THE BRIEF

FINANCIAL SERVICES LITIGATION QUARTERLY

SPRING 2023

HUNTON ANDREWS KURTH

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Risk-Adjusted Return Remains Touchstone for Fiduciaries Under New ERISA Rules on ESG Investing

The Biden administration Labor Department issued final new ERISA regulations last December addressing the circumstances and extent to which retirement plan fiduciaries can consider environmental, social and governance (ESG) factors in making retirement plan investments. The rules became effective on February 1, 2023.

ESG investing has been a popular topic of late, both for those seeking to promote socially desirable goals through investment strategies, and those who believe that consideration of ESG factors may offer better risk-adjusted returns. Some groups though, including a coalition of attorneys general, [1] are concerned that ESG investing allows ERISA plan fiduciaries to pursue a "woke" agenda at the literal expense of plan beneficiaries. But when the rhetoric of the proponents and opponents of ESG investing is stripped away and the actual new rules are examined, it becomes clear that the latest changes neither encourage nor discourage ESG investments, but instead restate the Labor Department's longstanding focus on risk-weighted financial returns as the polestar of compliance with ERISA fiduciary duties. Plan fiduciaries accordingly may consider ESG factors when evaluating the risk-weighted returns of investment options, but should not give extra weight to ESG factors in choosing investments.

[1] Twenty-five state attorneys general filed suit against the Labor Department *See State of Utah, et al. v. Walsh*, Case No. 2:23-cv-00016-Z (N.D. Tex. January 26, 2023). A motion by the attorneys general for a preliminary injunction against enforcement of the new rules is fully briefed but has not yet been decided by the court.

GENERAL PRINCIPLES

ERISA Section 404(a)(1)(A) requires a plan fiduciary to discharge his or her duties "solely in the interest of the participants and beneficiaries and for the exclusive purpose of (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expense of administering the plan." Section 404(a)(1)(B) requires a fiduciary to discharge his or her duties "with the care, skill, prudence, and diligence under the circumstances that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims." Though the tone and tenor of the Labor Department's guidance on these provisions has changed since its ERISA regulations (known as the "Investment Duties" regulations) were first published in 1979, the Department's general approach has stayed the same: "the focus of ERISA plan fiduciaries on the plan's financial returns and risk to beneficiaries must be paramount" so as to "maximize employee pension and welfare benefits."[2]

"ESG investing" can refer to two types of investing: 1) collateral purpose investing (investing to achieve non-financial goals) and 2) risk-return investing (i.e., accounting for ESG factors when investing to maximize risk-adjusted financial returns).[3] The distinction is that ESG investing for a collateral purpose is about supporting a set of values (e.g., addressing climate change, encouraging workforce diversity and equality) while possibly sacrificing returns to achieve social goals. Risk-return ESG investing, in contrast, is about finding value in investments because of ESG factors (e.g., better returns because of less climate-related risk or more productivity because of a diverse workforce). It is clear that the new ERISA regulations permit risk-return ESG investing but prohibit collateral purpose ESG investing approaches.

THE LABOR DEPARTMENT'S PRIOR REGULATIONS ON ESG FACTORS

On November 13, 2020, the Labor Department of former President Trump published a final rule amending the Investment Duties regulations. The final rule, titled "Financial Factors in Selecting Plan Investments," emphasized "pecuniary factors" as the sole factor to be considered by fiduciaries in selecting plan investments.[4] This emphasis was reflected in two provisions. First, the rule provided that, "[a] fiduciary's evaluation of any investment or investment course of action must be based only on pecuniary factors . . . . A fiduciary may not subordinate the interest of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote non-pecuniary benefits or goals."[5] Second, in choosing among investment alternatives, a fiduciary could only evaluate non-pecuniary factors if the fiduciary was "unable to distinguish" among investment alternatives "on the basis of pecuniary factors alone."[6] And if pecuniary factors were insufficient to choose among investments, the fiduciary was required to document why pecuniary factors were an insufficient distinguishing factor and

[2] Prudence and Loyalty in Selecting Plan Investments and Exercising Shareholder Rights, 87 Fed. Reg. 73822 (Dec. 1, 2022) (amending 29 C.F.R. Part 2550).

[3] *See* Brief for amicus curiae J. Mark Iwry, DE 88, *Utah v. Walsh*, No. 23-cv-16-Z, N.D. Tex., Apr. 12, 2023 (Iwry Br.), at 4-5.

[4] 85 FR 72846.

[5] 85 FR 72884.

[6] *Id.*

how the non-pecuniary factors were consistent with the interests of plan participants and beneficiaries.[7]

The 2020 regulations were consistent with the Labor Department's historical focus on risk and return as a fiduciary's paramount concern. The regulations were criticized though as potentially having a chilling effect on the consideration of ESG factors in evaluating investments. For example: in evaluating an investment, would a fiduciary violate his or her duties by considering the effects of climate change on a potential investment, or would climate change effects be considered a "non-pecuniary" factor that could not be considered in an analysis "that must be based only on pecuniary factors?" Similarly, if ESG factors were deemed non-pecuniary factors and a fiduciary considered them in choosing among investments, the burden was on a fiduciary to show in the first instance, with documentation, that the investment choices were economically indistinguishable based on pecuniary factors alone.

Part of this perception may have been due to the fact that the rules as initially proposed stated that, "ESG investing raises heightened concerns under ERISA."[8] The statement was understandable if "ESG investing" there referred to collateral purpose ESG investing. However, if "ESG investing" meant risk-return ESG investing, there

would seemingly be little cause for concern, for the pecuniary factor test is, in its simplest form, a risk-return analysis. Whatever was meant by the statement, it was removed from the final rules, but public perception of the Trump era rules was colored by it.[9]

THE NEW ESG REGULATIONS

The Biden administration proposed new Investor Duties regulations in a notice of proposed rulemaking dated October 14, 2021. The proposed rules were "intended to address uncertainties regarding aspects of the current regulation and its preamble discussion relating to the consideration of ESG issues."[10] The proposal also stated that, "climate change and other ESG factors are often material" and that "in many instances fiduciaries should consider climate change and other ESG factors in the assessment of investment risks and returns."[11]

After receiving approximately 900 letters and over 20,000 petitions during the comment period, the Labor Department revised and amended the proposed rules. The final rules were published on December 1, 2022, and went into effect on February 1, 2023. The new rules made two changes relating to ESG factors. First, the rules eliminated the pecuniary/non-pecuniary distinction. Instead of basing investment decisions "only on pecuniary factors," the choice of an investment "must be based on factors that the fiduciary reasonably determines are relevant to a risk and return analysis . . . . Risk and return factors may include the economic effects of climate change and other environmental, social or governance factors on the particular investment or investment course of action."[12] Second, the final rule permits fiduciaries to consider collateral benefits (such as ESG factors) as a tiebreaker if competing investments "equally serve the financial interests of the plan over the appropriate time horizon,"[13] rather than requiring that the competing investments be economically indistinguishable as under the prior rule.

[7] *Id.*

[8] 85 FR 39,113 at 39,116.

[9] *See* Iwry Br. at n.11.

[10] 86 FR 57276.

[11] *Id*. Note the statement that ESG factors "are often material" to the risk-return analysis. This statement mirrors the "heightened concerns" language in the proposed version of the prior rules: instead of chilling consideration of ESG factors, the proposed version of the current rules seemed to require it. This may have led to the perception that the new rules were intended to facilitate collateral benefit investing as a replacement for risk-return investing. But like the "heightened concerns" language, the "are often material" language was deleted from the final version of the rule, thereby leaving in place ESG-neutral risk-return analysis as the standard to be followed. *See also* Iwry Br. at n.11.

[12] 29 CFR § 2550.404a-1(b)(1)(4). As with removal of the "are often material" language discussed in the footnote above, the final rules dropped the statement in the proposed rules that investment decisions "may often require" an evaluation of ESG factors. The Labor Department stated when it announced the final new rules that the "may often require" language "was not intended to create an effective or de facto regulatory mandate. Nor was the language intended to create an overarching regulatory bias in favor of ESG strategies." 87 FR 73830.

[13] 29 CFR § 2550.404a-1(c)(2).

SEMANTICS RATHER THAN SUBSTANTIVE DIFFERENCES

Some critics of the Biden administration rules have claimed that the new rules put a thumb on the scale in favor of ESG investments. Language in the proposed version of the rules (but was removed from the final rules) may have led to that perception. But while the new rules may have thawed the chilling effect of the prior rules on ESG investments in retirement plans, they are more a restatement of the Labor Department's longstanding focus on economic benefit as the touchstone of a fiduciary's duty rather than a new approach to ERISA regulation.

Consider first what a fiduciary is to consider in making investment choices under the new rules: "factors that the fiduciary reasonably determines are relevant to a risk and return analysis."[14] Consider now the "pecuniary factor" definition under the prior rules: "a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment." The first change—"reasonably" in place of "prudently"—in common usage would be a distinction with little difference. The Labor Department stated in its final rulemaking that, "nothing in the principles-based approach should be construed as overturning long established ERISA doctrine or displacing relevant common law prudent investor standards."[15] There thus appears to be little daylight between the new "reasonably determines" requirement and the old "prudently requires" requirement.

The second change—"relevant to a risk and return analysis" in place of "material effect on the risk and/or return of an investment"—is more substantive. It seems to allow for more discretion because a fiduciary may consider any "relevant" factors, not just those that are "material." But this discretion under the new rule to consider more information is proportional and is not weighted in favor of ESG factors: "whether any particular consideration is a risk return factor depends on the individual facts and circumstances. The weight given to any factor by a fiduciary should appropriately reflect a reasonable assessment of its impact on risk-return." The last sentence tracks closely a similar limitation in the prior rule: "The weight given to any pecuniary factor by a fiduciary should appropriately reflect a prudent assessment of its impact on risk-return." So, again, the new rule replaces "prudent" with "reasonable," but the focus of the inquiry continues to be on a factor's impact on risk-return analysis.

Fiduciary discretion is further circumscribed by the next paragraph of the final rule:

> A fiduciary may not subordinate the interests of the participants and beneficiaries in their retirement income or financial benefits under the plan to other objectives, and may not sacrifice investment return or take on additional investment risk to promote benefits or goals unrelated to interests of the participants and beneficiaries in their retirement income or financial benefits under the plan.[16]

[14] 29 CFR § 2550.404a-1(b)(1)(4).
[15] 87 FR at 73831.
[16] 29 CFR § 2550.404a-1(c)(1).

NEW RULES, SIMILAR RESULTS

How might all this play out under the new rules? Suppose a fiduciary decides to invest in airline stocks and is choosing between two airlines for its investment. Airline Alpha recently announced a climate-friendly initiative that includes investments in fuel efficiency and increased use of biofuels. Airline Bravo has no such plans. Can a fiduciary choose to invest in Airline Alpha because of its climate-friendly initiatives?

It's clear that the fiduciary can't choose Airline Alpha solely on the basis of its climate-friendly initiative, because doing so would constitute collateral purpose investing. But the fiduciary likely can choose Airline Alpha if the airline's climate-friendly initiative (or the lack of one for Airline Bravo) is relevant to the risk/return analysis and, along with other factors bearing on the risk/return analysis, makes Airline Alpha a better investment for the plan. So, perhaps investments in fuel efficiency will yield significant savings (over and above capital costs associated with the change) in fuel costs for Airline Alpha, or the use of biofuels will yield more stable fuel costs and reduce maintenance costs. Or the fiduciary may conclude that the climate-friendly initiative will increase ticket sales. Conversely, the lack of a climate initiative may result in increased fuel costs and oil price volatility for Airline Bravo and dampen ticket sales. Or all of these factors may make Airline Alpha's risk-return profile look a little better, and Airline Bravo's profile look a little worse. The new rules thus likely allow the fiduciary to choose Airline Alpha as an investment over Airline Bravo.[17]

Isn't this approach though very similar to the Labor Department's "pecuniary factor" rules? Would not lower fuel costs and higher ticket sales be "a factor that a fiduciary prudently determines is expected to have a material effect on the risk and/or return of an investment," such that they could have been considered under the prior rules? Or consider the opposite scenario: if Airline Alpha's climate initiative was not expected to have a material effect on the risk-return analysis (and thus not be a "pecuniary factor" to be considered under the old rules), would it not also be unreasonable for a fiduciary to consider an immaterial factor in the risk/return analysis under the new rules? And under either set of rules the weight given to any factor is to appropriately reflect a reasonable/prudent assessment of its impact on risk-return. Hence, in our scenario, the acceptability of a fiduciary considering Airline Alpha's climate initiative under either set of rules rises and falls with the impact of the initiative on the risk/return analysis.

The only way for an ESG factor such as a climate initiative to be a deciding factor in choosing between investments is if the investment risk and return analysis resulted in a tie. The old rules said that "non-pecuniary" factors could be considered only if a fiduciary was unable to distinguish between investments "on the basis of pecuniary factors alone." The new rules allow for consideration of "collateral benefits" if a fiduciary "prudently concludes that competing investments, or competing investment courses of action, equally serve the financial interests of the plan over the appropriate time horizon."[18] The old rules also required somewhat extensive documentation supporting the investment choice. The new rules do away with the documentation requirements of the old rules, but the section ends with this sentence: "A fiduciary may not, however, accept expected reduced returns or greater risks to secure such additional benefits."[19] The chosen investment can't offer reduced returns or greater risks compared to an alternative investment, which seems to be another way of saying that the investments under consideration must be economically indistinguishable (as under the old rules) before collateral benefits (e.g., ESG factors) may be considered. The only difference to the tiebreaker test between the two rules thus is the documentation requirement found in the prior rule.

[17] This conclusion assumes, of course, that Airline Alpha is a better investment than Airline Bravo after all factors relevant to a risk/return analysis (including, e.g., share price and dividends as well as the climate initiative) are considered. The new rules do not provide for extra credit or preference for ESG factors (such as a climate friendly initiative) in the risk/return analysis.

[18] 29 CFR § 2550.404a-1(c)(2).

[19] *Id.*

CONCLUSION

Risk-adjusted return has been and remains the touchstone for ERISA plan fiduciaries. Much of the confusion and rhetoric surrounding the new rules is due to conflating collateral purpose investing with the risk-return investing required by ERISA. Investing with the primary purpose of pursuing non-financial collateral goals—such as to promote ESG values—has never been and is not now permitted under ERISA or its regulations. Risk-return investing, in contrast, has been and remains the standard to be followed by fiduciaries. That may include considering the relevant effects of ESG factors in the risk-return analysis. As the Labor Department stated in its final rulemaking, "the final rule makes unambiguous that it is not establishing a mandate that ESG factors are relevant under every circumstance, nor is it creating an incentive to put a thumb on the scale in *favor* of ESG factors."[20] Fiduciaries therefore should evaluate ESG factors like any other potential factor in the risk-return analysis.

All of this is not to say that the new regulations will have no effect on ESG investing. The practical effects though will be quite small. Removal of the documentation requirements in instances where investments are economically equivalent, for example, should theoretically make fiduciaries more comfortable in choosing ESG-related investments. This impact is however likely to be negligible, because it is relatively uncommon, in the first instance, for investments truly to be economically equivalent.[21] In the case of investments with such similar economics, a prudent fiduciary is likely simply to opt to spread risk and invest in both investments. Likewise, prudent fiduciaries document their decisions and analyses anyway (and are likely to continue to do so), so the prior rule's documentation requirement did not impose any new burdens on fiduciaries.[22]

[20] 87 FR 73831 (italics original).
[21] *See* Iwry Br. at 15.
[22] *Id.*

NOTEWORTHY

ELEVENTH CIRCUIT VACATES CLASS SETTLEMENT BECAUSE PLAINTIFFS LACKED STANDING FOR INJUNCTION

Injunctive relief is often a component of class settlement agreements. The value of such injunctive relief is a factor in evaluating whether the settlement—including attorney's fees—is "fair, reasonable, and adequate" under Rule 23(e)(2). However, even if a defendant agrees to an injunction, the named plaintiff(s) must have standing to seek such relief, via some type of lasting impact or likely future injury.

This principle was recently illustrated in *Williams v. Reckitt Benckiser LLC*, 65 F.4th 1243 (11th Cir. 2023). Defendants manufactured and sold "brain performance supplements" under the brand name Neuriva. Five plaintiffs brought a putative class action alleging that Defendants' false and misleading statements gave consumers the impression that Neuriva had been clinically proven to improve brain function, in violation of Florida, California and New York consumer protection laws.

Before any formal discovery, Plaintiffs and Defendants sought preliminary approval of a class settlement. In addition to cash relief, the settlement included a proposed injunction requiring changes to Neuriva's labeling and marketing for a period of two years.

The district court granted preliminary approval of the settlement but an objector objected to the settlement terms on the grounds that the $8 million in cash relief was illusory and that class counsel's $2.9 million fee award was disproportionately large. The district court overruled the objections, and the objector appealed.

On appeal, the Eleventh Circuit vacated and remanded, holding that the objector's arguments would have to wait for another day, as the settlement had a larger problem: the plaintiffs lacked Article III standing to pursue their claims for injunctive relief. The Court reiterated that, even in the class-action context, it is the Court's duty to assure itself of standing, *sua sponte* if need be. At least one named plaintiff must have Article III standing to raise each claim for relief. Here, the named plaintiffs had only alleged *past* harm—that they had purchased Neuriva based upon the misleading representations. Importantly, the named plaintiffs did not allege any "continuing, present adverse effects" associated with their prior purchases, nor did they allege "any description of concrete plans to purchase the Neuriva Products again in the future." Thus, the court concluded that the plaintiffs lacked standing to pursue injunctive relief.

The Eleventh Circuit noted that its reasoning differed from the Ninth Circuit's reasoning in *Davidson v. Kimberly-Clark Corp*., 889 F.3d 956, 969 (9th Cir. 2018), where the Ninth Circuit held that, "a previously deceived consumer may have standing to seek an injunction against false advertising or labeling, even though the consumer now knows or suspects that the advertising was false at the time of the original purchase." The Eleventh Circuit stated that it was unpersuaded by

Davidson, and that the Ninth Circuit's reasoning rested on the assumption that the plaintiff will, in fact, purchase the defendant's products again in the future, and be deceived by the advertising again. The Eleventh Circuit pointed out that, in *Williams*, the complaint provided no basis to conclude that the plaintiffs have any "actual or imminent" plans to purchase Neuriva again.

Williams serves as a reminder that at least one named plaintiffs must have standing to seek each form of relief sought, including injunctive relief, regardless of the defendant's agreement. It remains to be seen whether the circuit split on this issue will find its way to the Supreme Court.

SIXTH CIRCUIT HOLDS THAT MERELY DELINQUENT DEBTS ARE NOT IN DEFAULT FOR PURPOSES OF THE FDCPA

The Fair Debt Collection Practices Act ("FDCPA"), 15 U.S.C. § 1692, regulates the conduct of debt collectors. The statute, however, does not cover everyone who collects debt, but is targeted on "debt collectors" whose business is principally to collect debts for another person. Significantly, the statutory definition of "debt collector" includes an exception for those who collect a debt that, "was not in default at the time it was obtained." 15 U.S.C. § 1692a(6)(F)(iii). In *Ward v. NPAS, Inc.*, 63 F.4th 576 (6th Cir. 2023), the Sixth Circuit held that, in determining when a debt is in default for purposes of applying the exception, courts must consider not just when payment is due, but other terms of the contract governing the debt and factual issues concerning how the creditor treats the debt.

In *Ward*, the plaintiff incurred debt upon receiving two medical treatments at Stonecrest Medical Center ("Stonecrest") in July and October 2018. The plaintiff signed an agreement saying that Stonecrest may engage a third party for medical account billing and servicing, and that during the time the account is serviced by a third party, it "shall not be considered delinquent, past due or in default," and could be in default only after the third party returned the account to Stonecrest to determine if the account was actually "delinquent, past due, and in default." *Id*. at 578. After each treatment, Stonecrest mailed the plaintiff a bill that was due "upon receipt." When the plaintiff did not pay, Stonecrest referred the accounts to NPAS, Inc. ("NPAS") to be serviced. NPAS mailed the plaintiff four statements and left him three voicemail messages seeking payment; the last voicemail was left after the plaintiff attempted to send a cease-and-desist letter to NPAS through a law firm.

The plaintiff sued NPAS for, among other alleged FDCPA violations, calling him after he attempted to send the cease-and-desist letter. *See* 15. U.S.C. §§ 1692c(a)(2) & (c). The district court granted NPAS summary judgment on liability because NPAS was not a "debt collector" under the FDCPA. The plaintiff appealed, and the Sixth Circuit affirmed, holding that NPAS was not a debt collector under the FDCPA.

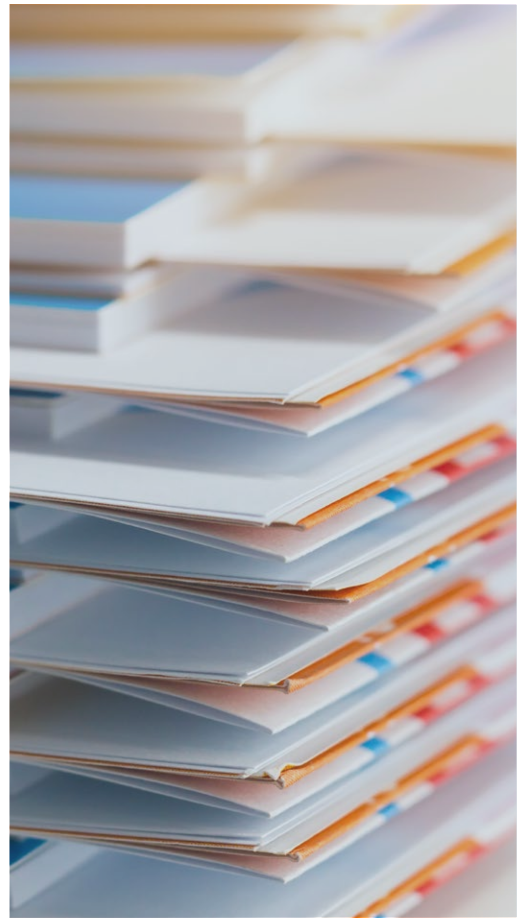
On appeal, the Sixth Circuit focused on the fact that the FDCPA expressly excludes from the definition of "debt collector" anyone collecting a debt that "was not in default *at the time it was obtained*." 15 U.S.C. § 1692a(6)(F)(iii) (emphasis added). The Court first noted that the FDCPA does not define "default." The plaintiff argued that the bills stated they were "due on receipt," and so he was in default by the time NPAS obtained the accounts months after they were due. Despite that and the fact that Black's Law Dictionary defines "default" as "the failure to pay a debt when due," the Court held that it must look to the underlying contract to determine whether a default existed. *Id.* at 583. The contract at issue stated that, "[d]uring the time that the medical account is being serviced by [NPAS], the account shall not be considered delinquent, past due or in default, and shall not be reported to a credit bureau or subject to collection legal proceedings," and so the Court concluded that "Ward's account was not 'delinquent, past due or in default'" while NPAS held the account.

The Court also rejected the plaintiff's argument that his debt was in default during the months before Stonecrest transferred the accounts to NPAS because he "breached the contract creating the debt" by "fail[ing] to fulfil [his] obligation to pay money." *Id.* at 584. The Court explained that even if a breach of the contract creating the debt was a default, "there [was] nothing in the record to suggest that Ward's failure to pay immediately would be treated as a breach," since Stonecrest essentially just waited for the plaintiff to pay, without charging interest or any penalty. *Id.* at 584. Accordingly, the debt was "not in default at the time it was obtained," excluding NPAS as a "debt collector" under the FDCPA. *Id.* at 583.

Ward's analysis indicates that there is not necessarily a bright-line test for when a debt is in default for purposes of the FDCPA, but that the debt's status turns on factual issues as to how the creditor treated the debt. Other Circuit Courts have similarly found that the lack of any definition of "default" in the FDCPA creates some uncertainty as to the scope of the statute. *E.g., McKiney v. Cadleway Props., Inc.*, 548 F.3d 496, 502 (7th Cir. 2008) (two-year delinquency "suffices to establish that it was a 'debt in default'"), *overruled on other grounds by Henson v. Santander Consumer USA Inc.*, 582 US 79 (2017); *Alibrandi v. Fin. Outsourcing Servs., Inc.*, 333 F.3d 82, 86 (2d Cir. 2003) (outstanding debt is in default "only after some period of time," but not "immediately" after it is due). Companies in the business of collecting debts on behalf of creditors may, therefore, need to consider how those creditors have treated delinquent debts in order to manage the risk of liability under the FDCPA.

THIRD CIRCUIT AFFIRMS DISMISSAL OF TILA CASE, REFUSING TO EXPAND STATUTE BEYOND ITS PLAIN LANGUAGE

The Truth in Lending Act ("TILA"), 15 U.S.C. § 1601 *et seq.*, and its implementing regulation, Regulation Z (12 C.F.R. § 1026), require creditors to make a host of disclosures before and during the creditor-borrower relationship. Ambitious plaintiffs' counsel are always on the lookout for new ways to allege class-wide violations of TILA's provisions.



The Third Circuit recently rebuffed such an attempt in *Weichsel v. JP Morgan Chase Bank, N.A.*, 65 F.4th 105 (3d Cir. 2023). Plaintiff filed a putative class action alleging that the failure to itemize the two components of his annual membership fee on his renewal notice constituted a violation of TILA. Specifically, Plaintiff complained that a December 2019 renewal notice did not "specify that the total annual fee of $525 comprised $450 for the primary cardholder and $75 for the additional card for an authorized user." Plaintiff sued for this violation, despite the fact that he received a subsequent February 2020 notice, also before the fee was assessed, which did separately itemize the two components of the annual fee.

The Bank moved to dismiss for lack of Article III standing and for failure to state a claim under TILA. The District Court held that Plaintiff's allegation of economic injury (that he would not have paid the full $525 if he had known it included the additional $75 fee for an additional authorized user) was sufficient to confer standing. But the Court granted the motion to dismiss, holding that, "neither TILA nor Regulation Z expressly mandates disclosure of each individual component of the total annual fee for a credit card account in a renewal notice."

On appeal, the Third Circuit affirmed both rulings. First, the Court noted that Plaintiff's allegation of economic injury ($75) was sufficient to confer standing. The Court explained that because Plaintiff alleged a monetary injury, "he need not allege any additional injury with a connection to the statute's purpose."

Turning to the substance of the TILA claim, the Court found that the renewal notice complied with the explicit terms of the statute and regulations: "[W]hile there is an itemization requirement in the statutes and regulations governing periodic disclosures, the same requirement is not included in the statutes and regulations applicable to renewal notices." The Court applied the principle that where a statute uses specific language in one provision (e.g., periodic disclosures), but different language in another (e.g., renewal notices), the Court presumes different meanings were intended.

Weichsel demonstrates that Circuit Courts seem to be increasingly influenced by SCOTUS' admonitions in many contexts to start (and often end) the job of statutory interpretation with the plain text.

THE SEVENTH CIRCUIT GRUDGINGLY VACATES SUMMARY JUDGMENT IN TCPA "JUNK-FAX" LITIGATION

Craftwood II, Inc., et al. v. Generac Power Systems Inc., Nos. 21-2858 and 21-3393, involved TCPA litigation about three fax advertisements sent to two hardware stores in Southern California. These stores were members of a hardware industry cooperative and wholesaler. The defendant, Generac Power Systems ("Generac"), supplied goods to the cooperative that the member hardware stores could purchase and then sell to the public. The stores claimed that the three allegedly unsolicited faxes violated the TCPA. However, based on evidence of the stores' consent to receive the faxes (obtained via an express contract and during a telephone call), the trial court granted summary judgment to Generac. The Seventh Circuit disagreed and remanded for further proceedings.

The Seventh Circuit first found that, because Generac was not a party to the contract at issue and TCPA consent is not transferrable, the contract did not give Generac permission to send fax advertising. The Court also found that, "ample conflicting evidence" regarding the provision of consent for one of the stores during a phone call presented "a classic factual dispute" that precluded summary judgment.

However, the *Craftwood II* opinion is notable for a different reason: it acknowledged and expressed support for criticism of "junk-fax" litigation. The Seventh Circuit observed that such cases are "fueled primarily by plaintiffs' attorneys looking for large fee awards—awards that often come at the expense of small businesses." The Seventh Circuit then questioned "whether it is good public policy to use so many court resources and so handsomely reward litigiousness over annoyances that have been greatly diminished by changes in technology." The Seventh Circuit explained that, "with nary a [fax] machine in sight," most faxes go directly to an email address like other unwanted messages, thus undercutting an original TCPA objective to reduce the monetary burden of unsolicited faxes (in the form of lost ink and expensive fax paper). Nevertheless, unless Congress updates the TCPA, the Seventh Circuit bemoaned that it was "obligated to follow the law as Congress has written it."

SECOND CIRCUIT HOLDS UNSETTLED LEGAL DISPUTE NOT COGNIZABLE AS AN INACCURACY UNDER FCRA

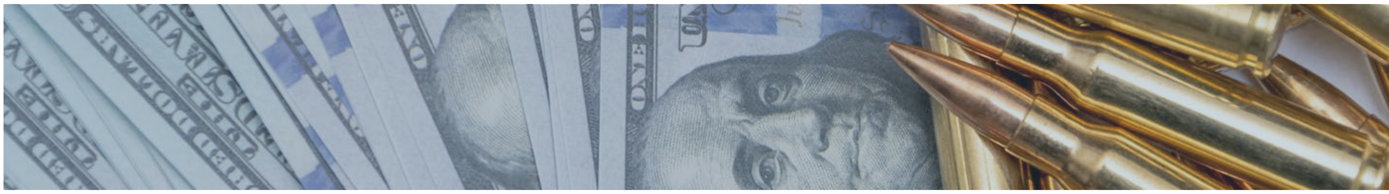
Section 1681e(b) of the Fair Credit Reporting Act ("FCRA") requires credit reporting agencies to "follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates." 15 U.S.C. § 1681e(b). To prevail on a section 1681e claim against a consumer reporting agency, it is necessary for the plaintiff to establish, among other things, that a credit report contains an inaccuracy. *Shimon v. Equifax Info. Servs. LLC*, 994 F.3d 88, 91 (2d Cir. 2021). A credit report is inaccurate "either when it is patently incorrect or when it is misleading in such a way and to such an extent that it can be expected to have an adverse effect." *Id*.

In *Mader v. Experian Info. Sols., Inc.*, 56 F.4th 264 (2d Cir. 2023), plaintiff Michael Mader alleged Experian, a consumer reporting agency, inaccurately reported his private student loan with nonparty Navient Solutions, LLC ("Navient") as due and owing because he obtained an order discharging his loan in bankruptcy. Notably, the bankruptcy order did not specifically reference Mr. Mader's private student loan. Instead, the discharge order stated Mr. Mader was "released from all dischargeable debts." On summary judgment, the district court confronted the issue of whether Mr. Mader's private student loan was dischargeable under the bankruptcy code, and in turn, whether this legal inaccuracy afforded Mr. Mader a cognizable claim under the FCRA.

An educational loan is not dischargeable if it was "made under any program funded in whole or in part by a governmental unit or nonprofit institution." 11 U.S.C. § 523(a)(8)(A)(i). Experian moved for summary judgment based upon a declaration from a Navient employee testifying that, because the private student loan was issued under a program that also includes federal loans, the private loan is nondischargeable. The district court determined that no fact issues existed, Mr. Mader's loan was non-dischargeable, Experian's inclusion of the private loan on his credit report was accurate and granted Experian summary judgment. *Mader*, 56 F.4th at 269-71.

On appeal, the Second Circuit found the district court erred by concluding no fact issue existed because the district court ignored a prospectus indicating Mr. Mader's private loan was made under a program only with private funds. *Id*. at 268. Nevertheless, the Second Circuit affirmed summary judgment because the "unresolved legal question regarding the application of section 523(a)(8)(A)(i) to Mader's educational loan renders his claim non-cognizable under the FCRA." *Id*. at 270. Specifically, the Second Circuit explained that, "[t]he 'inaccuracy' Mader alleges . . . evades objective verification. There is no bankruptcy order explicitly discharging this debt." Accordingly, Mader's debt "is not sufficiently objectively verifiable to render Mader's credit report 'inaccurate' under the FCRA." *Id*.

However, the Court warned the scope of its holding "does not mean that credit reporting agencies are never required by the FCRA to accurately report information derived from readily verifiable and straightforward application of law to facts." *Id*. Although the Court acknowledged that a "clear line has not been drawn between legal and factual inaccuracies in the FCRA context," the Court noted that, "[w]hat the FCRA does not require, however, is that credit reporting agencies resolve unsettled legal questions like the one at issue here." *Id*.



FOURTH CIRCUIT LIMITS THE APPLICATION OF THE MILITARY LENDING ACT TO CAR LOANS

The Military Lending Act ("MLA"), 10 U.S.C. § 987, was enacted in 2006 for the purpose of protecting active duty members of the military and their families from certain lending practices. The statute regulates persons who, among other things, are in the business of extending "consumer credit," which is defined under the Department of Defense's regulations, 32 C.F.R. § 232.3(f)(1), as credit offered for "personal, family, or household purposes" that is subject to a finance charge and payable in installments. The MLA, however, carves out an exception to the general definition of "consumer credit" for any car loan "procured in the course of purchasing a car," "offered for the express purpose of financing the purchase" of that car and "secured by the car." 10 U.S.C. § 987(i)(6). In *Davidson v. United Auto Credit Corp.*, 65 F.4th 124 (4th Cir. 2023), the Fourth Circuit held 2-1 that that exception is not limited to loans that are used *solely* to purchase a car, but can also apply when the proceeds of the loan are used to purchase a car and to cover related costs.

Davidson arose when the plaintiff, an active-duty member of the US Army, took out a loan from the defendant to finance the purchase of a car and to pay for a supplemental insurance policy to cover any amount due on the car after his auto insurance policy paid out, if the car was totaled or stolen. The plaintiff filed suit against the lender, alleging that the loan violated the MLA because it mandated arbitration and failed to disclose certain information. The district court granted the lender's motion to dismiss. It held that that the MLA's exception applied, for while the loan was not used solely to purchase the car, the additional coverage was "inextricably tied" to the plaintiff's purchase of the car, and so the loan was for the "express purpose" of financing the car. *Davidson v. United Auto Credit Corp.*, 2021 WL 2003547, at *5 (E.D. Va. May 19, 2021).

The Fourth Circuit affirmed. The majority's decision turned on a close analysis of the requirement for the exception that the loan be "offered for the express purpose of financing the purchase" of the plaintiff's car. It reasoned that, in the context of § 987(i)(6), the "express purpose" requirement means that the loan must be taken out "for the specific purpose" of financing the car, but that that need not be the only purpose for the loan. 65 F.4th at 130. It cited in support of that conclusion *Wooley v. Maynard*, 430 US 705 (1977), and *California v. Greenwood*, 486 US 35 (1988), in which the Supreme Court recognized that actions may be taken for an express purpose without that being the sole purpose of the actions. 65 F.4th at 131. The Court also rejected the plaintiff's argument that the MLA's reference to "*the* express purpose" did not limit the exception to loans that were solely taken out to purchase cars, holding that Congress has instructed courts to interpret "words importing the singular include and apply to several . . . things," "unless context indicates otherwise." 1 U.S.C. § 1.

The dissent argued that the majority decision violated the purpose of the MLA—which was to provide strong and broad protections for service members against questionable lending practices—by creating a loophole for lenders to avoid the statute simply by offering loans for bundles of products. 65 F.4th at 133. The dissent also took issue with the majority's textual analysis, arguing that its broad interpretation of the statutory exception renders certain elements of the exception superfluous and so violated ordinary canons of statutory interpretation. *Id*. at 134, 136. It further argued that the only plausible interpretation of the exception is that it can apply only if the lender had the "specific and precise intention" of offering the loan to the plaintiff for the car, and so the exception does not apply if the lender's "express purpose went beyond facilitating [plaintiff's] purchase of a car." *Id*. at 138.

Davidson is the first Court of Appeals decision to construe this exception to the MLA. Judging from the sharp disagreement between the majority and the dissent, and the detailed analyses provided by the majority and the dissent for their respective positions, it would not be surprising to find other Circuits having to address the same question.

FIFTH CIRCUIT HOLDS INDENTURE TRUSTEE IS A REAL PARTY IN INTEREST FOR PURPOSES OF DIVERSITY JURISDICTION

The Supreme Court has long held that in determining whether the requirements for diversity jurisdiction are met, federal courts must "disregard nominal or formal parties" and consider only the citizenship of "real parties to the controversy." *Navarro Sav. Ass'n v. Lee*, 446 US 458, 461 (1980). In *Navarro*, the Supreme Court held that plaintiff-trustees with the "customary powers to hold, manage, and dispose of assets" and who "control the litigation" are sufficiently "active" to qualify as a real party in interest, and so may invoke diversity jurisdiction on the basis of their own citizenship, rather than that of the trust's beneficiaries. *Id*. at 464-66. *In Arig, Inc. v. Wilmington Sav. Fund Soc'y, FSB as Tr. of Stanwich Mortg. Loan Tr. F*, No. 21-20657, 2023 WL 2645554 (5th Cir. Mar. 27, 2023), the Fifth Circuit relied on *Navarro* to hold that when a trustee is sued in its own name and that trustee has "sufficient control" over the trust assets to be a real party in interest, its citizenship, and not that of the trust beneficiaries, is relevant for determining diversity jurisdiction.

Arig concerned a property originally purchased in 2008 by the original purchaser who executed a deed of trust giving the lender a first lien against the property. That deed of trust was later assigned to Wilmington Savings, as trustee of the Stanwich Mortgage Loan Trust F. In 2020, the original owner failed to pay his HOA assessment, the HOA foreclosed on the assessment lien and the property was sold in a foreclosure sale to the plaintiff. While the assessment lien allegedly was subordinate to the deed of trust, the plaintiff filed suit in state court to quiet title and have the deed of trust declared void and unenforceable, naming Wilmington Savings, Wilmington Savings' predecessor as trustee (JPMorgan), MERS and the servicer as defendants. The defendants removed to federal court, and the plaintiff sought remand, arguing that the defendants had to allege the citizenship of the trust's certificateholders, rather than rely as they did on Wilmington Savings' citizenship, to allege diversity jurisdiction. After the district court granted the defendants' motion to dismiss, the plaintiff appealed the denial of his motion to remand, arguing that Wilmington Savings was not an "active trustee," and so only the citizenship of the trust beneficiaries could be relevant to diversity jurisdiction.

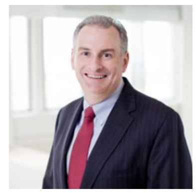
The Fifth Circuit affirmed the denial of plaintiff's motion. It first held that if a trustee is sued or sues in its own name, "the only preliminary question a court must answer is whether the party is an active trustee whose control over the assets held in its name is real and substantial." 2023 WL 2645554, at *2 (quoting *Bynane v. Bank of New York Mellon for CWMBS, Inc. Asset-Backed Certificates Series 2006-24*, 866 F.3d 351, 356 (5th Cir. 2017)). The Court acknowledged that Wilmington did not have "unfettered control" over the trust assets. For example, Wilmington Savings required the consent of the certificateholders or the trust manager to convey or transfer any assets of the trust, often had to take direction from the trust manager and could be removed by certificateholders. *Id*. at *3.

At the same time, however, the Court had "little trouble" determining that Wilmington Savings had the degree of control needed to qualify as a real party in interest. Among other things, it had legal title to the trust assets, was the mortgagee of record, had the authority in many circumstances to bind the trust without certificateholders' involvement, and was responsible for "establish[ing] accounts and receiv[ing], maintain[ing], invest[ing] and disburs[ing] funds." *Id*. at *2. The Court concluded that, notwithstanding the "checks" on the trustee's authority, it had "sufficiently significant control that the district court was correct to deem it the real party in interest." *Id*. at *3.

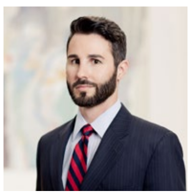
As *Arig* and the cases it relies on indicate, the threshold for a trustee to qualify as a real party in interest, such that its citizenship, rather than that of the trust beneficiaries, is relevant to diversity jurisdiction, may be quite low. In cases like *Arig*, in which the plaintiff seeks relief from the trustee itself, a trustee will generally be sufficiently "active" to be a real party in interest as long as it holds legal title to the trust assets and has some (even limited) authority to control the trust. *Id*. at *2.

CONTRIBUTORS

BRIAN V. OTERO
Co-Head, Financial Services Litigation
botero@HuntonAK.com
+1 212 309 1020

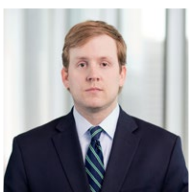


RYAN A. BECKER
Partner
rbecker@HuntonAK.com
+1 212 309 1055

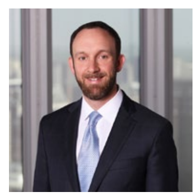


JASON M. BEACH
Partner
jbeach@HuntonAK.com
+1 404 888 4219

MICHAEL B. KRUSE
Counsel
mkruse@HuntonAK.com
+1 212 309 1387



GRAYSON L. LINYARD
Counsel
glinyard@HuntonAK.com
+1 214 468 3313



MICHAEL R. HORNE
Associate
mhorne@HuntonAK.com
+1 214 979 2931

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