RECENT ERISA LITIGATION AND RELATED MATTERS

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RECENT ERISA LITIGATION AND RELATED MATTERS

I. HIDDEN 401(K) PLAN FEES AND EXPENSES.

A. Background. An important part of a fiduciary's responsibility includes identifying, understanding, and evaluating fees and expenses associated with plan investments, investment options and services. When they initially consider a new investment, fiduciaries should be aware of all hard dollar payments made directly by plans as well as "revenue sharing" and similar payments made indirectly by third parties. The latter are sometimes referred to as "hidden fees." Fiduciaries should also monitor such payments to determine if they continue to be reasonable. While the reasonableness of fees and expenses is a concern for all qualified plans, it is particularly important for 401(k) plans, because they generally bear a higher proportion of the fees and expenses. Monitoring fees and expenses is an ongoing fiduciary responsibility.

B. Types of Hidden Fees. There are at least eight kinds of hidden 401(k) plan fees and expenses that fiduciaries need to be aware of: (i) SEC Rule 28(e) Soft Dollars, (ii) Sub-transfer Agent Fees, (iii) 12b-1 Fees, (iv) Variable Annuity Wrap Fees, (v) Investment Management Fees, (vi) Sales Charges, (vii) Revenue Sharing Arrangements, and (viii) Float.

1. *SEC Rule 28(e) Soft Dollars*. Brokerage firms may charge extra commission that can be used by investment advisors and others to purchase services, such as, valuable investment research. Such excess commission must be reasonable with respect to the services provided. Illegal Rule 28(e) fees violate ERISA Sections 403(c)(1), 404(a)(1) and 406(a)(1)(D). Fiduciaries should know whether they are being charged Rule 28(e) fees._

2. *Sub-transfer Agent Fees*. Brokerage firms and mutual funds often sub-contract recordkeeping and other services related to participant shares to a third party called a sub-transfer agent. Payments to these third parties are sub-transfer agent fees. The problem is not the receipt of such fees by the third parties, but whether the fee fairly represents the value of the services being rendered. The DOL, in its publication A Look at 401(k) Plan Fees, has made it clear that a plan sponsor must understand the value and associated compensation of each company providing services to the plan.

3. *12b-1 Fees.* 12b-1 fees are, in general, distribution expenses paid by mutual funds from fund assets. They may include commissions to brokers, advertising or other marketing expenses, and fees for administrative services provided by third parties to fund shareholders. 12b-1 fees can be as much as 1% of a fund's assets on an annual basis. Fiduciary audits have revealed that plan sponsors who have invested in mutual funds with high 12b-1 fees could have invested in a similar mutual fund without paying any 12b-1 fee or a lower 12(b)-1 fee.

4. *Variable Annuity Wrap Fees.* Variable annuities are insurance products that invest in mutual funds. Internal investment gains in such annuities are tax-

deferred but the product is subject to commissions. Therefore, one must ask if it is prudent to invest in a variable annuity and pay for commissions if gains under an ERISA-covered plan are already tax deferred. Also, variable annuities have expenses that may be greater than the costs charged by mutual funds. These are wrapped into a single aggregate fee called a "wrap fee." Wrap fees include investment management fees, surrender charges, mortality and expense risk charges, administrative fees, fees and charges for other features, and bonus credits. Investing in a variable annuity could be considered imprudent if the same underlying mutual funds are available at a lower cost outside of the variable annuity.

5. *Investment Management Fees*. Investment management fees are fees for managing investment assets and they are usually charged as a percentage of the assets invested. These fees are usually deducted directly from the investment return.

6. *Sales Charges*. Sales charges are also known as loads or commissions. These are transaction costs for buying and selling investment products.

7. *Revenue Sharing Arrangements*. Revenue sharing is the practice by mutual funds or other investment providers of paying other plan service providers, e.g., the plan's recordkeeper or other third party administrator, for performing services that the mutual fund might otherwise be required to perform.

8. *Float*. Float refers to earnings retained by a service provider (usually a bank or brokerage company) that result from short-term investments in liquid accounts used to facilitate cash transactions. Funds held in these accounts could include funds to cover checks issued for benefit payments by benefit plans that are not yet presented for payment by the recipient, or uninvested funds awaiting investment instructions from a plan fiduciary. The Department of Labor requires service providers to inform plan fiduciaries of the existence of float and the circumstances under which it will be earned and retained. See FAB 2002-3.

Comment: There is recently introduced classification of mutual funds of which employers should be aware. These are so-called "R funds" which generally offer the same types of mutual funds that can be purchased through normal brokerage systems, but they are specifically designed for pension plan investments and often carry one or more of the above-referenced hidden fees.

C. Hidden Fee Litigation. A not unexpected by-product of the increased public and regulatory interest in 401(k) plan fees and expenses has been the filing of lawsuits against some of the nation's largest employers and investment providers charging that they breached their fiduciary duties by failing to monitor hidden fees (as well as hard dollar payments) and to establish and follow procedures to determine whether such payments were reasonable. The complaints filed against plan sponsors allege that the defendants failed to

monitor and control, or even to inform themselves, of such payments, failed to establish procedures to determine that they were justified, and also failed to disclose such fees to plan participants.

1. The First Salvo. Claims by plan fiduciaries against service providers contending that the providers violated ERISA Section 406(b)(1) (self-dealing) and 406(b)(3) (kickbacks).

a. Haddock v. Nationwide Financial Services, Inc. (D. Conn. 2006). This decision denied a motion for summary judgment by an investment provider that had been sued by the trustees of five employer sponsored retirement plans over the provider's receipt of fees from mutual funds offered as investment options under variable annuity contracts. The Court held that there were triable issues of fact as to the following issues:

i. Whether Nationwide was a plan fiduciary because it retained the discretion to add or delete fund options to the investment mix or whether it was a fiduciary merely as a result of initially choosing funds for its investment platform;

ii. Whether revenue sharing payments made to Nationwide were plan "assets" within the meaning of the prohibited transaction provisions of ERISA, notwithstanding an acknowledgement by the Court that assets held by mutual funds are not plan assets; and

iii. Whether Nationwide's receipt of revenue sharing could have involved prohibited transactions even if revenue sharing payments are not plan "assets." The Court noted that a trier of fact might be able draw the inference that Nationwide provided only nominal services to the plan and that service contracts with mutual funds pursuant to which revenue was shared were merely shelf space arrangements.

b. Ruppert v. Principal Life Insurance Company S.D. ILL.). Complaint alleges that Principal is a fiduciary by virtue of providing investment advice to plan participants and that it committed violations of Sections 406(b)(1) and 406(b)(3) of ERISA by receiving revenue sharing payments from mutual funds. The complaint contains additional allegations that Principal's failure to disclose the existence of its revenue sharing arrangements to the plans and to participants was a fiduciary breach.

c. Phones Plus, Inc. v. Hartford Financial Services (D.Conn). Complaint brought by a 401(k) plan fiduciary against the Hartford alleging that revenue sharing payments were for services that the Hartford was already obligated to provide to its plan clients. As in the *Haddock* and *Ruppert* complaints, there is an allegation that revenue sharing payments are plan assets.

2. The Main Thrust. Participant claims against plan sponsors and related plan fiduciaries were filed in September and October of 2006 by the law firm of Schlicter, Bogert & Denton of St. Louis, Mo. Defendants include sponsoring employers, plan committees, company officers, directors and employees, but not plan providers. The core allegation is that these defendants breached their fiduciary duties under Section 404(a) of ERISA by causing or allowing plan providers to be paid excessive fees for their services. The alleged excessive payments included hard dollar payments made directly by plans as well as revenue sharing payments made by third parties. A novel aspect of these complaints is the allegation that the plan fiduciaries failed to capture revenue sharing monies embedded in the expense ratios of mutual funds offered under the plans even though these funds were not paid to any service providers. Notwithstanding the fact that the mutual funds themselves were not joined as defendants, this claim is an indirect attack on excessive mutual fund expense ratios based on the contention that plan fiduciaries had a duty to challenge such fees.

a. List of cases:

i. Abbot v. Lockheed Martin Corp. (S.D. Ill.)
ii. Beesley v. International Paper Company (S.D. Ill.)
iii. George v. Kraft Foods Global, Inc. (S.D. Ill.)
iv Kanawi v. Bechtel corp. (N.D. Cal.)
v. Loomis v. Exelon Corp. (N.D. Ill.) The claim for damages for investment losses in this case was dismissed on February 21, 2007).
vi Martin v. Caterpillar, Inc. (W.D. Mo.)
vii. Spano v. Boeing Co. (S.D. Ill.)
viii. Taylor v. United Technologies Corp. (D. Conn.)
ix. Will v. General Dynamics corp. (S.D. Ill.)

b. Issues.

i. Whether defendants acted prudently in selecting investment options.

ii Whether defendants are entitled to protection under Section 404(c) of ERISA.

iii. Whether plan fiduciaries have a duty to seek mutual funds with the lowest expense ratios.

iv. Whether the protection of Section 404(c) of ERISA is lost as a result of the failure to fully disclose to participants the amounts and nature of direct as well as hidden fees.

v. Whether the failure to disclose direct and hidden fees to participants constitutes a fiduciary breach.

3. New Tactics - Additional Complaints Joining Providers. In December of 2006, the Schlicter law firm filed three new complaints against plan sponsors and related fiduciaries seeking the same relief as in the cases filed earlier. In addition, the new round of complaints made defendants of plan service providers such as Fidelity Management Trust Company and Fidelity Management & Research Company claiming that they had breached their fiduciary duties by (i) causing or allowing plans to pay plan service providers excessive fees either directly or through revenue sharing and (ii) "secretly" charging and retaining revenue sharing payments that should have been used to benefit plans and participants.

a. List of cases:

i. Hecker v. Deere & co. (W.D. Wis.)
ii. Renfro v. Unisys Corp. (C.D. Cal.)
iii. Kennedy v. ABB, Inc. (W.D. Mo.)

4. Implications of Hidden Fee Cases.

a. Since most of the cases are in the preliminary phases of litigation, it is unclear whether they will result in significant recoveries for the plaintiffs.

b. Since the facts in these cases are very similar to those of many other employer sponsored 401(k) plans, victory by the plaintiffs would mean that these plans would face a significant exposure to liability.

c. Additional law suits are likely to be filed and some copycat claims have already been made.

d. Publicity generated by the litigation will increase the pressure to make regulatory as well as legislative changes that will require detailed fee disclosures by plan sponsors. In any event sponsors are, themselves, likely to demand more extensive disclosure from plan providers in order to protect themselves against claims.

D. Department of Labor Initiatives on Disclosure.

1. Form 5500 Reporting.

a. Current Rule. Fees and expenses paid by the plan must be disclosed on the Form 5500 using either the Schedule A which is used to report commissions or related fees paid to insurance companies or the Schedule C which is used to report fees paid to service providers. Service providers, such as insurance companies, have traditionally narrowly interpreted their duty to disclose. For example, investment management fees, soft dollars and internal fund expenses are not disclosed on either Schedule A or C of the Form 5500. There is little reporting of hidden fees.

b. Proposal. In July of 2006, the Department of Labor proposed changes to Schedule C that would require reporting of virtually all "indirect compensation," i.e., payments to plan service providers by third parties "in connection with that person's position with the plan or services rendered to the plan." This would effectively place the burden of obtaining such information on the plan administrator and in this regard does not necessarily require the cooperation of service providers.

2. Change to Prohibited Transaction Regulations. Plan service providers are parties in interest to a plan, and as such, must satisfy the statutory and regulatory conditions for exemption from the prohibited transaction rules. Under DOL Regulation Section 2550.

408b-2(a), these conditions require the services to be "necessary," that the arrangement under which they are provided be "reasonable," and that no more than "reasonable compensation" be paid for the services. The Department of Labor is reported to be considering a proposal to amend this regulation to make disclosure by the service provider a condition of exemption. The required disclosure would likely be designed to ensure that service providers furnish a plan fiduciary with information sufficient to allow the plan fiduciary to determine

a. Whether the plan is paying reasonable fees for services,

b. Whether the service provider's total compensation, including indirect payments from third parties, is reasonable, and

c. Whether the service provider's advice is affected by conflicts of interest.

E. Best Practices. The Department of Labor ("DOL") has made it clear that in enforcing ERISA they will not judge fiduciaries on the results they achieve, but on the processes they follow. Such processes should not be static but should change with the times. For example, processes that were appropriate in 1974 would not necessarily be appropriate in 2007, because fiduciaries are being held to increasingly greater expectations. So, as standards for fiduciaries evolve, fiduciaries should take the steps to withstand a challenge from the DOL. Such steps include the following:

1. Identify Fees. Make a concerted effort to learn how much the plan and participants are actually paying in fees and expenses. Obtain an exact dollar breakdown of the amounts being charged.

2. Disclosure. Make sure that all fees, including soft dollar and revenue sharing arrangements, are fully disclosed to participants.

3. Draft and Follow a Written Investment Policy Statement. ERISA requires an investment policy. While not required to be in writing, it is easier to demonstrate compliance with the policy statement if it is in writing. A policy statement should include clear standards for choosing investments, how they will be monitored and what triggers must occur to place an investment manager on a watch list. The roles of interested parties should also be clearly stated. The policy should contain enough detail so that the DOL (or a plaintiff's counsel) can clearly understand how or why an investment decision was made. The investment policy should be reviewed annually and modified as necessary.

4. Document Reviews of Investment Vehicles. Fiduciaries should document their reviews of investment vehicles, including negotiations related to direct as well as hidden fees. Such documentation should address key questions or discussions, and decisions made. The ability to provide documentation demonstrates a thoughtful process and alleviates the need to rely on memory.

5. Continuous Monitoring. Continuous monitoring should be the standard for all plans, and when appropriate, quarterly reporting for all but the smallest plans. Monitoring should directly reference back to the investment policy. Monitoring should also include a broad range of qualitative and quantitative metrics for each fund and/or manager. Fiduciaries should understand what the analysis means for the plan and the participants (*e.g.*, what are the fees? are they reasonable with respect to the services being provided?)

6. Utilize an Independent Third Party Investment Expert. Vendors often provide reporting and recommendations for analysis, placing funds on watch or replacing funds. However, there is an inherent conflict of interest when vendors report on proprietary funds, sub-advised funds and even nonproprietary funds where long-term business relationships and revenue agreements entwine with the investment decision process. As a result, fiduciaries should consider using the advice of an independent third party investment expert.

7. Replace Funds that Do Not Meet Investment Criteria. Many fiduciaries are reluctant to make decisions to replace poorly performing funds, and as a result, often add investment vehicles without removing the fund that the new investment vehicle was intended to replace. This could demonstrate an unwillingness on the fiduciary's part to perform his or her duties as required under ERISA.

8. Expense Ratios/Fees. An investment's expense ratio or manager's fees should not be above the median of its peer group (exceptions may be made for funds or managers with superior performance).

9. Conduct Fiduciary Audit. When appropriate, the fiduciary should hire an independent third party to conduct a fiduciary audit. A fiduciary audit should be conducted when vendors fail to adequately disclose fees or fees do not seem reasonable.

II. CASH BALANCE LITIGATION

A. Cooper v. IBM. On August 7, 2006, a three-judge panel of the United States Court of Appeals for the Seventh Circuit ruled that IBM's cash balance plan did not violate the age discrimination provisions of ERISA. The decision reversed the district court's ruling in *Cooper v. The IBM Personal Pension Plan* which had held that IBM's plan was age discriminatory because younger participants had more years to accumulate interest credits in their cash balance plan accounts before reaching normal retirement age than older participants.

Value under the IBM plan was imputed in the form of pay credits (5% of compensation) and interest credits (1% above the interest rate for one-year Treasury bills) to each participant's hypothetical account. The plaintiffs argued that the rate of accrual under this formula discriminated against older participants who were nearing retirement, because they had fewer years to build up their benefit when expressed as an annuity. Thus, older employees would

receive a smaller age 65 annuity than younger employees who received the same salary and interest credits.

Section 204(b)(1)(H) of ERISA states that "a defined benefit plan shall be treated as not satisfying the requirements …[of ERISA] if under the plan, an employee's *benefit accrual* is ceased, or the rate of an employee's *benefit accrual* is reduced, because of the attainment of any age." (Italics added.) The Seventh Circuit held that in interpreting this provision, the district court had erred by substituting the phrase "accrued benefit" (i.e., an amount "expressed in the form of an annual benefit commencing at normal retirement age) for the undefined phrase "benefit accrual". According to the court, the phrase benefit accrual refers, not to an amount taken out of a plan at retirement, but to an employer's contribution to a plan without the effect of the time value of money. Because every participant in the IBM plan received the same pay and interest credits every year, the Seventh Circuit found that the terms of the IBM plan were age neutral. Thus, it rejected the lower court's analysis under which virtually all cash balance plans would have violated the age discrimination provisions of ERISA.

The IBM plaintiffs requested the full appeals court to reconsider the three judge panel's ruling. However the full Seventh Circuit Court of Appeals declined the rehearing request in September and the plaintiffs then appealed the decision to the U. S. Supreme Court. On January 16, 2007, the high court denied the plaintiffs' petition for a writ of certiorari thereby ending the case and leaving the Seventh Circuit's decision as the best legal authority for all those cash balance and hybrid plans not covered by the Pension Protection Act's new hybrid plan rules which are generally effective June 29, 2005. However, as discussed below, the Seventh Circuit was soon joined by the Third Circuit and by several U.S. district courts.

B. <u>Register v. PNC Financial Services Group</u>. On January 30, 2007, the Court of Appeals for the Third Circuit followed the Seventh Circuit's lead and affirmed the dismissal of a class action against the PNC Financial Services Group, its cash balance pension plan, and its plan committee. The court rejected plan participants' claims that cash balance plans inherently discriminate against older workers because of age and that the PNC plan violated ERISA's prohibition against back-loading. In rejecting the age discrimination claim, the Court indicated that the participants' equating "benefit accrual" with "accrued benefit" was incorrect and that the Seventh Circuit's approach which interpreted the term, "benefit accrual" as a reference to the contributions an employer makes to a plan rather than to the amount the employee receives at retirement was the better reading.

As to the backloading claim, the Third Circuit rejected the plaintiffs' argument that the PNC plan failed the 133 1/3 % test due to the wearaway period following the plan's conversion to a cash balance plan. Wearaway refers to a period in which benefits remain level and no credits are accrued and is followed by a resumption of accruals. The plaintiffs contended that because the rate of accrual after the wearaway period would exceed 133 1/3 % of the previous growth rate (zero), the plan violated ERISA. However, the Court held that the relevant Treasury regulation applies only where there are two co-existing formulas under a single plan, not in the case of a plan amendment, such as a cash balance conversion. Under Treasury's accrual rules, the cash balance conversion was to be applied as if it were in effect for all previous plan years.

The Third Circuit also rejected several other claims based on alleged violations of notice requirements and the inadequacy of the plan's summary plan description.

C. Cases Rejecting IBM Decision. The *IBM* case, along with the cash balance safe harbor enacted as part of the Pension Protection Act indicated a more viable future for cash balance plans. Nevertheless, the *IBM* decision has not been universally accepted, and three subsequent district court decisions have taken a contrary view.

1. In re J.P. Morgan Chase Cash Balance Litigation. On October 30, 2006, the district court for the Southern District of New York, in *In Re J.P. Morgan Chase Cash Balance Litigation,* denied the plan's motion to dismiss an age-discrimination claim, and, in so doing, specifically rejected the Seventh Circuit's analysis in the *IBM* case. The plan provided for pay credits equal to a percentage of the participant's annual salary with the percentage increasing with years of service. Annual interest credits through normal retirement age were determined by reference to an outside index and were uniform for all participants. However, because younger participants would have more years to earn interest in their hypothetical accounts, the District Court held that older workers received an impermissibly smaller retirement benefit. Disagreeing with the Seventh Circuit, the Court determined that the proper focus of an age discrimination inquiry was the promised benefit at retirement. This created a split in the Second Circuit where, earlier in 2006, two other district courts had held that cash balance plans are not age-discriminatory.

2. *Richards v. FleetBoston Financial Corp*. In this case the U.S. District Court for Connecticut denied the plan sponsor's motion for reconsideration of the court's earlier denial of a motion to dismiss an age-discrimination claim, finding that cash balance plans clearly violate ERISA's age discrimination rule. The District Court also denied the employer's request for an interlocutory appeal, that is, a review of the age-discrimination issue by a higher court while the case is still pending before the District Court. Like the J.P. Morgan decision, *Richards* did not involve a final judgment. Nevertheless, the Court's analysis indicates that the final result will likely be a finding that cash balance plans are age-discriminatory.

3. *In Re Citigroup Pension Plan ERISA Litigation*. On December 12, 2006, yet another judge from the Southern District of New York held that cash balance plans violate ERISA's age discrimination and accrual rules when the Court granted summary judgment for the plaintiffs in a case involving Citigroup's cash balance plan. Following the *J.P. Morga*n decision, the Court accepted the plaintiff's argument that the term, "rate of benefit accrual," as used in ERISA, means the overall benefit an employee receives upon retirement and that the rate at which this benefit accrues must not decrease as a participant ages. Citigroup's plan, which provided for benefit credits according to a formula based on a percentage of compensation that depended on the participant's age and service, as well as interest credits, violated this formulation of the antidiscrimination rule. The *Citigroup* Court also held that the plan improperly applied the fractional rule method of benefit accrual by limiting its application to the date a participant separated from service, rather than applying it at any given time as required by the statute.

D. More Cases Accepting IBM. The Seventh Circuit's reasoning in Cooper v. IBM was followed in the decisions listed below.

1. Laurent v. PriceWaterhouseCoopers LLP (SDNY 2006).

2. Finley v. Dun & Bradstreet (DNJ 2007).

3. Sunder v. U.S. Bank Pension Plan (D. MO. 2007). and

4. Wheeler v. Pension Value Plan for Employees of Boeing Co. (S.D. IL 2007)

E. Other Recent Cash Balance Cases. Not all cases dealing with cash balance plans involve the issue of age discrimination. In Gillis v. SPX Corp. Individual Retirement Plan, (D. Mass. 2007), the issue was whether a cash balance plan could exclude an early retirement subsidy earned under a prior version of the pension plan from the calculation of a plan participant's transition benefit. Under the plan, participants were entitled to receive the greater of three benefit options: (1) the SPX accrued benefit, the General Signal accrued benefit (relating to the benefit accrued under the plan of a company acquired by SPX that was merged into the SPX cash balance plan), and (3) the transition benefit. The first two options included the early retirement subsidy, but the transition option, which was added to the plan after the merger of the SPX and General Signal plans and was intended to benefit only those former General Signal employees who had not accrued an early retirement subsidy did not. The Court held that the subsidy was adequately preserved in the first two options and that it was not a cutback to exclude it from the opening balance of the plaintiff's transition option.

III. LITIGATION ON PREEMPTION OF STATE HEALTH CARE STATUTES

A. Background. The basic rule under ERISA Section 514 is that ERISA "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." In a significant exception, ERISA provides that "nothing...shall be construed to exempt or relieve any person from any law of any State which regulates insurance...." In the early case of Shaw v. Delta Airlines, 463 U.S. 85 (1983), the Supreme Court interpreted the preemption statute broadly as applying to any state law which relates to employee benefit plans. However, in subsequent decisions, such as New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co., 514 U.S. 645 (1995), the Court appeared to retreat from its original position by holding that ERISA did not preempt state laws that imposed indirect costs on employee benefit plans.

B. Maryland's Wal-Mart Law. In early 2006, Maryland enacted a law called the Fair Share Health Care Fund Act that required employers with 10,000 or more employees in Maryland to spend at least 8% of their total payroll on employee health insurance coverage or pay the difference to the state between the 8% and what had actually been spent on health care coverage. Laws such as this have come to be known as "play or pay" laws. In Maryland's case,

the law was designed specifically to force Wal-Mart Stores, Inc. to increase health insurance benefits for its 16,000 Maryland employees.

C. Legal Challenge to Maryland Law. An employer group sued Maryland in federal court and in Retail Industry Leaders Association v. Fielder, 435 F Supp 2d 481 (D. Md. 2006) the District Court overturned the Wal-Mart law on preemption grounds. The Court was troubled by the fact that the Maryland law was directed against only one employer. However, regardless of whether this would, in and of itself, have been a reason to invalidate the law, the Court ruled that preemption applied, because the law effectively required Maryland employers to restructure their employee health insurance plans, thereby conflicting with ERISA's goal of promoting uniform nationwide administration of such plans.

The case was appealed to the U.S. Court of Appeals for the Fourth Circuit, which upheld the lower court ruling on January 17, 2007 by a 2-1 margin. Like the lower court, the Fourth Circuit's decision was based on its view of the state statute as an attempt to force employers to restructure their health plans. It noted that a law that regulates the structure or administration of an ERISA plan will not be saved from preemption merely because there is a method of opting out of its requirements by paying a tax to the state, although a state law that only creates indirect economic incentives that affect but do not bind the choices of employers would generally not be preempted.

D. Implications. It remains to be seen whether Maryland will seek a review of the Wal-Mart case by the full Fourth Circuit, sitting *en banc*, or by an appeal to the Supreme Court. Practitioners are divided on the question of whether the decision will apply to the pay or play statutes recently enacted or being considered by other states, such as Massachusetts, Minnesota and California. Thus, there are those who continue to feel that if there is a realistic possibility that an employer might choose to pay a sum to a state rather than create a plan or alter an existing plan, a pay or play system might be upheld as an exercise of the state's taxing power.

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