plus interest, were remitted to the company's 401(k) Plan. In addition, there was a failure to have a fidelity bond. The fiduciaries agreed to pay \$38,688.68 to the plan, through a payment plan, representing principal and prejudgment interest as of May 1, 2014, and excluding post judgment interest and amounts due to Fitzmeyer. On May 22, 2014, the judge signed the consent decree specifying the terms of the settlement. Boston Office

Perez v. Hill (N.D. W. Va. and Bankr. N.D.W. Va.)

On May 22, 2014, the Secretary filed a complaint and consent judgment and order resolving alleged violations committed by Sherry Hill, the fiduciary of the Stinger Sheet Metal, Inc. SIMPLE IRA Plan. The Secretary obtained a non-dischargeability order in bankruptcy court on March 24, 2011. Unpaid employee contributions owed to the plan were collected through a parallel criminal action by the U.S. Attorney. The consent judgment required payment to the plan of \$20,120 in outstanding employer contributions and permanently barred Ms. Hill from serving as a fiduciary or service provider to an ERISA-covered plan. Boston Office

Harris v. IAQ Inc. (M.D. Fla.)

On February 4, 2014, the Secretary filed a complaint against Gail Garrow and IAQ Inc., fiduciaries of the company's 401(k) Plan, alleging that in April 2009, Garrow terminated the plan and requested that the plan's fund custodian, John Hancock, transfer approximately \$211,334 in plan assets into an operating account maintained by IAQ. These plan assets were placed in the IAQ operating account and commingled with IAQ's general assets. The Department learned that Garrow and IAQ distributed \$74,125 of the plan assets to 45 participants. The account balances of the remaining 40 participants were not distributed and remained in IAQ's operating account. During settlement negotiations, Garrow and IAQ restored the losses, placing the restitution in an interest-bearing account. On February 11, 2014, the court approved a consent judgment and order, appointing an independent fiduciary for the purpose of terminating the plan and distributing \$155,332.77 in remaining assets and lost earnings. The order also permanently enjoined the defendants from acting as fiduciaries to any ERISA-covered plan. Atlanta Office

Perez v. Jochims (D. Minn.)

On January 14, 2014, the Secretary filed a complaint against Stephanie J. Jochims and Robert C. Jochims, alleging that from October 16, 2009 to February 21, 2010, the defendants failed to ensure that \$5,166.67 in employee contributions and loan repayments were remitted to the Western Steel Erection 401(k) Plan. On May 6, 2014, the court entered a consent order and judgment requiring defendants to restore \$5,956.93 to the plan and enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

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

On January 13, 2014, the Secretary filed a complaint against Richard J. Jurczykowski, Richard A. Lindahl, and Guardian Graphics, Ltd., alleging that from January 23, 2008 to May 10, 2013, they failed to ensure that \$55,538.83 in employee contributions were remitted to the company's

401(k) Profit Sharing Plan. On April 7, 2014, the court entered a consent order and judgment requiring the defendants to restore \$50,656.12 to the plan and enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan. As part of the judgment, Jurczykowski waived his right to collect \$6,160. Chicago 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. On September 10, 2014, the district court entered a consent judgment requiring the Kepharts to restore \$232,177 to the plan, removing them as the plan trustees, appointing an independent fiduciary to administer and terminate the plan at the Kepharts' expense, and permanently enjoining the Kepharts from serving as trustees, fiduciaries, advisors, or administrators to any ERISA-covered plan. In addition, the judgment directs the forfeiture of Timothy Kephart's individual plan account balance to offset the plan's losses. Philadelphia Office

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

On February 4, 2014, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was nearly one year delinquent under the terms of the payment plan provided for in the consent judgment entered in this matter. On February 27, 2014, the court issued the requested order to show cause and, on April 4, 2014, the court held a hearing on the Secretary's motion. Following the hearing and several admonitions by the court relative to Sampson's payment obligations under the judgment, on June 13, 2014, the court ordered Sampson to pay at least \$750 per month toward the judgment, ordered him to consider a stock pledge, and reminded Sampson that penalties could be imposed on him if he fails to make the required payments. The court continues to retain jurisdiction of this matter and requires regular status reports to determine whether Sampson should increase his payments. The Secretary first filed a petition for civil contempt against Sampson on February 28, 2013, because Sampson was similarly 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 L. 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, the company's Retirement Savings Plan fiduciaries, alleging that they failed to

remit employee contributions and failed to collect employer contributions on behalf of the plan. The total losses to the plan were approximately \$85,142.00, plus lost earnings, all or most of which were paid since the complaint was filed. On August 19, 2014, the court approved the Secretary's settlement and entered judgment against the defendants. The defendants ultimately restored all losses to the plan and agreed to be enjoined from serving as fiduciaries in the future unless and until they have completed forty hours of fiduciary training to the satisfaction of the Secretary. Atlanta Office

Perez v. Kousaie (N.D. Ohio and Bankr. N.D. Ohio)

On February 19, 2014, the Secretary filed a complaint against Frank Kousaie, individually and as fiduciary of the Anesthesia & Pain Center of Akron, Inc. 401(k) and Profit Sharing Plan. The complaint alleged that Kousaie failed to remit employee contributions to the plan, totaling \$12,843.61 in unremitted contributions and lost opportunity costs. The Secretary simultaneously filed a proof of claim and an adversary proceeding seeking an order of non-dischargeability of debt against Kousaie, who had filed for Chapter 11 personal bankruptcy. The proof of claim totaled more than \$136,000, which included the unremitted employee contributions and unremitted employer contributions. On July 31, 2014, the parties entered into a consent judgment that stipulated the non-dischargeability of the debt, and the Secretary raised no objection to Kousaie's bankruptcy plan, which is expected to result in full reimbursement of the Secretary's priority claim and a portion of the unremitted employer contributions. The parties likewise entered into a consent judgment settling the district court matter, contingent upon the Secretary's receipt of funds owed through the bankruptcy plan and appointing an independent fiduciary to liquidate the plan. Cleveland Office

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

On July 16, 2014, the Secretary filed a complaint alleging that, from 2007 through 2009, Richard J. Kwasny and the law firm of Kwasny & Reilly, P.C. failed to ensure that discretionary employee contributions to the firm's 401(k) Profit Sharing Plan were remitted and remitted on a timely basis. The complaint seeks an order directing the defendants to restore all losses plus interest to the plan, permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary with the plenary authority to administer the plan and distribute its assets to participants. The defendants filed an answer to the complaint on October 29, 2014. On November 7, 2014, the Secretary filed a motion to strike the answers of the company, which the court granted on November 19, 2014. On December 1, 2014, the clerk of the court entered default against the company. Philadelphia Office

Perez v. LeBlanc (N.D. Tex. and Bankr. 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 alleged that during the last three months of the Doctors Hospital of Shreveport'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 sought 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. After the LeBlancs failed to participate in the lawsuit, the Secretary obtained the clerk's entry of default on January 15, 2014. On January 20, 2014, Chris LeBlanc filed a notice of bankruptcy in the pending litigation. The Secretary responded formally to the notice in district court and informally to the bankruptcy court judge, advising that the automatic stay was inapplicable to the pending district court action. In the bankruptcy, the Secretary filed an adversary complaint against Chris LeBlanc on April 11, 2014, and a proof of claim on May 14, 2014. On April 14, 2014, the Secretary filed a motion for default judgment in the district court. On July 1, 2014, the Secretary filed a motion to withdraw reference, and on July 22, 2014, Chris LeBlanc entered into an agreed judgment of non-dischargeability of the debt. After a hearing by the bankruptcy court on July 23, 2014, the court entered the agreed judgment on July 29, 2014. The Secretary is awaiting a ruling on his motion for default judgment from the district court. 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 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. On August 20, 2014, the court entered a consent order and judgment requiring that Lehman pay \$33,956.17 to the plan. The consent order and judgment provided for the appointment an independent fiduciary for the plan and also enjoined the defendants from violating the provisions of ERISA and serving or acting as a fiduciary or service provider to any ERISA-covered plan. 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. On March 20, 2014, the court entered a consent judgment and order which required Louis to make restitution to the plan of \$163,676.25 plus interest via installments of \$300 per month until those funds are paid in full. In any year that Louis' income exceeds \$50,000, he is required to pay the amount in excess of \$50,000 toward the plan. The consent judgment also allows the Secretary to force sale of Louis' properties for the benefit of the plan and requires Louis to name the plan as a primary beneficiary of his \$1 million life insurance policy. Louis also agreed to pay a civil penalty of \$32,735.25 upon his restoration of all losses to the plan. In addition, upon completion of all payments, Louis will be permanently enjoined and restrained from future service as a fiduciary of, or service provider to, any ERISA-covered employee benefit plan. San Francisco Office

Solis v. Lukas Machine, Inc. (W.D. Wash.)

On April 14, 2014, the Secretary filed a complaint against Lukas Machine, Inc. and Brenda Lukas-Jones, alleging that, from March 2008 through October 2011, they failed to remit at least \$32,725.64 in employee contributions and at least \$8,677.30 in participant loan repayments to the company's 401(k) Profit Sharing plan, causing the plan to suffer at least \$46,072.71 in losses,

including lost-opportunity costs of \$4,783.94 as of the date of the filing of the complaint. Because the Secretary learned from plan custodian Mass Mutual Life Insurance Company that Lukas-Jones was seeking to rollover her entire plan account balance (well in excess of the identified plan losses) which could adversely affect recovering for the plan in this matter, on April 15, 2014, the Secretary filed a motion for temporary restraining order (TRO) and preliminary injunction. The motion sought an order restraining Mass Mutual from processing Lukas-Jones' request so her plan account could be used to offset her ERISA liability under Section 206(d)(4) of ERISA. That same day, on April 15, 2014, the court issued a TRO, temporarily restraining Mass Mutual from processing the pending rollover request, with an expiration date of April 29, 2014 for the TRO. On April 15, 2014, the court also issued an order to show cause for a preliminary injunction, giving Lukas-Jones an opportunity to request the TRO be dissolved or to oppose the imposition of a preliminary injunction, and the Secretary an opportunity to further brief the issues. Lukas-Jones did not request dissolution of the TRO or otherwise oppose issuance of a preliminary injunction and, on April 28, 2014, the Secretary responded to the court's order, requesting that \$60,000 of Lukas-Jones' plan account be preserved during the pendency of the Secretary's litigation so that such amounts could be used to restore the losses claimed in her lawsuit in addition to covering payment of independent fiduciary fees needed to administer and wind-down the plan. On April 29, 2014, the court issued a preliminary injunction, enjoining Mass Mutual from processing Lukas-Jones' rollover request, mandating that \$60,000 be set aside to satisfy any judgment issued in this matter while the rest could be rolled over. After the defendants failed to answer the complaint, on May 27, 2014, the court entered default. Following the Secretary's June 24, 2014 motion for default, the court entered a default judgment of approximately \$49,000 against Lukas Machine and Lukas-Jones, representing plan losses, lost-opportunity costs and independent fiduciary fees. The court ordered that such amounts be offset from Lukas-Jones' plan account and permanently enjoined and restrained Lukas Machine and Lukas-Jones from further violations of ERISA and permanently enjoined and restrained Lukas-Jones from future service as a fiduciary of, or service provider to, any ERISA-covered employee benefit plan. Seattle Office

Perez v. Mashali (D. Mass. and Bankr. 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 employee and employer contributions 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 his debt 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 appointed an independent fiduciary, who 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. The Department ultimately determined that Mashali is responsible, pursuant to employment agreements he entered into with about 40 doctors and assistants, for that portion of unpaid contributions constituting deferred employee contributions. He has paid some employees through informal arrangements or settlements in private suits but still owes \$1.7 million. With

his personal bankruptcy and the revocation of his medical licenses in Massachusetts and Rhode Island, Mashali lacked the ability to pay. Once Mashali was indicted for Medicare fraud and held without bail in February 2014, the Department's attempts at consensual negotiations ceased. As an alternative recourse, in December 2014, the Department filed a motion for summary judgment seeking to have the court find Mashali liable for the \$1.7 million debt. 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. The defendants failed to answer the complaint, and on March 20, 2014, the Secretary moved for a default judgment, which the court entered on April 17, 2004. The default judgment requires the defendants to restore \$28,951.82 to the plan, removes them from all fiduciary positions with respect to the plan, appoints an independent fiduciary to administer and terminate the plan, allows for the defendants' individual plan account balances to offset the plan's losses, and enjoins the defendants from ever serving as fiduciaries or service providers to any ERISA-covered plans. Arlington Office

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

On October 6, 2014, the Secretary filed a complaint against Eclipse Freight Systems, Inc. and its owner, Christopher L. McDougal, alleging that they each failed to ensure employee contributions withheld from employees' pay were remitted to the plan from January 15, 2009 through April 30, 2011. Defendants owe nine plan participants approximately \$52,269.75 in employee contributions and another \$9,340.82 as lost opportunity costs through May 30, 2014. The complaint seeks to recover these amounts as well as an injunction against Eclipse and McDougal and a fiduciary bar against McDougal as well as other appropriate relief. Dallas Office

Perez v. Miles (W.D.N.C.)

On May 23, 2014, the Secretary filed a complaint alleging that between January 2, 2008 and October 16, 2012, Miles & Associates Inc., Wayne Miles, and Leon Stadther withheld employee contributions and participant loan repayments to the company's 401(k) Profit Sharing Plan. In addition, the company failed to deposit employer matching contributions to the plan associated with the withheld employee contributions for the same payroll periods. To restore these losses, Miles later offset funds owed to the plan by using \$580,956 from his personal plan account. On July 28, 2014, the court entered a consent decree permanently enjoining Miles and Stadther from serving in any capacity to or receiving any compensation, consideration or anything of value from any ERISA-covered plan and from engaging in any further action in violation of ERISA and requiring the company to designate a person or persons other than the defendants to act as fiduciaries to the company's third-party clients. Atlanta Office

Perez v. Nicksons Machine Shop, Inc. (C.D. Cal.)

On January 10, 2014, the Secretary filed a complaint against Nicksons Machine Shop, Inc. and Dennis Leal, alleging that, from July 1, 2006 through July 31, 2011, they failed to remit approximately \$55,947.00 in employee contributions and participant loan payments to the company's 401(k) Plan, causing the plan to suffer losses with lost-opportunity costs that continue to accrue. On July 29, 2014, the court entered a consent judgment and order, requiring Nicksons

and Leal to restore \$59,316.27 to the plan by Leal offsetting his entire plan account balance under Section 206(d)(4) of ERISA and by paying the remaining balance due the plan via a payment plan. The consent judgment also appoints an independent fiduciary to administer and eventually wind-up the plan at Leal's expense. Leal has also agreed to pay \$11,863.25 in civil penalties and be permanently enjoined and restrained from future service as a fiduciary of, or service provider to, any ERISA-covered employee benefit plan. Previously, on August 24, 2012, the Secretary obtained an order from the bankruptcy court, declaring that Leal's \$55,947.00 debt to the plan is non-dischargeable. Leal filed for protection under Chapter 7 on May 2, 2012. Los Angeles 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. The court entered a consent judgment on April 8, 2014, requiring the defendants to make restitution to the plan of \$66,474.02 for unremitted employee contributions and loan repayments, \$66,392.57 in pre-judgment interest, and \$9,750 for costs and expenses associated with the appointment of an independent fiduciary, for a total of \$142,616.59. The defendants were also removed as plan fiduciaries and are permanently enjoined from ever serving as fiduciaries to any ERISA-covered plan. Philadelphia 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. On May 13, 2014, the Secretary filed a post-judgment civil contempt motion against Orsuto for failing to restore the above monies to the plan pursuant to the consent judgment. On October 20, 2014, one day prior to the order to show cause hearing, Orsuto paid the remaining monies owed to the plan. New York 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 they 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. On April 18, 2014, the court entered a consent judgment and order, requiring the defendants to make restitution of \$47,567.63,

including interest, requiring them to ensure that distributions are made to all participants, and permanently enjoining the Durhams from acting as fiduciaries to any ERISA-covered plan, except as necessary to fulfill the terms of the consent judgment and order. 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 in 2009, 2010 and 2011 the defendants failed to remit over \$23,000.00 in employee contributions to the plan. On May 6, 2014, the court entered default judgment against the defendants, removing them from their fiduciary positions and barring them from serving as plan fiduciaries or service providers to ERISA-covered plans, appointing an independent fiduciary, and ordering defendants to restore \$32,186.84 to the plan, including an offset of any account balances held by Pasdon against the amounts he owed the plan. New York Office

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

The Secretary filed a complaint in district court against Stephen T. Pazdar on September 4, 2013 and a complaint against Thomas M. Trahan on May 16, 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. On February 11, 2014, the court granted the Secretary's motion for entry of default judgment against both defendants for failure to answer or otherwise defend. With the motion pending, Pazdar paid the full \$30,430.59 to the plan custodian on March 14, 2014. The suit against Pazdar was resolved by means of a consent judgment entered on April 7, 2014. The funds have been allocated to the non-fiduciary participants, and the plan is to be terminated. The court entered a default judgment against Trahan on April 7, 2014. Boston Office

Perez v. Quality Control Pattern & Model, Inc. (E.D. Pa.)

The Secretary filed a complaint on October 29, 2014 against David Braunsberg, Quality Control Pattern & Model Inc. and the company's SIMPLE IRA Plan, alleging that from July 2008 through July 2011, Braunsberg and the company failed to ensure that employee and mandatory employer contributions were remitted to the plan. The complaint seeks a judgment from the court requiring the company and Braunsberg to restore all losses plus interest to the plan, and permanently enjoining from serving as fiduciaries or service providers to any ERISA-covered plan. Philadelphia 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, 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 for the late and missing loan repayments and lost opportunity costs of \$4,579.62, as well as a civil penalty of \$3,613.28. The consent judgment also permanently enjoins the defendants from serving as fiduciaries to any ERISA-covered plan. Ramsburg filed for Chapter 7 bankruptcy protection on January 31, 2014. On May 14, 2014, the bankruptcy court entered a consent order directing that Ramsburg's debt to the plan is non-dischargeable. Philadelphia Office

Perez v. Raydar, Inc. (S.D. Ind.)

On October 8, 2014, the Secretary filed a complaint against Raydar, Inc. alleging that the defendant failed to remit and timely remit employee contributions to the Raydar & Associates, Inc. Safe Harbor 401(k) Plan between January 2008 and November 2010, causing losses of approximately \$91,380. The complaint seeks the restoration of all losses to the plan and a permanent injunction barring Raydar, Inc. from violating ERISA. 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. On June 13, 2014, the court entered a consent judgment and order, permanently enjoining Red from serving as a fiduciary to any ERISA-covered plan. 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 alleged 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. On April 17, 2014, the court entered a default judgment against the defendants, removing them from their positions as fiduciaries to the SIMPLE IRA Plan, permanently enjoining them from violating ERISA or acting as fiduciaries or service providers to ERISA-covered plans, requiring Morris and SMJ to pay the Group Health Plan participants \$1,749.63 in unremitted health insurance premiums and lost opportunity costs, requiring Morris and Replica to pay the Group Health Plan participants \$6,787.65 in unremitted health insurance premiums and lost opportunity costs, and requiring Morris and Replica to pay the SIMPLE IRA Plan participants \$2,999.11 in unremitted retirement plan contributions and lost opportunity costs. Chicago Office

Perez v. Ridge & Long Limited Company (E.D. Va.)

On July 29, 2014, the Secretary filed a complaint against Gregory Ridge, Ridge & Long Limited Company and the company's 401(k) Profit Sharing Plan & Trust, alleging that from January 2, 2009 through September 9, 2011, Ridge and the company failed to ensure discretionary employee contributions to the plan were remitted and remitted on a timely basis. The complaint seeks an order directing the defendants to restore all losses plus interest to the plan, permanently enjoining the company and Ridge from serving as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary with the plenary authority to administer the plan and distribute its assets to participants. Arlington Office

Perez v. Rose (E.D. Mich.)

On November 25, 2014, the Secretary filed a complaint against William Robin Rose and the Rose Business Forms Company, d/b/a Rose Printing Services, Inc., fiduciaries of the Rose

Printing Services, Inc. Employees 401(k) Retirement Savings Plan, Employees Health Plan, and Employees Dental Plan, alleging that they failed to ensure that \$20,026 in employee contributions were remitted to the plans from September 17, 2010, through August 31, 2012. In addition, from January 2, 2009, through March 16, 2012, the defendants allegedly failed to timely remit \$79,606 in employee contributions to the employees' 401(k) Plan account and instead kept the funds in the company's corporate bank account for up to 115 days before remitting them to the plan. Chicago 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. 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 did not answer the complaint. On June 24, 2014, the Secretary filed a motion for default judgment against Rothstein for additional lost earnings incurred through June 24, 2014, as well as the fees associated with the independent fiduciary's administration and termination of the plan. In the default judgment entered on June 30, 2014, the court enjoined Rothstein from violating the provisions of Title I of ERISA and from acting as a fiduciary to any ERISA-covered plan, ordered him to pay the plan \$1,775.56 in additional post-judgment interest and \$79,384.50 in fees and expenses incurred by the independent fiduciary, and instructed the independent fiduciary to offset these amounts from Rothstein's individual plan account. 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. On July 22, 2014, the court entered a consent judgment requiring Schneider to restore \$11,881.18 over the course of a year to an interest-bearing trust account established in the name of the 401(k) Plan. The \$11,881.18 represents \$7,456.94 in employee contributions, \$478.59 in loan repayments, and \$3,945.65 in lost earnings. The judgment also permanently enjoins Schneider from acting in any fiduciary capacity to an ERISA-covered plan. Kansas City Office

Perez v. Seavey's Furniture & Appliance, Inc. (D. Me.)

On December 17, 2014, the Secretary filed a complaint against Seavey's Furniture & Appliance, Inc. and Timothy W. Seavey, fiduciaries of the company's SIMPLE IRA Plan, alleging that they failed to remit \$16,015.00 in employee contributions to the plan. Boston Office

Perez v. Sharpless (E.D. La.)

On December 15, 2014, the Secretary filed a complaint against Linda K. Sharpless to recover \$39,700.58 in missing employee retirement contributions and lost opportunity costs from The Multipractice Clinic, Inc. Retirement Savings Plan. The complaint alleges that Sharpless failed to ensure that all employee contributions and plan assets were remitted to the plan from August 15, 2011 through December 30, 2011. Thirteen employee participants were affected by the missing retirement contributions. Dallas Office

Perez v. Shearer (S.D. Ohio and Bankr. S.D. Ohio)

On November 25, 2014, the Secretary filed a complaint against Donald Shearer, individually and as a fiduciary of the Cincy Fireprotection, Inc, 401(k) Savings Plan. Shearer had filed for Chapter 13 bankruptcy, so the Secretary also filed a proof of claim and an adversary complaint alleging non-dischargeability of Shearer's debts to the plan. The Secretary alleged that Shearer owed more than \$12,000 in unremitted employee contributions and \$64,000 in participant loans from the plan that were then re-lent to the plan sponsor, which is now out of business. Cleveland Office

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

On February 21, 2014, the Secretary filed a complaint against Sims Insulation and Mechanical, Inc. and owner Richard Sims, alleging that they failed to remit \$18,478 in employee premiums to the company's Health Plan from July 2, 2009 through April 8, 2011, and \$23,230 in employee contributions to the company's IRA Plan from June 26, 2008 through October 14, 2011. On August 29, 2014, the Secretary filed a motion for default judgment. On December 31, 2014, the court issued a notice of motion setting regarding the motion for default, allowing the defendants twenty-one days to file a response. Dallas 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. On March 17, 2014, the court entered an order approving a consent judgment and order requiring Sippola to restore \$9,396.03 to the plan and enjoining Sippola from serving as a fiduciary to any ERISA-covered plan for five years. Cleveland 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. On July 29, 2014, the court entered a consent judgment, ordering the defendants to restore \$143,481 to the plan, ordering them to hire an independent fiduciary at defendants' expense to terminate the plan, and permanently enjoining them from violating ERISA and from serving as fiduciaries or service providers to any ERISA-covered plan. Cleveland 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. A motion to approve consent judgment and order was filed on September 3, 2013. On March 20, 2014, the court entered a consent judgment and order requiring defendants to pay \$8,518.27 to

plan participants and permanently barring them from serving as fiduciaries to any ERISA-covered plan. Atlanta Office

Perez v. SR Plastics Inc. (M.D. Ga.)

On May 27, 2014, the Secretary filed a complaint against defendants SR Plastics Inc., Gary Anderson and Daniel Fetsch, alleging that the fiduciaries withheld approximately \$28,541.00 in employee contributions intended for the SR Plastics Group Health Plan, even after the insurance policy with Blue Cross Blue Shield was cancelled. The complaint seeks restitution to the plan and permanent injunctions barring Fetsch and Anderson from violating the provisions of Title I of ERISA and from acting as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. Atlanta 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. On August 11, 2014, the court entered a default judgment against the defendants, ordering them to restore \$31,830.65 to the plan and enjoining them from being fiduciaries or service providers to any ERISA-covered plan. Chicago Office

Perez v. Stratton (W.D. Wis. and Bankr. E.D. Wis.)

On February 12, 2014, the Secretary filed a complaint against David Stratton and IDS Sales and Engineering, Inc., fiduciaries of the company's Retirement Savings Plan, alleging that from December 1, 2010 through February 28, 2011, they failed to ensure that \$14,435.61 in employee contributions was remitted to the plan. In addition, the complaint alleged that from February 2, 2010 through November 24, 2010, IDS failed to timely remit \$31,523.42 in employee contributions and \$167.40 in employee loan repayments, holding these amounts instead in IDS's corporate bank account for up to 71 days before remitting them to the plan. On January 17, 2014, the Secretary filed an adversary complaint in bankruptcy court against Stratton seeking to have his debt to the plan declared non-dischargeable. Following the execution of a stipulation of non-dischargeability on August 29, 2014, the bankruptcy court ordered Stratton's debt to the plan non-dischargeable. Chicago 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. The Secretary filed a motion for default judgment on November 20, 2013. The court granted the Secretary's motion for default judgment on September 9, 2014, permanently enjoining the defendants from serving as fiduciaries and ordering full restitution to the plans. Furthermore, Principal Financial Group, the asset custodian, agreed to file an application under the Department's Abandoned Plan Program. Atlanta Office

Perez v. The Children's Place Inc. (M.D. Fla.)

On December 30, 2014, the Secretary filed a complaint against The Children's Place Inc. and Hendrik Johannes Lamphrecht, alleging that between August 1, 2009 and May 1, 2010, defendants failed to remit \$14,192.36 in employee premium contributions to the company's welfare benefit plan. Additionally, employee participants and their dependents incurred \$13,979.13 in unpaid medical expenses and prescription drug charges after their insurance coverage lapsed due to nonpayment of premiums. The complaint seeks a court order requiring the defendants to restore all losses to the plan, including lost opportunity costs, and to offset the individual accounts of any defendant against the amount of losses, permanently enjoining them from violating Title I of ERISA and from serving as fiduciary, officer, trustee, agent, or representative in any capacity to any ERISA-covered plan, and appointing a successor fiduciary or administrator at the defendants' expense. 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 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 inaccurately identified the amount owed to the plan. On February 12, 2014, the bankruptcy court converted the Chapter 11 case to a Chapter 7 case. Separately, on October 9, 2014, Defendant Peter Nasvik filed for Chapter 7 bankruptcy protection. 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 company's Health Plan and 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. The Secretary filed a consent judgment and order on November 11, 2014. As required by the judgment and order, all the participants, except for one, had received and deposited their checks. 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. Vinson filed his answer on July 18, 2013. He was subsequently prosecuted for and found guilty of bank fraud, wire fraud, and other charges. Additionally, Vinson had several large judgments against him, and several properties previously held in his name had been foreclosed. The Assistant U.S. Attorney who prosecuted Vinson informed the Department that Vinson was expected to serve a long prison sentence. Since August 2013, Mr. Vinson has been imprisoned and is currently awaiting sentencing. Given his criminal conviction, Vinson is subject to an automatic 13-year bar. The company is out of business. Based on these circumstances, the Secretary filed a motion to dismiss without prejudice, which the court granted on August 28, 2014. Atlanta Office

Perez v. Ulery (W.D.N.C.)

On April 15, 2014, the Secretary filed a complaint against John Ulery and Comco Signs Inc. with respect to the company's 401(k) Plan and Group Health Plan, alleging that the fiduciaries failed to remit employee contributions and administer the plans. After the defendants failed to answer the complaint, the Secretary obtained a clerk's entry of default on November 19, 2014 and is pursuing a default judgment. Atlanta 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 s 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. On June 27, 2014, the Secretary filed separate motions for summary judgment against both defendants. Chicago 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, 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. On May 13, 2014, the court entered a default judgment against Messer and granted all relief requested in the complaint. 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. On June 21, 2014, the Secretary filed a motion for entry of default based upon the defendants' failure to answer the complaint. That motion was allowed by the court on March 26, 2014. On April 2, 2014, the Secretary filed a motion for default judgment. 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. On May 30, 2014, the court entered a consent order and judgment requiring the defendants to restore \$37,463.48 to the Lakes Plan and \$12,560.18 to the ADS Plan and enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan for two years. Chicago Office

**2. Insurance Rebates**

None

**3. Miscellaneous**

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. On March 27, 2014, the court granted the Secretary's motion for summary judgment, ordered defendants to pay \$58,236.24 in lost earnings and pre-judgment interest and permanently enjoined Vallett from violating ERISA and from serving as a fiduciary to any ERISA-covered plan in the future. See also Solis v. A.D. Vallett, Section J. Financial Institution and Service Provider Cases. Atlanta Office

Perez v. Animal Clinic of Alamo, Inc. (N.D. Cal.)

On February 12, 2014, the Secretary filed a complaint against Animal Clinic of Alamo, Inc. and its owners, Deborah Knibb and John Baine, III because, on June 18, 2010, Baine withdrew \$35,000 from the Profit Sharing Plan. Later, on June 2, 2010 and October 27, 2011, Knibb withdrew \$152,338.12 from the Profit Sharing Plan and later deposited \$150,000 of these funds into an IRA in her name. Knibb's withdrawals exceeded her balance due under the plan, leaving approximately \$35,000 due non-fiduciary participants. The complaint sought restoration of plan losses only from Knibb because Baine's debt was discharged in a bankruptcy proceeding that concluded prior to the filing of the Secretary's complaint and his withdrawal roughly equaled what he was due under the terms of the plan. On June 19, 2014, Knibb filed an answer denying liability and asserted a cross-claim against Baine, alleging that to the extent that she is found liable, she is entitled to indemnity from Baine. Knibb also filed a third-party complaint against David Berlier, CPA, alleging that he supplied false documents, which caused damage to the plan. San Francisco Office

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

On October 27, 2014, the Secretary filed a complaint against Jeffrey Brast and Patricia Brast, fiduciaries of the Special Care Home Oxygen & Medical Equipment, Inc. Profit Sharing Plan, for withdrawing all plan assets in order to fund the operation of their now defunct company, which was the plan sponsor. The Brasts were co-owners of the company and were also named trustees and functional plan administrators. Plan losses exceed \$171,000 and are owed to four participants including the Brasts. Dallas Office

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

On May 22, 2014, the Secretary filed a complaint against Stephen Scott Danby, Jr. and the Danby Lumber and Millwork Company, Inc. alleging that they engaged in multiple prohibited transactions and the imprudent use of the assets of the company's 401(k) profit sharing plan for non-plan expenses. The complaint seeks restoration of diverted plan assets and correction of the prohibited transactions. In addition, the complaint seeks the appointment of an independent fiduciary to marshal assets, make distributions to participants, and terminate the plan. On July 1, 2014, the court entered a consent order that directed that the proceeds of the sale of real property owned by the plan be deposited into the registry of the court pending final resolution of this litigation. On November 5, 2014, the court granted a motion to withdraw filed by counsel for Danby. Philadelphia 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 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. On May 13, 2014, the bankruptcy court entered a default judgment finding his \$2,723,782.46 debt non-dischargeable. Chicago Office

Perez v. DSI Contracting Inc. and Burgess Baird Jr. (N.D. Ga.)

On February 3, 2014, the Secretary filed a complaint against Burgess Baird Jr., fiduciary of the DSI Contracting, Inc. Profit Sharing Plan, alleging that he caused the plan to purchase real estate contiguous to property DSI was developing, that he issued loans to participants in amounts that exceeded the amounts allowed under the terms of the plan document, and that the proceeds of the participant loans were used to invest in the property that DSI was developing. In addition, Baird issued a \$490,000 loan from the plan to a real estate company, called Burge Realty, LLC, which, in turn, used the proceeds of the loan to buy ten lots in the development. Finally, Baird failed to attempt to collect on the participant loans or the loan to Burge Realty, resulting in large losses to the plan. On February 3, 2014, the Secretary filed a complaint seeking restitution of all losses by the defendants, including interest or lost opportunity costs, reversal of the prohibited transactions, a permanent injunction prohibiting the defendants from serving as fiduciaries to any ERISA-covered plan, and the appointment of a successor fiduciary at Baird's expense. Once discovery was completed, the Secretary filed a motion for summary judgment which is now pending. Atlanta Office

Perez v. Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan (E.D.N.Y.)

On March 25, 2014, the Secretary filed a complaint against Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan seeking to remove Sajovic as trustee and bar him from serving as a fiduciary to the plan or any other ERISA-covered plan in the future. The Secretary's complaint alleged that Sajovic breached his fiduciary duties when in April 2013 he, unilaterally and without notice, deliberately took actions to block a second plan trustee from authorizing or obtaining distribution of plan benefits; refused to authorize two employees' requests to roll over eligible plan assets into their IRAs after they separated from the company; and otherwise ceased to administer the plan. As of July 2013, the plan reported seven active participants, including Sajovic, and \$118,678.82 in assets. On December 8, 2014, the court granted the Secretary's request for a default judgment and removed Sajovic from his role as trustee. As a result of the court order, the second trustee will be able to give instructions to the plan's asset custodian to distribute benefits to plan beneficiaries. See also Perez v. Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan, Section K. Orphan Plans. New York 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 is 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. On January 14, 2014, the court approved the consent judgment. On January 28, 2014, the court entered default judgments against defendants Sun Control Systems and Thomas Buckingham, removing them as fiduciaries, appointing an independent fiduciary to administer and terminate the plans, and requiring these two defendants to restore principal, interest and independent fiduciary fees to the plans. See also Solis v. Estate of John Buckingham, Section B.1. Collection of Plan Contributions and Loan Repayments. Philadelphia Office

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

On December 31, 2014, the Secretary filed a complaint against Eye Centers of Tennessee, Raymond K. Mays, and Larry E. Patterson, alleging that the defendants improperly transferred over 90% of the assets of the company's 401(k) Profit Sharing Plan to real estate projects and used many of these projects for their own financial and personal benefit. The Secretary is seeking approximately \$1.1 million in restitution, representing over \$800,000 in transferred plan assets to parties in interest, transferred plan assets to defendants, and unremitted employee and employer contributions. In addition, the Secretary is seeking a permanent injunction against defendants from violating the provisions of Title I of ERISA and acting as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. Atlanta 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. Orland Fasel allegedly 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 had been stayed pending resolution of the criminal matter. On June 9, 2014, the court entered a consent order and judgment finding Orland Fasel jointly and severally liable to the plan for the \$83,500. The court also enjoined him from serving as a fiduciary or service-provider to any ERISA-covered plan. Chicago 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 an independent fiduciary to administer the plans. On May 16, 2014, Hofmeister moved to stay the proceeding because he is the subject of a criminal investigation. That motion was denied on July 1, 2014. See also Perez v. Hofmeister, Section J. 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 Tweardy, 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 an independent fiduciary to administer the plan. On May 16, 2014, Hofmeister moved to stay the proceeding because he is the subject of a criminal investigation. That motion was denied on July 1, 2014. On July 1, 2014, the court entered a consent order and judgment against Tweardy and Clemmens, enjoining them from violating ERISA and from being fiduciaries or service providers to any ERISA-covered plan unless they give the Department ten days' notice of their intent to serve in these capacities. Tweardy and

Clemmens paid \$62,500 to the plan and \$12,500 as a civil penalty. See also Perez v. Hofmeister, Section J. Financial Institution and Service Provider Cases. Cleveland 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 company's 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. On January 8, 2014, the court issued a consent order and judgment ordering Mark Isaacs and Neil Isaacs to restore \$79,104.72 in undistributed plan assets to the plan and permanently enjoining them from serving as fiduciaries or service providers to any ERISA-covered plan. Chicago Office

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

On February 26, 2014, the Secretary filed a complaint against Mark Kinser, Joyce Bennett, Unlimited Construction, Inc. and the company's Retirement Plan, alleging that on August 10, 2010, Kinser withdrew \$491,000 from the plan's investment account through a check that was made payable to Kinser and Bennett as trustees of the company's Defined Benefit Plan. The complaint further alleges that Kinser and Bennett endorsed the check and on August 18, 2010, the check was deposited into a banking account in Kinser's name. The complaint seeks restitution to the plan for all losses due to the withdrawal of the \$491,000, including lost opportunity costs, the appointment of an independent fiduciary to administer and terminate the plan, and an injunction removing the defendants as fiduciaries to the plan and permanently barring them from serving as fiduciaries to any ERISA-covered plans. Bennett filed an answer to the complaint on March 18, 2014. The United States Attorney requested that the case be stayed in order to ensure that the parallel criminal investigation is not compromised. On June 19, 2014, the Secretary filed a motion for a stay, which the court granted on August 11, 2014. The court issued an order on December 1, 2014 continuing the stay. Philadelphia 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 an independent fiduciary to administer the plan. On May 16, 2014, Hofmeister moved to stay the proceeding because he is the subject of a criminal investigation. That motion was denied on July 1, 2014. On January 8, 2014, a consent order and judgment was entered against Robert LaCourciere, enjoining him from violating ERISA and from being a fiduciary or service provider to any

ERISA-covered plan. A similar consent order and judgment was entered against Pamela Babbish on January 31, 2014. Cleveland Office

Perez v. Melocchi (S.D. Fla.)

On October 30, 2014, the Secretary filed a complaint against Rimoldi of America Inc. and Louis J. Melocchi, with respect to the company's profit sharing plan. Melocchi, the named trustee, allegedly directed Nationwide Insurance to wire the plan assets to his personal bank account and used plan assets for his personal and business expenses. Thereafter, Melocchi distributed funds to one participant and failed to distribute the remaining funds to four other participants, resulting in losses of approximately \$51,480.04, plus lost earnings. Atlanta 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 and the adversary proceeding in the bankruptcy court was stayed on April 26, 2012, because of the district court action. Both of these matters are stayed pending Caro's criminal trial. 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, with respect to the company's ESOP. Nohl Crest Homes (NCH) is a defunct Florida corporation. Peter Tibma and Kenneth Emery 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 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. Tibma filed a cross-claim against Emery and a third party claim against company's former chief financial officer, Jose Fernandez. On September 22, 2014, the court entered a consent judgment and order appointing an independent fiduciary and permanently enjoining Tibma and Emery from violating Title I of ERISA and from serving as a fiduciary, trustee, agent, or representative in any capacity to any ERISA-covered plan. Tibma agreed to make restitution to the plan of \$275,000 within 20 calendar days of entry of the court's order by delivering a check to the independent fiduciary, and \$35,000 in other assets will be transferred to the custody of the independent fiduciary. As part of the settlement, Tibma also agreed to dismiss

his cross claim against Emery without prejudice and his third party claim against Fernandez with prejudice. Emery, who is currently unable to make restitution to the plan, will make financial disclosures to the Department for several years. The Department will revisit possible restitution from Emery if and when his financial condition changes. See also Harris v. Nohl Crest Homes, Inc., Section A. Employer Stock. Atlanta Office

Perez v. Stortini (D. Del.)

On April 30, 2014, the Secretary filed a complaint against Michael Stortini, Paul Robino and Barbara Becker-Graham, seeking the recovery of more than \$500,000 for the Frank Robino Companies LLC 401(k) Plan. The complaint alleges that between May and August 2009, the defendants authorized the investment of plan assets into the Robino-Stortini Holding Company without taking any steps to evaluate the soundness of the investment, and then failed to monitor the holding company's performance. The complaint further alleges that after the transfer of funds to the holding company, Stortini wrote checks from the holding company account to various entities, including himself and Frank Robino Companies LLC, thereby depleting the account. The holding company went defunct and plan participants were unable to obtain their benefit payments. On November 19, 2014, the court entered a consent judgment providing for payment to the plan of \$475,740.96, requiring the defendants to pay for the cost of an independent fiduciary who will be responsible for plan administration, management and distribution of plan assets, and permanently enjoining the defendants from serving in any fiduciary capacity to any ERISA-covered plan in the future. Philadelphia 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

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 discussions with Weiss' newly-retained counsel to secure restitution to the plan. New York Office

**C. Financing the Union**

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

On August 8, 2014, the Secretary filed a complaint against 13 trustees of six Taft-Hartley funds sponsored by the Plumbers and Steamfitters Local 21, which was also named as a defendant. The complaint alleges that from approximately 2009 to January 2014, the trustees approved an unlawful reimbursement arrangement whereby the trustees appointed Defendant Robert Philp, a trustee of the Fund and full-time salaried Business Manager of the Union, to serve as the Funds' Administrator, and authorized the Funds to pay Local 21 a pro rata portion of Defendant Philp's union salary as reimbursement for time spent by him allegedly performing administrative services for the Funds. The Secretary filed an amended complaint on November 20, 2014. The trustee defendants filed an answer on December 3, 2014, and Local 21 filed an answer on December 15, 2014. New York Office

**D. Prudence of Investments**

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

Perez v. Ditch Witch Equipment of Tennessee Inc. (E.D. Tenn.)

On April 29, 2014, the Secretary filed a complaint against Aubrey Needham and Ditch Witch Equipment of Tennessee, Inc., alleging that in 2005, Needham entered the company's Profit-Sharing Plan into a margin agreement account which allowed him to make plan investments on margin. Needham began purchasing stock warrants as plan investments, and as a result of purchases on margin, the plan's margin account had a negative balance of more than \$500,000 by the end of 2005. To satisfy the margin calls, Needham liquidated other plan investments in various mutual funds. In late 2006, Needham had liquidated all of the plan's mutual fund investments and all plan assets were invested in stock warrants of a publicly traded company, Star Maritime Acquisition Corp. In April 2007, Needham liquidated the SMAC stock warrants and began purchasing stock warrants of another publicly-traded company, Health Care Acquisition Co., which became PharmAthene Inc. In August 2007, 100 percent of plan assets were invested in PharmAthene stock warrants, and plan assets remained solely invested in PharmAthene stock warrants and stock through April 2009. As a result of the plan's investments

in PharmAthene, the plan suffered net losses totaling at least \$359,770.91. The complaint charges Needham with failing to give appropriate consideration to whether the investments or investment course of action was reasonably designed to further the purposes of the plan and failing to take into consideration the risk of loss and the opportunity for gain (or other return) associated with the investment or investment course of action. He also failed to appropriately consider the composition of the plan's investment portfolio with regard to diversification, the liquidity and return of the portfolio relative to the anticipated cash flow requirements of the plan, and the projected return of the portfolio relative to the funding objectives of the plan. The Secretary is seeking a court order requiring the defendants to restore all losses to the plan, including interest, to disgorge any benefits or profits that they received as a result of fiduciary violations, to set off any restitution or other monetary recovery that defendants may be ordered to pay against any claims which they may have against the plan, including any claims for benefits, and to remove defendants from their positions as fiduciaries with respect to the plan, and permanently bar them from serving as fiduciaries for, or having control over the assets of, any ERISA-covered plan. Atlanta Office

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. On May 5, 2014, the court entered a consent judgment and order, requiring Mahaffy to fully restore plan losses of \$420,127 to non-fiduciary participants. Because Mahaffy is paying the judgment over time, he is required to pay 3% interest on all payments made and name the plan as the sole beneficiary of his life insurance policy, which he is required to renew until the settlement amount is paid in full. The order also provides: to pay the debt off sooner than the payment plan provides, Mahaffy must begin actively marketing all of the real property he owns, except for his principal residence and neither he nor Georgetown Realty will be paid or receive any fee or commission in connection with these sales which can only be made unrelated third parties only, with the proceeds paid directly to the independent fiduciary; if any properties are not sold within 4 years, they will be put up for auction; if Mahaffy's household income exceeds a threshold amount, the Secretary may demand that he pay half of the excess income to the plan; if Mahaffy files for bankruptcy protection before the full amount is paid, he agrees to stipulate that this debt to the plan is non-dischargeable; and Mahaffy is permanently barred from serving as a fiduciary or service provider to any ERISA-covered plan. Seattle Office

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

On October 31, 2014, the Secretary filed a complaint alleging that from Nov. 3, 2008, through May 19, 2009, the assets of the Wheeling Corrugating Company Retirement Security Plan and the Salaried Employees' Pension Plan of Severstal Wheeling Inc. were imprudently invested by the plans' fiduciaries, including the Severstal Wheeling, Inc. Retirement Committee – specifically committee members Michael DiClemente and Dennis Halpin – and WPN Corp. and its owner Ronald LaBow, who had been hired as the plans' investment manager. The suit also

alleges that the Retirement Committee and its members failed to properly oversee the plans and monitor the actions taken by WPN and LaBow. The suit seeks to order the defendants to restore to the plans all losses and lost earnings, amounting to in excess of \$7 million, caused by their fiduciary breaches and to remove the Retirement Committee as fiduciaries and appoint an independent fiduciary with authority to manage the plans. Philadelphia 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 Appeals 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

### Fontaine v. MetLife (7th Cir.)

The district court in this private claim for disability benefits held that ERISA does not preempt a state insurance law barring discretionary clauses in documents governing insurers in Illinois. On October 15, 2014, the Secretary filed an amicus brief arguing that the district court was correct that the law was saved from ERISA preemption as a state insurance regulation. Plan Benefits Security Division

### Gobeille v. Liberty Mut. Ins. Co. (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. On July 5, 2013, the Secretary filed an amicus brief in support of the state, arguing for no preemption. Oral argument, in which the Secretary did not participate, was held November 18, 2013. The Second Circuit issued an adverse decision on February 4, 2014. A petition for rehearing was denied on May 16, 2014. Vermont filed a cert. petition on August 13, 2014. On December 15, 2014, the Supreme Court invited the government's views on whether to grant cert. 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 was appealed, but the Secretary decided not to participate. The Sixth Circuit issued a decision adverse to Wisconsin on September 30, 2014. 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 private 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. Oral argument, in which the Secretary participated, was held on November 21, 2014. 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. The Second Circuit issued a favorable decision affirming the district court on December 23, 2014. Plan Benefits Security Division Fish v. Greatbanc Trust Co. (7th Cir.)

This is an appeal from a summary judgment that dismissed the private plaintiffs' 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. The Seventh Circuit issued a favorable decision on May 14, 2014. Plan Benefits Security Division

Gabriel v. Alaska Elec. Pension Fund (9th Cir.)

The Ninth Circuit, over a dissent, held that a pension plan participant challenging termination of his pension benefits could not seek equitable surcharge because he does not seek to remedy the fiduciary's unjust enrichment or to restore losses suffered by the plan. The plaintiff filed a rehearing petition on July 22, 2014, and the Secretary filed an amicus brief in support on July 28, 2014, arguing that the Ninth Circuit erred in limiting surcharge to such situations. On December 16, 2014, the panel vacated its decision and issued a new decision recognizing the availability of surcharge to remedy a participant's losses caused by a fiduciary breach. 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. 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. Oral argument, in which the Secretary participated, was held on March 19, 2014. The court issued a mostly favorable

decision on April 3, 2014, reversing the district court's dismissal for lack of standing. Gates filed a petition for rehearing on one issue that the Secretary did not address. The court denied the petition on May 5, 2014. Plan Benefits Security Division

Harrison v. Wells Fargo (4th Cir.)

In this private benefit case, the district court held that there was no obligation to seek out readily available evidence necessary to deciding a claim. On March 31, 2014, the Secretary filed an amicus brief in support of the claimant, arguing that plan fiduciaries do have such an obligation and that in addition, they violated the claims regulation by failing to inform the claimant that she should submit information from her treating psychiatrist. Oral argument, in which the Secretary participated, was held on October 28, 2014. On December 8, 2014, the Fourth Circuit issued a favorable decision holding, among other things, that plan fiduciaries had the obligation in this case to seek out the psychiatric information and to inform the participant specifically of the need for this information. Plan Benefits Security Division

New York State Psychiatric Ass'n v. UnitedHealth Group (2d Cir.)

This is a class action against United Behavioral Health and its parent for wrongful benefits denials and alleged violations of ERISA's mental health parity and claims processing provisions. The district court dismissed the 502(a)(1)(B) claims on the basis that participants seeking plan benefits can only sue the plan itself or the plan administrator and not a third-party claims administrator. Relying on the Supreme Court's decision in Varity v. Howe, the district court also dismissed the section 502(a)(3) claims as restated benefit claims. On April 22, 2014, the Secretary filed an amicus brief in support of the plaintiffs, arguing that the claims administrator was a proper party in a claim for benefits under section 502(a)(1)(B), and the section 502(a)(3) claim seeking a prospective injunction that the plans be operated in compliance with mental health parity was distinct from the claim for benefits. Oral argument was held on December 15, 2014, but the court denied the Secretary's motion to participate. On February 6, 2014, the court asked the parties to file a short letter brief addressing whether a recent Second Circuit decision affects the section 502(a)(3) claims. On February 20, 2014, the Secretary filed a letter brief arguing that the decision has no effect on those claims. Plan Benefits Security Division

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

This case involves numerous benefit claims asserted by a Texas hospital, which provided out-of-network benefits to participants and beneficiaries of numerous ERISA-covered health care plans and sued as assignee of those 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. Oral argument, in which the Secretary participated, was held on April 28, 2014. 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. Oral argument, in which the Secretary participated, was held on January 7, 2014. The court issued a favorable decision agreeing with the plaintiff and the Secretary and reversing the denial. 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. 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 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. Oral argument, in which the Secretary participated, was held on January 14, 2014. The court issued a favorable decision on August 7, 2014. MetLife filed a petition for rehearing on September 4, 2014. It was denied on September 30, 2014. 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 and prohibited transactions. 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 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. Oral argument, in which the Secretary participated, was held on April 7, 2014. The court issued a favorable decision on November 4, 2014. The defendants petitioned for rehearing, which was denied on December 12, 2014. Plan Benefits Security Division

Thurber v. Aetna Life Ins. Co. (S. Ct.)

On October 7, 2013, the Supreme Court invited the government's views on whether to grant cert. on the two issues raised: (1) whether an ERISA plan may assert an equitable lien by agreement to recover tort proceeds from an injured plan participant or beneficiary where it has not identified a particular fund that is in the participant's possession and control; and (2) whether a discretionary clause in an ERISA plan results in abuse-of discretion review of a denial of benefits where the clause was never disclosed to the participant in a summary plan description. The government filed a brief on May 6, 2014 answering the first question in the negative, the

second question in the affirmative, and asking the court to deny cert. on both issues. The Court denied cert. on June 9, 2014. 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 years before the suit were time barred. A petition for cert., filed on October 30, 2013, was granted on October 2, 2014, limited to the following question: "Whether a claim that ERISA plan fiduciaries breached their duty of prudence by offering higher-cost retail-class mutual funds to plan participants, even though identical lower-cost institution-class mutual funds were available, is barred by 29 U.S.C. §1113(1) when fiduciaries initially chose the higher-cost mutual funds as plan investments more than six years before the claim was filed." The government recommended cert. on that question in response to the court's invitation in a brief filed August 19, 2014, and filed a merits brief in support of petitioners on December 9, 2014. 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. There was 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. Oral argument, in which the Secretary participated, was held January 7, 2014. On February 28, 2014, the Fifth Circuit issued an unfavorable decision on the ground that Dlabel was not acting as a fiduciary. 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 them to repay the \$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 was 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. The Eighth Circuit issued a mostly favorable decision on March 19, 2014. Plaintiffs filed a rehearing petition, which was denied by the court of appeals, and a cert. petition, which was denied by the Supreme Court on November 10, 2014. Plan Benefits Security Division

## **G. Section 510**

### Perez v. Scott Brain (C.D. Cal.)

On May 21, 2014, the Secretary filed a retaliation complaint under Section 510 of ERISA, alleging that the trustees and administrator of several Southern California Cement Masons Union pension and welfare funds terminated an employee of the funds, Cheryle Robbins, because she cooperated with an EBSA investigator who was investigating Scott Brain, president of the local and one of the funds' trustees and also because she participated in a complaint to the union's international leadership, alleging that trustee Brain was engaging in several schemes which resulted in underpayment to the funds and which, if true, would violate ERISA. The complaint seeks broad injunctive relief including back pay, reinstatement, removal of the trustees and other relief. On June 30, 2014, the Secretary amended the complaint to name Melissa Cook and her law firm, Melissa W. Cook & Associates, as defendants. Attorney Cook served as counsel to the trust funds and was also the romantic partner of Brain from at least May 2013 through at least March of 2014, although she never disclosed this conflict to the other trustees. The complaint alleges that Cook stepped outside her role as counsel to effect the removal of Robbins in an effort to protect Brain. The first amended complaint alleges that the Cook defendants knowingly participated in violations of Section 404 of ERISA and that the Cook defendants violated Section 510 of ERISA. The amended complaint seeks broad injunctive relief mentioned above, including relief against Cook and her law firm to protect ERISA plans, participants, and beneficiaries against improper conduct and uninformed counsel. On August 26, 2014, the Cook defendants filed a motion to dismiss the Secretary's first amended complaint, arguing that the Secretary's claims against them should be dismissed because: (1) Cook is not a fiduciary and thus cannot be found liable for a fiduciary breach; (2) Cook was not Robbins' employer and thus cannot be found liable for violating ERISA Section 510; (3) Cook is protected from liability by the California state law rule of "agents-immunity" because she was acting as an attorney for her clients; and (4) the Secretary's claims are barred by the one-year statute of limitations for attorney malpractice claims found in California Code of Civil Procedure § 340.6. On October 17, 2014, the Secretary filed his opposition to the motion to dismiss and, on November 10, 2014, the Cook defendants filed their reply. On December 2, 2014, the Secretary filed a motion for leave to file a second amended complaint. The proposed second amended complaint varies from the first amended complaint in three ways. First, relief is sought from the individual trustees who voted to outsource Robbins' department. Second, the second amended complaint added one additional trustee defendant who participated in such vote. Third, relief is sought from certain defendants with respect to the terminations of Louise Bansmer and Cory Rice (mother and son). The proposed amended complaint alleges that the two were terminated by the trust funds' administrator in violation of Section 510 for their participation in making internal ERISA-

protected complaints and for refusing requests by Brain to change contribution rates and because she continued to speak to Robbins while Robbins was on administrative leave. As with the other complaints, the proposed second amended complaint seeks broad injunctive relief. Los Angeles Office

#### 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. The Secretary participated in oral argument on January 28, 2014. The Sixth Circuit issued an unfavorable decision affirming the district court decision on May 9, 2014. The Supreme Court denied cert. on November 17, 2014. Plan Benefits Security Division

### **H. Participant Loans**

None

### **I. MEWAs**

#### Perez v. Distribution by Datagen Inc. f/k/a Depawix Health Resources Inc. (N.D. Ga.)

On February 14, 2014, the Secretary filed a complaint against Distribution by Datagen, Inc. f/k/a Depawix Health Resources, Inc., and several companies and individuals involved in the imprudent marketing and operation of a multiple employer welfare arrangement. In addition to Distribution by Datagen, defendant companies named in the suit include Smart Services, Inc. f/k/a Peck and Peck, Inc., based in Atlanta, Georgia, BeneSmart, Inc., based in Stone Mountain, Georgia, and Gallagher Health Studies, Inc., Inspired by Coconut, Inc., and Green Gables Artisan's Cooperative, Inc., based in Jacksonville, Florida. Individual fiduciaries named in the suit include Michael Purr, Ann Marie Purr, Grant Lockhart, Marlin Brett Dixon, Cheryl L. Clinton, and Christopher Peck. The complaint alleges that defendants offered part-time "employment" with Gallagher Health Studies for prospective Datagen Plan participants, which consisted primarily of participating in an annual health assessment and communicating with a patient advocate regarding the participant's health care, for enrollment in Datagen's self-insured health plan. The defendants also offered an additional part-time "employment" arrangement with Inspired by Coconut and Green Gables Artisan's Cooperative for participants who incurred more than \$1,500 in medical expenses in a four-week period. Participants in the additional "employment" arrangement typically paid premiums of several hundred dollars per month for coverage under health insurance policies secured by Inspired by Coconut and Green Gables. The additional part-time "employment" arrangement purportedly required participants to produce hand-crafted items; however, participants could pay additional sums to have the work outsourced. After deducting premiums from participants' accounts over several months, defendants failed to remit funds to the third-party administrator and to insurance companies, resulting in approximately \$250,000 in unpaid medical claims. The complaint alleges that defendants also misled participants by affirmatively promoting the Datagen Plan as sound and viable, while aware that TPA services and

insurance coverage were being terminated for non-payment and health plan claims were unfunded. As alleged in the complaint, many of the defendants have been ordered to cease and desist the unauthorized marketing and selling of insurance in Florida and Louisiana based on their practice of offering health insurance coverage for part-time “employment” like that alleged in the Secretary’s complaint. After the issuance of Florida’s cease and desist order, defendants did not cease marketing and offering insurance via purported part-time “employment,” but rather continued operations after merely changing the names of the entities and the plans. The complaint seeks recovery of the losses suffered by plan participants, a permanent bar against defendants serving as fiduciaries or service providers for any ERISA-covered plan in the future, and the appointment of a successor fiduciary, if necessary. Atlanta Office

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. New York Office

Secretary v. Koresko (3d Cir.)

This is a fiduciary breach case involving the diversion of assets from a MEWA death benefit arrangement. While the case was ongoing in the district court, Koresko and other defendants filed multiple appeals, a motion to stay and a mandamus action. Ultimately, the Secretary was successful in getting all of the appeals dismissed as interlocutory, except the appeal from the order prohibiting the defendants from acting as plan fiduciaries or service providers and appointing an independent fiduciary. Eventually, after numerous extensions, Koresko filed his opening brief on May 28, 2014, and the Secretary filed a response brief on June 27, 2014, arguing that the court of appeals should uphold the district court’s order. The district court held a three-day bench trial in June 2014. Philadelphia Office

Perez v. Pro Systems, Inc. (D. Minn.)

On April 29, 2014, the Secretary filed a complaint against Pro Systems, Inc., a professional employer organization ("PEO"), two related companies (Pro Resources Corporation and Micropro, Inc.), individual fiduciaries James Piche and Michael Brodsho, and the Pro Systems Group Health Plan. The companies invoiced the client-employers, who participated in the plan, every pay period for PEO services, including charges related to the plan. One of the charges was a fee called "other insurance costs," which the companies characterized as a "management fee." However, the plan's third-party administrator provided the vast majority of services necessary for the operation of the plan, and the "other insurance costs" fee was not properly disclosed to client-employers and plan participants. On June 30, 2014, the court entered a consent order and judgment requiring the defendants to restore \$203,212 to client-employers who participated in the plan, enjoining all of the defendants from serving as fiduciaries or service providers to any self-funded ERISA-covered plan in the future, and appointing an independent fiduciary to distribute the restored funds to the client-employers. Chicago 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. The related criminal action was completed during 2014. The Secretary subsequently filed a motion to lift the stay of the civil case, which was granted by the court on December 18, 2014. Atlanta Office

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

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. On March 27, 2014, the court granted the Secretary's motion for summary judgment, ordered defendants to pay \$58,236.24 in lost earnings and pre-judgment interest and permanently enjoined Vallett from violating ERISA and from serving as a fiduciary to any ERISA-covered plan in the future. See also Solis v. A.D. Vallett, Section B.3. Miscellaneous. Atlanta 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, recognizing the resignation of Bernard Tew as fiduciary and appointing an independent fiduciary to administer the plans. On May 16, 2014, Hofmeister moved to stay the proceeding because he is the subject of a criminal investigation. That motion was denied on July 1, 2014. 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 Tweardy, 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 an independent fiduciary to administer the plan. On May 16, 2014, Hofmeister moved to stay the proceeding because he is the subject of a criminal investigation. That motion was denied on July 1, 2014. On July 1, 2014, the court entered a

consent order and judgment against Tweardy and Clemmens, enjoining them from violating ERISA and from being fiduciaries or service providers to any ERISA-covered plan unless they give the Department 10 day notice of their intent to serve in these capacities. Tweardy and Clemmens paid \$62,500 to the plan and \$12,500 in a civil penalty. See also Perez v. Hofmeister, Section B.3. Miscellaneous. Cleveland 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 his firm, Hutcheson Walker Advisors LLC, and the appointment of an independent fiduciary to take control of plan assets currently under the control of an entity called the Retirement Security Plan & Trust ("RSPT"). On May 16, 2012, the court entered the temporary restraining order. On June 13, 2012, the court issued a preliminary injunction, 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. Hutcheson was criminally convicted on April 15, 2013. The Secretary's action is stayed pending conclusion of Hutcheson's criminal appeals. Plan Benefits Security Division

Perez v. Mavis (D. Colo.)

On December 29, 2014, the Secretary filed a complaint against Alvin Martin Mavis, third-party administrator and functional fiduciary of the The Welzig Heating & Air 401(k) Plan, for engaging in prohibited transactions when he received undisclosed compensation as a registered agent of a broker/dealer that sold securities to that plan. Following the Department's investigation, the sponsoring company and plan trustee fired Mavis and made the plan financially whole. Denver Office

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

On December 29, 2014, the Secretary filed a complaint against Roger Ramsay, an investment advisor to ERISA Plans, and Compensation Planning Corp. of Rochester, Inc., a third party administrator. The complaint alleges that from at least 2006 through 2011, defendants received undisclosed and unauthorized compensation, failed to offset fees received against fees the plans would otherwise have had to pay, and Ramsay failed to advise plans to move assets to a lower fee fund class with the same investment portfolio. New York Office

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 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 and/or vacate the consent judgment. On June 14, 2013, the Secretary filed a memorandum in opposition to the motion. On March 26, 2014, the court declined Supreme Auto Plan's motion to intervene and/or vacate the consent judgment. On April 25, 2014, Supreme Auto appealed the matter to the Seventh Circuit. On June 2 and September 6, 2014, Supreme Auto Plan, the Secretary and the Seventh Circuit representative met for settlement discussions. Chicago Office

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

This case involved a class action of plan participants, suing on behalf of their retirement plan, against John Hancock for allegedly charging excessive fees. 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) 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 private plaintiffs filed an appeal 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. The Department participated in oral argument on June 12, 2014. The Third Circuit issued an adverse decision in favor of the defendants on September 26, 2014. Plan Benefits Security Division

Perez v. Western Asset Management (not filed)

On January 27, 2014, the Department concluded a three-way settlement between the Department, the Securities & Exchange Commission (SEC) and Western Asset Management, a subsidiary of Legg Mason, (WAM) that resulted in recoveries of over \$16 to ERISA-covered plans and \$1.6 million in civil penalties in addition to the penalties obtained by the SEC in its action. The investigations focused on two types of improprieties - one involving illegal cross-trades affecting about 60 ERISA-covered accounts and one involving the improper investment of more

than \$89 million of ERISA-covered assets (affecting more than 100 ERISA-covered accounts) in securities that WAM knew were not ERISA-eligible. Personnel from the Special Inspector General for the Troubled Asset Relief Program ("SIGTARP") also participated in the investigations. Plan Benefits Security Division

## **K. 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, alleging 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. The defendant has issued distributions to plan participants and terminated the plan. The Secretary is drafting a consent order and judgment to finalize the resolution of the matter. Chicago Office

### Perez v. American Therapeutic Corp. (S.D. Fla.)

On March 5, 2014, the Secretary filed a complaint against American Therapeutic Corp. and Marianella Valera for failing to administer the company's 401(k) Profit Sharing Plan and to ensure that the funds in the plan were appropriately distributed to participants after the company ceased operations in December 2010. The plan has about 17 participants and approximately \$83,657.94 in assets. The last contributions remitted to the plan were on December 8, 2010. On September 19, 2011, Valera was sentenced to 35 years in prison for 21 felony counts of Medicare fraud. As the result of her conviction, Valera is not permitted to serve as a fiduciary, administrator, officer, trustee, custodian, agent, employee, representative, or have control over the assets of any ERISA-covered plan during or for the period of 13 years after her conviction, or after the end of her imprisonment, whichever is later. On June 9, 2014, the court approved the consent judgment and order, permanently barring the defendants from serving as fiduciaries to any ERISA-covered plan and appointing an independent fiduciary, at defendants' expense, to wind down the plan and distribute its assets. Atlanta 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 fiduciary to distribute the plan assets. The successor fiduciary provided

evidence that distributions to the plan participants had been made. On June 13, 2014, the Secretary filed a notice of voluntary dismissal which was entered by the court on June 16, 2014. Atlanta 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, alleging 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. On March 20, 2014, the court entered judgment against the defendants, granting the Secretary's motion for default judgment. The court appointed an independent fiduciary, enjoined the defendants from serving as a fiduciary to any ERISA-covered plan, and enjoined the defendants from further violations of ERISA. Atlanta Office

Perez v. Clifford, Jr. (N.D. Ill.)

On January 30, 2014, the Secretary filed a complaint against Timothy J. Clifford, Jr., Patrick D. Clifford, and Clifford Replacement Windows & Siding, Inc., alleging that the defendants failed to terminate the company's 401(k) Plan and distribute plan assets. The complaint seeks the distribution of \$33,033.90 in plan assets to seven participants. On April 9, 2014, the court entered a consent judgment ordering the defendants removed as plan fiduciaries, permanently enjoining them from violating ERISA and from acting as fiduciaries or service providers to any ERISA-covered plan, and appointing an independent fiduciary to make final distributions and terminate the plan. Chicago Office

Perez v. Collective Trust for the Pension Plans for Hotels and Motor Inns Associated with the Sheraton Corporation (D. Mass.)

On April 14, 2014, the Secretary filed a complaint alleging that the Collective Trust, which held the assets of four plans, had failed to administer or terminate the plans. Pursuant to the terms of a consent judgment and order entered on May 29, 2014, the Collective Trust agreed to have an independent fiduciary appointed by the court to administer the trust and the approximately \$745,689.58 in assets remaining in the trust. 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 sought the distribution of approximately \$208,348 in plan assets. The court appointed an independent fiduciary on April 7, 2014. New York Office

Perez v. Council on Economic Priorities, Inc. 403(B) Retirement Plan (S.D.N.Y.)

On March 6, 2014, the Secretary filed a complaint against the Council on Economic Priorities, Inc. 403(B) Retirement Plan, seeking the appointment of an independent fiduciary to distribute to 11 participants \$115,538.04 in assets held by Metropolitan Life Insurance Company. An amended complaint was filed on November 17, 2014, stating that an additional \$42,823.01 in plan assets held by AXA Equitable was due to four participants. The plan was abandoned when the non-profit organization went out of business in 1998. New York 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. On January 27, 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

Perez v. Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan (E.D.N.Y.)

On March 25, 2014, the Secretary filed a complaint against Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan seeking to remove Sajovic as trustee and bar him from serving as a fiduciary to the plan or any other ERISA-covered plan in the future. The Secretary's complaint alleged that Sajovic breached his fiduciary duties when in April 2013 he, unilaterally and without notice, deliberately took actions to block a second plan trustee from authorizing or obtaining distribution of plan benefits; refused to authorize two employees' requests to roll over eligible plan assets into their IRAs after they separated from the company; and otherwise ceased to administer the plan. As of July 2013, the plan reported seven active participants, including Sajovic, and \$118,678.82 in assets. On December 8, 2014, the court granted the Secretary's request for a default judgment and removed Sajovic from his role as trustee. As a result of the court order, the second trustee will be able to give instructions to the plan's asset custodian to distribute benefits to plan beneficiaries. See also Perez v. Edward J. Sajovic & Edward J. Sajovic Design LLC 401(k) Profit Sharing Plan, Section B.3. Miscellaneous. New York Office

Perez v. Electronic Business Solutions, Inc. (D. Mass.)

On December 23, 2014, the Secretary filed a complaint alleging that Electronic Business Solutions, Inc. failed to properly manage plan assets and administer the 401(k) Plan. Pursuant to a consent judgment filed contemporaneously, Electronic Business Solutions agreed to have an independent fiduciary appointed by the court to administer the plan and distribute the approximately \$34,356.06 in assets to the 29 remaining participants. Boston Office

Perez v. Finken (D. Minn.)

On August 18, 2014, the Secretary filed a complaint against Janet Finken and I.Q. Marketing, Inc. for failing to administer the company's 401(k) Plan since January 1, 2008. Ten participants had not been able to obtain distributions of their account balances, totaling \$192,523.17. The complaint seeks to remove the defendants as plan fiduciaries, to permanently enjoin them from serving as fiduciaries or service providers to any ERISA-covered plan in the future, and to have an independent fiduciary appointed to administer the plan, distribute the assets to eligible participants, and terminate the plan. Chicago Office

Perez v. First Land Title Agency of New York, Inc. Profit Sharing Plan (E.D.N.Y.)

On June 11, 2014, the Secretary filed a complaint seeking the appointment of an independent fiduciary to distribute \$127,120.42 in plan assets of the First Land Title Agency of New York, Inc. Profit Sharing

Plan. Due to a criminal conviction, the plan's last known fiduciary has been barred from administering or operating the plan. Service was made on the New York Secretary of State on July 15, 2014. The Clerk of the Court issued a Certificate of Default on August 20, 2014. The Secretary moved for a default judgment on August 27, 2014. New York Office

Perez v. H&G Contractors 401(k) (S.D. Tex.)

On August 26, 2014, the Secretary filed a complaint against the H&G Contractors 401(k) Plan, seeking the appointment of an independent fiduciary to direct the termination of the plan and the distribution of \$19,767.52 owed to 19 plan participants. On October 24, 2014, the court granted the requested relief. Dallas Office

Perez v. HDS Lighting Inc. (S.D. Fla.)

The Secretary filed a complaint on September 11, 2014, alleging that the Defendants HDS Lighting Inc. and Hubert Dale Scott, Jr. failed to properly administer the company's 401(k) Plan. When the company went out of business in 2009, the defendants also failed to ensure that plan's four remaining plan participants, with account balances totaling \$78,734.47, received their respective distributions. The complaint asked that the defendants be permanently enjoined from violating Title I of ERISA and from serving as fiduciaries to any ERISA-covered plan and that the court appoint a successor fiduciary to terminate the plan and distribute its assets. Atlanta Office

Perez v. Holden Sand & Gravel (D. Mass.)

On October 1, 2014, the Secretary filed a complaint alleging that Holden Sand & Gravel and Joseph Montalto, fiduciary for the Holden Sand and Gravel Simple IRA Plan, failed to ensure that employee contributions were properly forwarded to the plan and failed to properly manage plan assets and administer the plan. Boston Office

Perez v. Home Comp Care, Inc. Savings and Retirement Plan (N.D. Ill.)

On January 27, 2014, the Secretary filed a complaint against Dr. Anthony Alexander for failing to administer the Home Comp Care, Inc. Savings and Retirement Plan since 1996. Fifteen plan participants had not been able to obtain distributions of their account balances, totaling \$9,754. On September 2, 2014, the parties entered into a consent order and judgment removing Alexander from his position as plan trustee, enjoining him from serving as a fiduciary or service provider to any ERISA-covered plan, and appointing an independent fiduciary, at the defendant's expense, to distribute the plan assets and terminate the plan. Chicago Office

Perez v. Hufgard (N.D. Ohio)

On July 1, 2014, the Secretary filed a complaint against John W. Hufgard, individually and as fiduciary to the Universal Custom Process, Inc. 401(k) Retirement Plan. The complaint alleged that the plan was abandoned because the plan sponsor was out of business and its sole fiduciary, John W. Hufgard, had been incarcerated, leaving no one to administer the plan. On August 1, 2014, the court approved a consent judgment that removed Hufgard as a fiduciary and appointed an independent fiduciary to liquidate and manage the plan. 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

Perez v. Matti Kon and Blitz Systems, Inc. 401(k) Retirement Plan (S.D.N.Y.)

On December 24, 2014, the Secretary filed a complaint seeking the appointment of an independent fiduciary to distribute \$42,612.64 in plan assets of the Blitz Systems, Inc. 401(k) Retirement Plan. The plan's last known fiduciary, Matti Kon, has not administered the plan or made distributions to plan participants. New York 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. The Secretary moved for and was granted default judgment, which was entered by the court on April 16, 2014, and the court appointed an independent fiduciary for the plan. Atlanta 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. The non-profit organization and plan sponsor ceased operations in December 2008. On February 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

Perez v. Polar Dry Ice, Inc. (E.D. Pa.)

On September 12, 2014, the Secretary filed a complaint against Polar Dry Ice, 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 2008. As of December 17, 2014, the plan had four remaining participants with individual account balances totaling \$36,406.61. The complaint seeks the appointment of an independent fiduciary to terminate the plan and distribute its assets to participants. Philadelphia Office

Perez v. Rainwire Partners Inc. (N.D. Ga.)

On December 17, 2014, the Secretary filed a complaint against Bryan M. Johns, alleging that after Rainwire Partners ceased operations in 2005, Johns, fiduciary of the company's 401(k) plan, failed to ensure that the funds were appropriately distributed to participants. The plan currently has approximately ten participants and assets of approximately \$17,000. The Secretary seeks a court order appointing an independent fiduciary, at Johns' expense, to arrange for the termination of the plan and distribution of its assets and enjoining Johns from engaging in any further action in violation of Title I of ERISA. Atlanta Office

Perez v. Roadrunner Materials Distributors, Inc. (C.D. Cal.)

On March 28, 2014, the Secretary filed a first amended complaint seeking the removal of Roadrunner as a fiduciary and the appointment of an independent fiduciary to terminate the company's 401(k) Profit Sharing Plan and distribute its assets. As of May 15, 2013, the plan had seven participants and \$6,089 in assets. On September 22, 2014, the Secretary filed a motion for default judgment. October 22, 2014, the court entered default judgment against Roadrunner and appointed an independent fiduciary. Los Angeles Office

Perez v. Spartan Roofing Company, Inc. (W.D. Mich.)

On October 23, 2014, the Secretary filed a complaint against Spartan Roofing Company, Inc. alleging that the company abandoned its profit sharing plan. The fiduciary of the plan and owner of the company died, leaving no one to administer the plan. The plan has 13 participants and approximately \$400,000 in assets. Cleveland Office

Perez v. Tincher (D. Neb.)

On May 8, 2014, the Secretary filed a complaint against Mark Tincher and the Tincher Chevrolet Oldsmobile 401(k) Plan. The complaint alleges that the plan had been abandoned by Tincher, the sole trustee. As a result, the plan has not been terminated, and account balances, totaling \$183,146.48, have not been distributed to participants. The complaint seeks a judgment to have Tincher removed and an independent fiduciary appointed to complete distributions and to terminate the plan. On July 2, 2014, the court approved a consent judgment appointing an independent fiduciary to distribute plan assets and terminate the plan. Kansas City 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. Atlanta Office

Perez v. World Health Alternatives, Inc. (W.D. Pa.)

On August 29, 2014, the Secretary filed a complaint against World Health Alternatives, Inc. seeking its removal from all fiduciary positions with respect to its Health and Welfare Benefits Plan, and the appointment of an independent fiduciary to receive and distribute to participants and beneficiaries payments from the company's bankruptcy estate to the plan. The company filed for bankruptcy in 2006. The Department's investigation found that from February 20, 2006, through April 28, 2006, covered plan benefits were not paid to participants. On April 17, 2007, the Secretary filed a proof of claim in the company's bankruptcy in the amount of

\$747,160.42, representing the total amount of unpaid medical claims. On June 12, 2014, the bankruptcy court approved a distribution in the amount of \$206,230.65 to satisfy the Secretary's claim. Because the bankruptcy trustee would not assume fiduciary responsibility for receiving and distributing these plan funds, the Secretary's complaint sought a court-appointed independent fiduciary to carry out these tasks. On June 26, 2014, the trustee issued payment to the plan in the amount of \$206,230. On October 7, 2014, the trustee filed an objection to the Secretary's proof of claim, which had already been paid, and the court set a hearing on that objection for December 4, 2014. The parties requested a continuance of the hearing, which the court granted. Philadelphia 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. The State Street Bank and Trust Co. of Boston, Massachusetts, the plan's custodian, was unable to distribute the plan's retirement benefits without the defendants' authorization. On January 2, 2014, the court entered a default judgment against Zohouri Group LLC, appointed an independent fiduciary for the plan for the purpose of terminating the plan and distributing the plan's assets, and permanently enjoined Zohouri Group from acting as a fiduciary to any ERISA-covered plan. Atlanta Office

**L. Contempt and Subpoena Enforcement**

Perez v. Access Limousine Service, Inc. (D. Md.)

On February 7, 2014, the Secretary filed a petition to enforce an administrative subpoena against Access Limousine Service, Inc., alleging that the company failed to comply with an administrative subpoena issued by the Department in its investigation of the company's Health Plan. On February 10, 2014, the court issued an order to comply with the subpoena or alternatively a deadline for the company to file documentation as to why it should not be required to comply. On February 24, 2014, the company provided a partial response to the subpoena. On March 11, 2014, Secretary notified the court that the company's production was incomplete. On March 12, 2014, the court issued an arrest warrant for the owner of the company. On March 13, 2014, the owner of the company notified the Secretary that no further documentation existed, and the Secretary filed a motion withdrawing the petition to enforce. Philadelphia Office

Perez v Belanger (E.D. Pa.)

On November 7, 2013, the Secretary filed a petition to enforce an administrative subpoena against A. Kenneth Belanger and Belanger and Company, Inc. alleging that they failed to comply with an administrative subpoena issued by the Department in its investigation of them. A show cause hearing was held on January 6, 2014, and the court granted the Secretary's petition on January 6, 2014. The court ordered the respondents to produce the documents requested in the subpoena by January 22, 2014. On August 4, 2014, the Secretary filed a motion to hold the respondents in contempt for failing to comply with the court's January 6, 2014 order. On

November 4, 2014, a hearing was held on the Secretary's contempt motion. The court determined that the respondents' reasons for failing to fully comply with the subpoena were "excuses." The court then ordered the respondents to provide the Department with all electronic documents responsive to the subpoena by November 18, 2014 and to allow the Department to come to respondents' place of business with a portable scanner to obtain copies of all paper documents responsive to the subpoena. A status conference was held on November 25, 2014, and as a result of that conference, the respondents have continued producing documents responsive to the subpoena. The Secretary's motion to hold the respondents in contempt remains under advisement. Philadelphia Office

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 on January 7, 2014. Cleveland Office

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

On March 27, 2014, the Secretary filed a contempt petition against Thomas Fernandes for failure to pay the participants of the Air Gage Company 401(k) and Health Care Plans \$11,143.21 plus post judgment interest. The Secretary refiled this petition on June 13, 2014. A hearing was held on October 8, 2014. Fernandes failed to appear, and the court ordered him to appear at a contempt hearing scheduled for December 1, 2014. See also Solis v. Fernandes, Section B.1. Collection of Plan Contributions and Loan Repayments. 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. 401(k) 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. Kineticsware, Inc. (W.D. Wash.); Solis v. Sampson (In re Sampson) (Bankr. W.D. Wash.)

On February 4, 2014, the Secretary filed a petition for civil contempt and a request for an order to show cause because Sampson was nearly one year delinquent under the terms of the payment plan provided for in the consent judgment entered in this matter. On February 27, 2014, the court issued the requested order to show cause and, on April 4, 2014, the court held a hearing on the Secretary's motion. Following the hearing and several admonitions by the court relative to Sampson's payment obligations under the judgment, on June 13, 2014, the court ordered Sampson to pay at least \$750 per month toward the judgment and to consider a stock pledge and reminded Sampson that penalties could be imposed on him if he fails to make the required payments. The court continues to retain jurisdiction of this matter and requires regular status

reports to determine whether Sampson should increase his payments. The Secretary first filed a petition for civil contempt against Sampson on February 28, 2013, because Sampson was similarly 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

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 company's 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 for violating the court order. Prior to the February 28, 2014 scheduled hearing date on the Secretary's motion for civil contempt, RMRF retained counsel and the parties agreed to extend the hearing date to allow RMRF to provide for additional production and for the Secretary to take the principal's (Dan Shaw) administrative deposition. On July 11, 2014, the parties appeared before the court on the Secretary's motion for civil contempt, with the court taking the matter under submission. On August 6, 2014, the court denied the Secretary's motion for civil contempt, concluding, based on RMRF's productions since February 2014, that RMRF "attempted to comply with the Court's Order, and that any misunderstanding was based upon a reasonable, good faith interpretation of that Order." The court, however, did order RMRF to produce by October 3, 2014 the various categories of documents that the Secretary identified as outstanding in his motion/briefs. San Francisco Office

Perez v. The CFP Group, Inc. (D. Md.)

On June 9, 2014, the Secretary filed a petition to enforce two administrative subpoenas against The CFP Group, Inc. and Roberto Clark, alleging that they failed to comply with the subpoenas issued by the Department in its investigations of the company's Health Plan and its 401(k) Savings Plan. A show cause hearing was held on July 31, 2014, at which time the court granted the Secretary's petition and ordered the respondents to produce the documents requested in the subpoenas in seven days. Arlington 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. In 2014, the Secretary followed up to ensure compliance with the agreement. Chicago Office

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

On July 14, 2014, the Secretary filed a second motion for adjudication of contempt against defendant Kevin T. Weir based on his failure to comply with the terms of the amended consent judgment agreed to by the parties and entered by the court on June 19, 2012. The court held a status conference with the parties on August 19, 2014, and thereafter the parties negotiated the terms of a second amended consent judgment. The court granted the secretary's motion to approve and enter second amended consent judgment and stay contempt proceedings on October 24, 2014. These proceedings relate to a February 3, 2011 lawsuit that the Secretary filed against Weir and Liberty-Pittsburgh Systems, Inc., alleging that these defendants, as fiduciaries to the company's 401(k) Retirement Plan, failed to forward and timely forward elective employee contribution and employee loan repayments to the plan during the period January 2007 through December 2009. The defendants agreed to resolve the Secretary's lawsuit through a consent judgment entered by the court on August 30, 2011. The original consent judgment required Weir and the company to restore \$67,137 to the plan and appointed an independent fiduciary for the plan. Arlington Office

## **M. Bankruptcy**

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

### In re Gettig Technologies, Inc. (Bankr. M.D. Pa.)

On January 2, 2014, the Chapter 7 trustee in this bankruptcy proceeding filed an objection to the Secretary's seven-year-old proof of claim relating to losses the Department uncovered in its investigation of the debtor's Gettig Technologies, Inc. Group Health Plan. On March 5, 2014, representatives of the Secretary met with the trustee to review the Department's findings and the trustee's legal concerns. After conferring and reviewing documentation, the parties agreed that the Secretary would file an amended proof of claim and the trustee would withdraw his objection. Philadelphia Office

### In re Guimond (Bankr. D.N.H.)

On March 28, 2014, the Secretary filed an adversary complaint against Paul W. Guimond, trustee of the New England Brace Company (NEBCO) 401K Plan, alleging that his fiduciary breaches constitute defalcation and thus rendered his debts to the plan non-dischargeable. The debtor filed a motion to dismiss, asserting that the Secretary had failed to allege with specificity the facts establishing our claim as required under Iqbal, and the Secretary filed a response. On July 29, 2014, at a hearing on the debtor's motion, the court ordered the Secretary to amend the complaint. The Secretary filed an amended complaint on August 29, 2014. NEBCO had filed a Chapter 11 bankruptcy petition and subsequently filed a Chapter 7 bankruptcy petition. The Secretary had filed a proof of claim in the NEBCO bankruptcy proceedings, and also filed a proof of claim in Guimond's Chapter 13 bankruptcy proceedings. On August 1, 2014, the court confirmed an amended Chapter 13 Plan that recognized the priority status of the Department's claim, and provided for full payment of the debt over a period of several years. On September 5, 2014, in light of the provision for priority payment of the Secretary's claim in the debtor's Chapter 13 Plan, the Secretary filed a motion to withdraw the adversary complaint without prejudice. On September 9, 2014, an order was issued allowing the Secretary's motion and dismissing the amended complaint without prejudice. Boston Office

### In re Herring (Bankr. D. Mass.)

On October 24, 2014, the Secretary filed a complaint to determine the non-dischargeability of debt in the bankruptcy proceedings of Richard C. Herring, a fiduciary to the Central NY Weight Loss LLC Employee Savings and Retirement Plan and Trust, alleging that the debtor had committed defalcation in his capacity as a fiduciary to the plan by failing to forward \$8,646 in employee contributions to the plan. On November 17, 2014, the court entered an order approving a stipulation signed by the debtor and the Secretary that the debt is non-dischargeable. Boston Office

### In re John J. Cassel, M.D., P.C. (Bankr. E.D. Pa.)

On November 27, 2013, the bankruptcy trustee in this Chapter 7 proceeding involving debtor John J. Cassel, M.D. P.C. filed a motion to terminate his duty to perform the obligations of the plan administrator of the debtor's profit sharing plan. In response to the motion, representative

of the Secretary negotiated a proposed order with attorneys for the trustee and for the participants, which the bankruptcy court signed on March 12, 2014. The order addresses the responsibilities of the trustee, the debtor and third parties with respect to termination of the plan. Philadelphia Office

In re 180 Properties, LLC (Bankr. N.D. Ill.)

On October 21, 2014, the bankruptcy court sustained the Secretary's objection to the bankruptcy trustee's motion to appoint an independent fiduciary for the 180 Properties, LLC 401(k) Plan. 180 Properties filed for Chapter 7 bankruptcy relief at the end of August 2014. The bankruptcy trustee filed a motion for approval to appoint an independent fiduciary to administer and terminate the 401(k) Plan, which currently has 16 participants and assets totaling \$93,000. The Secretary argued that the bankruptcy court lacked jurisdiction to appoint an independent fiduciary to an ERISA-covered plan and that the bankruptcy court lacked authority to authorize compensation from the ERISA-covered plan to any independent fiduciary. The bankruptcy trustee argued that in order to properly perform his duties as administrator to the 401(k) Plan, pursuant to Bankruptcy Code §704(a)(11), he was asking the court to appoint an independent fiduciary pursuant to §327. The bankruptcy trustee asserted that §327 of the Code enabled the court to grant his request to appoint a professional to administer the 401(k) Plan. The Secretary countered by arguing that the main fallacy in the bankruptcy trustee's argument was that the statutory support he was relying on only provided the bankruptcy court authority where bankruptcy estate assets were involved as indicated in §330 of the Code. The court recognized that the limitations period runs from the initial selection of the investment, and not from each time the continuing duty to monitor was breached. A petition for rehearing was denied on April 24, 2014. Plan Benefits Security Division

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 April 9, 2013, 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. On March 31, 2014, the district court ruled that the bankruptcy court lacked the power to order payment of the fees of the trustee and his professionals from plan assets. It more broadly stated that the bankruptcy court lacked jurisdiction over any of the actions taken by the trustee in his role as ERISA plan administrator except when the trustee was seeking "a specified dollar award" from plan assets. On April 8, 2014, the trustee filed a notice of appeal of the district court order. On July 8, 2014, the trustee filed his appellant brief. The Secretary filed his appellee brief on October 7, 2014 and the trustee filed his reply brief on October 21, 2014. Plan Benefits Security Division

#### **N. Miscellaneous**

##### 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. The Secretary participated in oral argument on March 19, 2014. The Sixth Circuit issued a favorable decision on both the statute of limitations issue and the fiduciary status/plan assets issue, on May 14, 2014. The Supreme Court denied cert. on October 20, 2014. Plan Benefits Security Division

##### 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. Oral argument, in which the Secretary participated, was held on January 24, 2014. The court issued a 2-1 adverse decision on October 14, 2014, upholding the forum selection provision. Plan Benefits Security Division