ASPEN PUBLISHERS VOL. 21, NO. 4 WINTER 2008

BENEFITS LAW JOURNAL

Litigation

The Decline and Fall of Temporary "Stock Drop" Claims

James P. Baker

While "an opera ain't over til the fat lady sings," the Valkyries may be warming up. It appears the demise of the Employee Retirement Income Security Act of 1974 (ERISA) temporary "stock drop" industry is upon us. The decline and fall of temporary stock drop class actions was perhaps caused by their initial immoderate success. The catastrophic failures at Enron, WorldCom, Global Crossing, and others resulted in waves of ERISA class action stock drop lawsuits followed by a series of significant stock drop class action settlements. Plaintiff recoveries in *Enron* ($324 million), *WorldCom* ($47 million), and *In re Global Crossing* ($79 million) seemed to confirm the validity and vitality of ERISA stock drop claims.

James P. Baker is an ERISA litigation partner in the San Francisco office of Jones Day. He co-chairs Jones Day's employee benefits and executive compensation practice. Mr. Baker was recognized by the National Law Journal as one of the 40 best ERISA/employee benefits attorneys in the United States and is "AV" rated by Martindale-Hubbell. Chambers USA has selected Mr. Baker as one of "America's Leading Lawyers" nationally for ERISA litigation, and the Bay Area Lawyer Magazine has chosen him as one of the San Francisco area's "Super Lawyers." He wishes to thank Marla Letellier, an ERISA litigation associate in the San Francisco office, for her assistance in the preparation of this article. The views set forth herein are the personal views of the author and do not necessarily reflect those of the law firm with which he is associated.

Following the early successes in bringing stock drop claims for permanent 401(k) plan losses, a variation on the Enron theme emerged. The mutant theory alleged even a temporary decline in the price of company stock held in a 401(k) plan was a breach of fiduciary duty under ERISA. Temporary stock drop claims were first brought in tandem with securities fraud lawsuits. The unstated purpose of these companion ERISA temporary stock drop lawsuits was to get around the stay on all discovery proceedings pending resolution of motions to dismiss that applies to securities fraud claims under the Private Securities Litigation Reform Act (PSLRA). The early settlements from temporary ERISA stock drop claims turned out to be significant. For example, Royal Dutch Shell paid $90 million to settle a class action temporary stock drop claim.

The class action stock drop industry was, of course, born out of *Enron* 's bad facts. In early 2001, Enron Corporation shares were trading at $80. Jeff Skilling unexpectedly resigned as chief executive officer (CEO) of Enron in August 2001. Enron shares were then trading at $35. Ken Lay, the former chairman of Enron, returned as the CEO. Enron thereupon stunned Wall Street in October 2001 by announcing a $638 million loss and a $12 billion write-down. Between September 2001 and November 2001, the 401(k) plan was in "lock down" mode. To facilitate the transition to a new plan administrator, Enron 401(k) plan participants were not allowed to change any 401(k) plan investments or trade Enron stock. During the lockdown, Enron stock collapsed from $34 to $10 per share. It was also during this same time period that Ken Lay made a speech in the Enron cafeteria extolling the virtues of buying Enron stock while he was busily selling all of his own Enron shares.

In Norse mythology, Valkyries determined who won and who lost in battle. They chose the most heroic of those who died to join Odin's forces for the fight between good and evil on Judgment Day. While it is not yet Judgment Day for ERISA stock drop claims, picking the winners and losers in recent circuit court of appeals decisions has not required any help from the Valkyries.

Three New Rules

Three themes have emerged in these recent decisions. First, the circuit courts of appeals have followed the Ninth Circuit's conclusion that "mere stock fluctuations, even those that trend downwards significantly, are insufficient to rebut the *Moench* presumption."[1] So price gyrations alone do not stake a claim. The developing law from these circuit court of appeals decisions is that a fiduciary has a duty to sell employer stock only when the fiduciary knows the employer faces imminent collapse or when the employer is experiencing a serious deterioration of its financial circumstances or other extreme circumstances.[2] In *Moench*, a drop in the price of company stock from $18.25 to less than $0.25 per share (a 99 percent decline) was not, by itself, enough to overcome the presumption of prudence.[3] Similarly, in *Kuper v. Iovenko*,[4] an 80 percent decline in value from $50 per share to $10 per share was rejected by the Sixth Circuit as insufficient.[5] In affirming the dismissal of a complaint, the Ninth Circuit in the *Wright* court found that the defendant fiduciaries were not imprudent by failing to allow plan participants to sell company stock when its price increased from $23.44 per share to $33.89 per share and then declined by roughly 75 percent to $7.94 per share.[6] In *Edgar v. Avaya*,[7] the Third Circuit followed the *Wright* court's rationale and dismissed the complaint, finding no fiduciary breach when the company's stock price fell by 25 percent, from $10.69 to $8.01, in one day.[8] A temporary 40 percent decline in the price of Reliant Energy, Inc. (REI), stock was also found by the Fifth Circuit to be an insufficient factual predicate to support the plaintiffs' imprudence claim:

> *Moench* concluded it might have been imprudent for the fiduciaries to continue investing in company stock that steadily lost ninety-eight percent of its value over two years, falling from $18.25 per share to $0.25 per share. It was also relevant that the fiduciaries were aware of the company's impending collapse, and the employer ultimately filed for Chapter 11 bankruptcy protection. *Moench*, 62 F.3d at 557. In contrast to the company-wide failure evidenced in *Moench*, here Kirschbaum has alleged round-trip trading by a few employees and an initial drop in REI's stock value of approximately forty percent. There is no indication that REI's viability as a going concern was ever threatened, nor that REI's stock was in danger of becoming essentially worthless. This is a far cry from the downward spiral in *Moench*, and much less grave than facts other courts routinely conclude are insufficient to rebut the *Moench* presumption. As the Ninth Circuit has explained, "[m]ere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the *Moench* presumption." *Wright*, 360 F.3d at 1099.[9]

Theme number two is that a court will dismiss class action stock drop complaints if plaintiffs do not adequately plead material facts in support of their imprudence or failure-to-disclose claims. As the Seventh Circuit recently explained, even if ERISA plaintiffs could show that defendants knew about the misconduct, generic allegations about corporate misconduct would be insufficient to support a fiduciary breach claim when the alleged misconduct involved sums that were small (in comparison to the company's total revenues) and the company's stock price either rose or declined slightly in response to public disclosures of the alleged misconduct:

> … [E]ven if the defendants possessed the power of clairvoyance … a $90–$95 million charge against earnings due to the circulation fraud, representing less than 2 percent of one year's revenues for Tribune … would not cause a reasonable fiduciary to believe that the plan's drafters would have intended that he cease compliance with the ESOP's direction to invest exclusively in Tribune securities.[10]

The third emerging theme is that plaintiffs' routine assertion that defendants breached their fiduciary duty under ERISA by failing to trade company stock based on material nonpublic information has been consistently rejected. The circuit courts of appeals agree that ERISA plan fiduciaries are prohibited by the securities laws from trading company stock on insider information.[11]

Four Important Decisions

Luckily for plaintiffs' lawyers, the fat lady cannot yet sing. The Ninth Circuit, which issued the first decision rejecting the temporary price decline theory, has now issued a new seemingly contradictory decision. We will now turn and review each of these four important ERISA stock drop decisions, beginning with *Edgar v. Avaya, Inc.*,[12] out of the Third Circuit.

1. *Edgar v. Avaya, Inc.*

Avaya's stock price slumped 25 percent in one day (from $10.69 to $8.01) after the company announced that its earnings for fiscal year 2005 would not meet its previous forecast.[13] The *Avaya* plan stated that the investment options "shall include the Avaya Stock Fund, which shall be invested primarily in shares of Avaya common stock, with a small portion in cash and other liquid investments."[14] The summary plan description warned that the value of investment in the Avaya Stock Fund "will vary depending on Avaya's performance, the overall stock market, the performance and amount of short-term investments held by the fund, and the amount of fund expenses. Investing in a non-diversified single stock fund carries more risk than investing in a diversified fund."[15]

The complaint alleged it was imprudent for the defendants to offer investment in Avaya stock as an investment option and that defendants breached their fiduciary duties by failing to disclose Avaya's allegedly deteriorating financial condition to plan participants. The district court granted the defendants' motion to dismiss.[16]

The Third Circuit Court affirmed. It followed the rule it previously announced in *Moench* that plan fiduciaries are presumed to have acted prudently because of the language in ERISA Section 404(a)(2).[17] This presumption applies where fiduciaries are "not absolutely required to invest in employer securities," but are "more than simply permitted to make such investments."[18] The court held that this intermediate standard of review struck the proper balance between total insulation from judicial review on the one extreme and *de novo* review of the decision made by fiduciaries on the other extreme.[19]

The plaintiffs' argument that the *Moench* presumption did not apply because the Avaya plans were eligible individual account plans (EIAPs) rather than employee stock owenership plans (ESOPs) was summarily rejected. The underlying rationale behind the *Moench* presumption applies with equal force to EIAPs because, just like ESOPs, EIAPs are meant to promote investment in employer stock and "are subject to many of the same exceptions that apply to ESOPs."[20] The plaintiffs' all-too-familiar argument that the *Moench* presumption should not be applied at the motion-to-dismiss stage was another nonstarter. "Quite simply, if a plaintiff does not plead all of the essential elements of his or her legal claim, a district court is required to dismiss the complaint pursuant to Rule 12(b)(6)."[21] Accordingly, the court applied the *Moench* presumption to the plaintiffs' allegations that the defendants acted imprudently in offering Avaya stock as an investment option.

Relying on the Third Circuit's earlier *Moench* decision, the court explained that "in order to rebut the presumption that a fiduciary acted prudently in investing in employer securities, a 'plaintiff must show that the ERISA fiduciary could not have believed reasonably that continued adherence to the ESOP's direction was in keeping with the settlor's expectations of how a prudent trustee would operate.'"[22] Avaya's stock price decline of only $2.68 per share (from $10.69 to $8.01) after Avaya announced its likely earnings shortfall did not create the sort of "dire situation which would require defendants to disobey the terms of the Plans by not offering the Avaya Stock Fund as an investment option, or by divesting the Plans of Avaya Securities."[23] The court also noted that Avaya stock bounced back to $10.74 in just over three months after the stock's initial decline.[24] It observed: "Indeed, had defendants divested the Plans of Avaya common stock during the Class Period, they would have risked liability for having failed to follow the terms of the Plans."[25]

The failure-to-disclose claim also came up short because

> The Summary Plan Description informs Plan participants that their investments are tied to the market performance of the funds; that each fund carries different risks and potential returns;

> that participants are responsible for investigating the investment options; and that, in doing so, they might consider seeking the advice of a personal financial advisor. In addition, the Plan Descriptions explicitly warn participants that there are particular risks associated with investing in a non-diversified fund. Nowhere in the Plan Descriptions or the Plans themselves are participants guaranteed a particular return on their investments. These disclosures were sufficient to satisfy defendants' obligation not to misinform participants about the risks associated with investment in the Avaya Stock Fund. Under Third Circuit law, they did not have a duty to "give investment advice" or "to opine on" the stock's condition. Rather, the information provided Plan participants the opportunity to make their own informed investment choice.[26]

The court also agreed with the district court's finding that had defendants publicly released the adverse earnings information prior to the public announcement, "under the 'efficient capital markets hypothesis,' such a disclosure would have resulted in a swift market adjustment."[27]

This would have prevented the plans from selling Avaya stock at a higher pre-announcement price, and the plans would have suffered the same losses they suffered after Avaya made the earnings announcement.[28]

Additionally, "had defendants decided to divest the Plans of Avaya stock prior to April 19, 2005, based on information that was not publicly available, they would have faced potential liability under the securities laws for insider trading."[29]

2. *Kirschbaum v. Reliant Energy, Inc.*

In *Kirschbaum*,[30] plan participants sued REI, after its stock fell approximately 40 percent on the basis of disclosures that certain REI employees engaged in "round trip" trading. Round-trip trading is the simultaneous booking by two energy providers of sales of the same exact amount of power or natural gas. While nothing actually changes hands in these transactions, they serve to inflate the trading volume of the two entities. Once these illegal trades were made public, REI's stock fell from $24.60 on May 9, 2002, to $14.50 a week later.[31]

The district court granted defendants' motion for summary judgment, and the Fifth Circuit affirmed. The Fifth Circuit found that the temporary 40 percent decline in the price of REI stock was insufficient to overcome the *Moench* presumption:

> In contrast to the company-wide failure evidenced in *Moench*, here Kirschbaum has alleged round-trip trading by a few employees and an initial drop in REI's stock value of approximately forty percent. There is no indication that REI's viability as a going

> concern was ever threatened, nor that REI's stock was in danger of becoming essentially worthless. This is a far cry from the downward spiral in *Moench*, and much less grave than facts other courts routinely conclude are insufficient to rebut the *Moench* presumption. As the Ninth Circuit has explained, "[m]ere stock fluctuations, even those that trend downward significantly, are insufficient to establish the requisite imprudence to rebut the Moench presumption." *Wright*, 360 F.3d at 1099.[32]

The court stated it was not holding that the *Moench* presumption can only be overcome when a company is about to collapse, but noted that the *Moench* presumption "is a substantial shield."[33] Another reason the *Moench* presumption "cannot be lightly overcome" is that:

> Fiduciaries may not trade for the benefit of plan participants based on material information to which the general shareholding public has been denied access. Moreover, from a practical standpoint, compelling fiduciaries to sell off a plan's holdings of company stock may bring about precisely the result plaintiffs seek to avoid: a drop in the stock price.[34]

The plaintiffs' assertion that the *Moench* presumption could not apply to their facts because the REI defendants had purchased REI stock when it was "artificially inflated" was derided as a "pleading artifice":

> Kirschbaum contends that the court's [Moench] presumption in favor of continued company stock investment should not apply at all where allegations, like his, relate to the fiduciaries' knowing purchases of stock at an artificially inflated price. *Moench*, Kirschbaum argues, concerned a "mere" failure to diversify. We reject this limitation. The distinction between these allegations is not only often elusive, but hardly justified by *Moench* itself. … More to the point, there is no principled difference between how a fiduciary should respond to "artificial inflation" of the stock price as opposed to other sorts of negative insider information. Consequently, the standard of judicial review applicable to such decisions should not generally turn on pleading artifices. The *Moench* presumption logically applies to any allegations of fiduciary duty breach for failure to divest an EIAP or ESOP of company stock. [Footnote omitted.][35]

While the court did not decide the issue, it suggested that an imprudence claim may not be actionable when company stock is a mandated plan investment vehicle. A plan that compelled investment in company stock, rather than leaving fiduciaries with some discretion as to offering company stock as an investment option, is seemingly protected from attack by the language of ERISA Section 404(a)(2). The court found the defendants' argument on this issue to be a "potent objection":

> [W]hile *Moench* did not resolve the issue, the court clearly implies that a plan participant would bear an even heavier burden of showing a fiduciary duty breach where the plan utterly compelled investment in company stock.[36]

The *Kirschbaum* court ultimately declined to address the issue because it found that the plaintiffs had failed to overcome the *Moench* presumption.[37]

The plaintiffs' misrepresentation claims faired no better. The court found that the plaintiffs had failed to identify any alleged misrepresentation that was made by the defendant in a fiduciary capacity. The alleged misrepresentations in REI's Form S-8 and 10a Prospectus were made in REI's corporate rather than fiduciary capacity. "When it incorporated its SEC filings into the Forms S-8 and 10a Prospectus, REI was discharging its corporate duties under the securities laws, and was not acting as an ERISA fiduciary. 'Those who prepare and sign SEC filings do not become ERISA fiduciaries through those acts, and consequently, do not violate ERISA if the filings contain misrepresentations.'"[38] The court distinguished an earlier district court case in which it was alleged that the company had used its 10a Prospectus as its summary plan description for the purposes of complying with ERISA. The *Kirschbaum* plaintiffs did not make any similar allegation, and the record demonstrated that REI issued a separate summary plan description to plan participants.[39] On the basis of this distinction, the court upheld the dismissal of the plaintiffs' misrepresentation claims.

3. *Pugh v. Tribune Co.*

In *Pugh v. Tribune Co.*,[40] participants filed a class action stock drop lawsuit after it was disclosed that employees at two Tribune subsidiaries (*Newsweek* and *Hoy*), falsely boosted circulation numbers so that they could charge higher advertising rates and inflate revenue. This fraudulent activity resulted in a $90 million charge against the Tribune Company's earnings.[41] The Tribune 401(k) plan gave participants 10 different investment options: nine mutual fund accounts and a company stock fund which invested primarily in Tribune stock. The terms of the plan required that participants have the option of investing in Tribune stock.[42] The district court dismissed with prejudice all of the plaintiffs' breach of fiduciary duty claims.[43]

The allegation that a temporary stock price decline made owning any Tribune stock in the retirement plan imprudent was again teed up by the plaintiffs. They alleged Tribune stock should have been immediately discontinued as an investment option given the circulation overstatements of *Newsweek* and *Hoy*.[44] The plaintiffs, however, did not allege that the defendant fiduciaries had actual knowledge of the fraud occurring at *Newsweek* and *Hoy*.[45] The court found that the plaintiffs had also failed to allege any facts supporting their claim that defendants should have known about the circulation overstatements. Because the defendants were unaware of the fraudulent circulation figures, the defendants had no reason to conclude that investment in Tribune stock was imprudent. On the basis of this finding alone, the court upheld the dismissal of the plaintiffs' prudence claim.[46]

Although it had already found the plaintiffs' prudence claim defective, the court assumed *arguendo* that the defendants should have known about the overstatements in order to analyze the issue of whether it was in fact imprudent for defendants to offer and maintain an investment in Tribune stock. The court reviewed Tribune's stock prices and concluded that Tribune stock did not suffer any significant price drops as a result of the disclosure of the fraudulent circulation numbers. After the first announcement of the overstatements, Tribune's stock closed up from $46.78 to $47.27. When Tribune disclosed an expected charge against revenues of $35 million about a month later, the stock price dropped 2.6 percent from $43.12 to $42.00. Two months later when a further announcement was made indicating a total charge against earnings of as much as $95 million, Tribune stock closed at $39.72.[47]

Additionally, the court reasoned that the fraudulent conduct alleged by the plaintiffs was simply not material to the company's overall finances and as such could not support a prudence claim:

> As Judge Hart correctly observed, even if the defendants possessed the power of clairvoyance, they would have foreseen a $90–95 million charge against earnings due to the circulation fraud, representing less than 2 percent of one year's revenues for Tribune. Such circumstances would not cause a reasonable fiduciary to believe that the plan's drafters would have intended that he cease compliance with the ESOP's direction to invest exclusively in Tribune securities. Accordingly, if it were necessary to resolve this issue, we would likely find that the complaint fails to adequately allege that the defendants acted imprudently by not discontinuing the company stock fund.[48]

With respect to the plaintiffs' remaining misrepresentation claim, the court affirmed the district court's dismissal because "the facts alleged do not support that the defendants should have been aware of the circulation fraud; thus, they were not negligent in the allegedly inaccurate statements they made to plan participants."[49]

4. *In Re Syncor ERISA Litigation*

In the Ninth Circuit, consistency is apparently the hobgoblin of shallow minds. We will begin by observing that *Syncor's*[50] totality-of-the-circumstances test for assessing stock drop imprudence claims cannot be reconciled with the Ninth Circuit's decision in *Wright*. In *Wright*, the circuit court applied the *Moench* presumption of prudence and ruled that a failure to show the company's financial situation was "seriously deteriorating and there is a genuine risk of insider self-dealing," which required dismissal of the complaint.[51] Go figure.

Syncor involved ESOP participants who filed suit after allegations of illegal bribery caused the price of Syncor stock to drop in the midst of a merger. Ultimately ESOP members received fewer shares of Cardinal Health in its merger with Syncor because of the bribery scandal. The plaintiffs alleged the bribery scheme hurt the plan's participants because it made Syncor stock an artificially inflated, imprudent investment at the time of the merger.

Syncor merged with Cardinal Health on January 1, 2003. Prior to the merger, Syncor was the administrator of the Syncor 401(k) plan (the Plan).[52] The Plan included an ESOP component, which provided employees with the opportunity to invest up to 2 percent of their compensation in Syncor stock.[53]

In June of 2002, Syncor and Cardinal announced that they would merge in a stock-for-stock transaction, and that Syncor shareholders would receive 0.52 shares of Cardinal stock for every outstanding share of Syncor stock.[54] During its due diligence of the deal, however, Cardinal Health uncovered evidence that Syncor's subsidiaries in Taiwan and China had used illegal bribes to grow their business. Syncor's stock price dropped after these illegal payments were disclosed, and the merger exchange rate was reduced from 0.52 shares of Cardinal stock to 0.47 shares. This reduction caused the Plan participants to lose between $24 million and $65.5 million.[55] Based on this loss, the Plan participants filed a lawsuit against the fiduciaries of the Plan alleging that it was imprudent for them to allow participants to continue to invest in Syncor stock when they knew that Syncor was engaged in an illegal bribery scheme.[56]

The defendants filed motions for summary judgment. While the motions were pending, the parties reached a settlement agreement on the day before the district court granted the defendants' motion for summary judgment.[57] The district court, however, disregarded the parties' settlement agreement and entered judgment for the defendants.[58]

The plaintiffs appealed both the district court's refusal to consider their settlement agreement before entering judgment for the defendants as well as the merits of the court's finding on summary judgment that the plaintiffs failed to demonstrate the existence of a disputed issue of material fact as to their prudence claims.

Much of the Ninth Circuit's decision is dedicated to its irritation with the district court for failing to properly consider the parties' settlement. It found the district court abused its discretion: (1) by refusing to consider the settlement agreement as mandated by Rule 23(e) of the Federal Rules of Civil Procedure; and (2) for failing to withdraw its untimely judgment for the defendants.[59] After reversing the district court's summary judgment for the defendants for failing to follow the command of Federal Rule of Civil Procedure 23(e), the court went on to discuss the district court's decision on the merits. On this second issue, the court created significant confusion within the Ninth Circuit case law on the legal standard applicable to stock drop prudence claims.

The district court found that the plaintiffs had failed to rebut the *Moench* presumption because they did not show that Syncor's financial situation was seriously deteriorating or that there was a significant risk of insider self-dealing.[60]

The Ninth Circuit did not disagree with the district court's conclusion that the plaintiffs had failed to meet this standard. Instead, the Ninth Circuit ruled that the plaintiffs' imprudence claim was subject to a totality-of-the-circumstances standard of review:

> The plain language of 29 U.S.C. § 1104(a)(2) does not require fiduciaries of an eligible individual account plan to diversify their investment outside of company stock in order to meet the prudent man standard of care. *See Wright*, 360 F.3d at 1096–1097. However, 29 U.S.C. § 1104(a)(2) does not exempt fiduciaries from the first prong of the prudent man standard, which requires a fiduciary to act with care, skill, prudence, and diligence in any investment the fiduciary chooses. *See Wright*, 360 F.3d at 1097, 29 U.S.C. § 1104(a)(1)(B). **A prudent man standard based only upon a company's alleged financial viability does not take into account the myriad of circumstances that could violate the standard.** A violation may occur where a company's stock did not trend downward over time, but was artificially inflated during that time by an illegal scheme about which the fiduciaries knew or should have known, and then suddenly declined when the scheme was exposed. While financial viability is a factor to be considered, it is not determinative of whether the fiduciaries failed to act with care, skill, prudence, or diligence.[61]

The *Syncor* court mistakenly stated that the Ninth Circuit had not yet adopted the *Moench* presumption by citing to *Wright* and that, it "declined to do so now." As noted above, while the Ninth Circuit in *Wright* did criticize the *Moench* presumption, it did so because it was concerned that subjecting fiduciaries to liability for holding too much company stock in EIAPs was in conflict with the statutory language of ERISA. "Interpreting ERISA's prudence requirement to subject EIAPs to an albeit tempered duty to diversify arguably threatens to eviscerate congressional intent and the guiding rationale behind EIAPs themselves. … The Third Circuit's intermediate prudence standard is difficult to reconcile with ERISA's statutory text, which exempts EIAPs from the prudence requirement to the extent that it requires diversification."[62]

Given the Ninth Circuit's dissatisfaction with the district court for refusing to entertain the parties' settlement, its reversal of the summary judgment order was a not-so-subtle message to the district court to approve the settlement. For veteran court watchers, the Ninth Circuit's flailing of the district court on the prudence issue as well as its adoption of a new standard of review is arguably *dicta* because the Ninth Circuit had already reversed the district court's judgment for failing to properly entertain the parties' proposed class action settlement pursuant to Federal Rule of Civil Procedure 23(e). The Ninth Circuit's prudence discussion in *Syncor* can perhaps be confined to its peculiar facts. The *Syncor* stock was artificially inflated because the stock price "suddenly declined when the scheme was exposed" and the Plan's participants' accounts permanently lost a significant amount of their value after a corrective disclosure was made.[63]

Conclusion

The two different standards of review in *Syncor* and in *Wright* simply cannot be reconciled. The temporary stock drop opera thus continues. Until a new Ninth Circuit or Supreme Court opinion comes down, the Valkyries remain silent. They dare not anoint a winner, nor can they mourn a loser. ERISA lawyers are left, once more, with hope but no answers. We know Judgment Day will come. But when, and for whom?

Notes

[1] Wright v. Oregon Metallurgical Corp., 360 F.3d 1090, 1099 (9th Cir. 2004), *citing* Moench v. Robertson, 62 F.3d 553 (3d Cir. 1995).

[2] 360 F.3d at 1098.

[3] 62 F.3d at 557.

[4] 66 F.3d 1446 (6th Cir. 1995).

[5] Kuper v. Iovenko, 66 F.3d at 1451, 1459–1460.

[6] 360 F.3d at 1095–1096, 1099.

[7] 503 F.3d 340 (3d Cir. 2007).

[8] 503 F.3d at 348–349.

[9] Kirschbaum v. Reliant Energy, 526 F.3d 243, 255 (5th Cir. 2008).

[10] Pugh v. Tribune Co., 541 F.3d 686, 702 (7th Cir. 2008).

[11] *Wright*, 360 F.3d at 1098 n.4 (9th Cir. 2004); Edgar v. Avaya, Inc., 503 F.3d at 350 (3d Cir. 2007); *Kirschbaum*, 526 F.3d at 256 (5th Cir. 2008); *Harzewski Guidant Court*, 409 F.3d 799, 807 (7th Cir. 2007).

[12] 503 F.3d 340, 350 (3d Cir. 2007).

[13] *Id.* at 344.

[14] *Id.* at 343.

[15] *Id.* at 344.

[16] *Id.*

[17] 29 U.S.C. § 1104(a)(2).

[18] *Id.* at 346.

[19] *Id.*

[20] *Id.* at 347.

[21] *Id.* at 349.

[22] *Id.* at 348 (*citing* Moench v. Robertson, 62 F.3d 553, 571 (3d Cir. 1995)).

[23] *Id.*

[24] *Id.* at fn.13.

[25] *Id.* at 348–349.

[26] *Id.* at 350 (*internal citations omitted*).

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] 526 F.3d 243 (5th Cir. 2008).

[31] *Id.* at 247.

[32] *Kirschbaum*, 526 F.3d at 256–257.

[33] *Id.* at 256.

[34] *Id.* at 256.

[35] *Id.* at 254.

[36] *Id.* at 255.

[37] *Id.*

[38] *Id.* at 257.

[39] *Id.*

[40] 521 F.3d 686 (7th Cir. 2008).

[41] *Id.* at 690.

[42] *Id.* at 699.

[43] *Id*. at 692.

[44] *Id*. at 699–700.

[45] *Id*. at 700.

[46] *Id*. at 701.

[47] *Id*. at 702.

[48] *Id*.

[49] *Id*. at 702.

[50] 516 F.3d 1095 (9th Cir. 2008).

[51] *Id*. at 1098.

[52] *Id*. at 1097.

[53] *Id*. at 1098.

[54] *Id*.

[55] *Id*.

[56] *Id*.

[57] *Id*. at 1099.

[58] *Id*.

[59] *Id*. at 1101–1102.

[60] *Id*. at 1102.

[61] *Id*. at 1102. *Emphasis supplied.*

[62] *Wright*, 360 F.3d at 1097.

[63] *Id*. at 1102.

Reprinted from *Benefits Law Journal* Winter 2008, Volume 21, Number 4, pages 93-106, with permission from Aspen Publishers, Inc., Wolters Kluwer Law & Business, New York, NY, 1-800-638-8437, www.aspenpublishers.com

Wolters Kluwer
Law & Business