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Federal Taxation

by Steven C. Evans*

Nineteen ninety-two was not a banner year for substantive federal income tax decisions for the Eleventh Circuit. Although the Eleventh Circuit decided several procedural tax cases, several cases under the Employment Retirement Income Security Act of 1974 ("ERISA"),¹ and several criminal tax cases, the Eleventh Circuit decided only one substantive tax case. This Article reviews the substantive tax case, the procedural tax cases, and the ERISA cases decided by the Eleventh Circuit in 1992.

I. INCOME TAX DEDUCTIONS

Taxpayer in Estate of Wallace v. Commissioner² was a deceased physician who had engaged in a number of successful business and investment ventures. These ventures included residential property in the Caribbean, oil and gas ventures, medical buildings, office buildings, and even a commercial fishing venture.³ From 1980 to 1985, taxpayer engaged in the cattle feeding business.⁴ Taxpayer hired Joe Haynes to advise him in the business. Haynes bought cattle that were not yet fattened, placed them in commercial feedlots, and sold the fattened cattle at the appropriate time. According to the Eleventh Circuit, these decisions were essentially investment decisions.⁵ The cattle were fed at commercial feedlots where the feedlot employees took care of the cattle and fed the cattle a high protein

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2. 965 F.2d 1038 (11th Cir. 1992).
3. Id. at 1039-40.
4. Id.
5. Id. at 1042.
diet. Taxpayer did have some contact with the feeding end of the business because he would, on occasion, move cattle from one feedlot to another—a move considered unusual because of the extra expense involved.\textsuperscript{7} Taxpayer financed his cattle feeding venture with loans from Production Credit Associations. Although the terms of the loan agreement required him to hedge a portion of the cattle, taxpayer was often one hundred percent hedged.\textsuperscript{8} Taxpayer deducted the entire cost of the feed for his cattle feeding business in the year in which the feed was purchased, not the year in which the feed was consumed.\textsuperscript{9} The Internal Revenue Service ("I.R.S.") determined that taxpayer was a farming syndicate under the definition of Internal Revenue Code ("Code") Section 464\textsuperscript{10} and disallowed the tax deferral benefit taxpayer received for feed purchased, but not consumed.\textsuperscript{11} Taxpayer petitioned the Tax Court, which ruled that taxpayer was a limited entrepreneur who did not actively participate in the management of his cattle feeding enterprise under Code Section 464.\textsuperscript{12} Taxpayer appealed.\textsuperscript{13}

On appeal the Eleventh Circuit noted that Code Section 464(e)(2) defines a limited entrepreneur as a person who has an interest in an enterprise other than as a limited partner and who does not actively participate in the management of such enterprise.\textsuperscript{14} Taxpayer argued that the Tax Court erred in defining the enterprise used to measure taxpayer's participation as the feeding of cattle rather than the buying and selling of cattle. He argued that because all cattle farmers use commercial feedlots, the holding of the Tax Court would lead to the conclusion that every cattle owner who does not manage a commercial feedlot is a farming syndicate under the statute. Taxpayer also argued that he did not have limited liability, which is one of the factors used in determining whether an enterprise is a farming syndicate.\textsuperscript{15}

On appeal the Eleventh Circuit noted that the statutory language of Code Section 464 is silent about the meaning of actively participate.\textsuperscript{16} The Eleventh Circuit adopted the factors listed in the House Conference Report to Code Section 464 as the guide to determining active participa-

\textsuperscript{6} Id. at 1040.
\textsuperscript{7} Id. at 1042.
\textsuperscript{8} Id.
\textsuperscript{9} Id. at 1040.
\textsuperscript{11} 965 F.2d at 1040.
\textsuperscript{12} Estate of Wallace v. Commissioner, 95 T.C. 525, 551 (1990).
\textsuperscript{13} 965 F.2d at 1039.
\textsuperscript{14} Id. at 1043 (quoting I.R.C. § 464(e)(2)(1988)).
\textsuperscript{15} Id. at 1043-44.
\textsuperscript{16} Id. at 1044.
tion.\textsuperscript{17} Factors under the House Conference Report intended to show active participation include participating in the decisions involving the operation or management of the farm, actually working on the farm, living on the farm, or hiring or discharging employees. Factors indicating a lack of participation include a lack of control of the management and operation of the farm, having the authority only to discharge the farm manager, having a farm manager who is an independent contractor rather than employee, and having limited liability for farm losses.\textsuperscript{18} Although taxpayer argued that the term “farm” under the statute should include buying and selling as well as feeding, the Eleventh Circuit stated that Congress intended farming to be defined as an activity that takes place on a farm, not in a bank.\textsuperscript{19} Specifically, the Eleventh Circuit stated that making investment decisions did not fall under the heading of cultivation, raising, or harvesting, all of which appear in Code Section 464.\textsuperscript{20} Furthermore, the Eleventh Circuit noted that the Congressional intent of eliminating a tax incentive for high-bracket taxpayers who invest in syndicate farming operations to the disadvantage of full-time farmers would be served in the instant case.\textsuperscript{21}

The Eleventh Circuit also noted that taxpayer’s argument that the Tax Court’s holding would render virtually every cattle owner in the United States as a limited entrepreneur under the statute blatantly ignored an exception listed in Code Section 464(c)(2) that preserves the special tax benefits for full-time farmers.\textsuperscript{22} Finally, the Eleventh Circuit noted that even if the Tax Court had erred in determining that taxpayer’s liability was not limited, it would still affirm the determination that taxpayer did not actively participate in his cattle feeding enterprise. Despite this fact, the Eleventh Circuit reviewed taxpayer’s practice of hedging almost one hundred percent of his herd many times during the operation. The Eleventh Circuit found that his use of hedging was “unusually excessive”\textsuperscript{23} and indicated a predominant concern with protecting against a loss, rather than the profit potential, of cattle feeding.\textsuperscript{24} Consequently, the Eleventh Circuit agreed that taxpayer had satisfied the limited liability factor and affirmed the Tax Court’s holding.\textsuperscript{25}

\textsuperscript{17} Id. at 1045.
\textsuperscript{19} Id. at 1047.
\textsuperscript{20} Id. at 1046-47 (quoting I.R.C. § 464).
\textsuperscript{21} Id. at 1047.
\textsuperscript{22} Id. at 1049.
\textsuperscript{23} Id. at 1053.
\textsuperscript{24} Id.
\textsuperscript{25} Id.
II. Tax Procedure

A. Interest on Deficiencies

Taxpayer in *RJR Nabisco, Inc. v. United States* had paid $60,000,000 to the I.R.S. on February 1, 1982. It paid this amount to terminate the running of simple interest on a disputed tax. In 1985 the I.R.S. assessed $51,759,762 in tax deficiencies and penalties as well as two interest components. The first component of interest, equalling $33,253,265, was simple interest from the date of the deficiency through February 1, 1982. The second component consisted of compound interest computed on the simple interest that had ceased accruing on February 1, 1982. Taxpayer paid the I.R.S. the full amount of interest, simple and compound, and submitted written claims for refund. The I.R.S. denied taxpayer’s claim for a refund and taxpayer instituted an action in the district court for a refund. The district court granted summary judgment to the I.R.S. and taxpayer appealed.

On appeal the Eleventh Circuit noted that the interpretation of Code Section 6622 and its effective date governed this dispute. Code Section 6622 provides for compound interest to be calculated on “interest accruing after December 31, 1982.” The Eleventh Circuit noted that both parties had stipulated that “[n]o interest on the tax deficiencies was accruing on or anytime after December 31, 1982.” Taxpayer argued that the compound interest could not apply to its debt because no interest accrued after December 31, 1982. The Eleventh Circuit, however, noted that all simple interest had ceased to accrue on taxpayer’s debt as of January 1, 1983, under the new statute. Interestingly, despite the stipulation of the parties, the Eleventh Circuit decided that a better interpretation recognized that interest was accruing on taxpayer’s debt because, by operation of the statute, interest began accruing again for all taxpayers on January 1, 1983. The Eleventh Circuit also emphasized that the government’s position was supported by this theory because a distinction be-

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26. 955 F.2d 1457 (11th Cir. 1992).
27. Id. at 1458.
28. Id. at 1459.
30. Id. at 818.
32. 955 F.2d at 1459.
33. Id. at 1460 (quoting I.R.C. § 6622(a)).
34. Id. at 1461.
35. Id.
36. Id. (citing I.R.C. § 6622(a)).
tween principal and interest disappears under a compound interest calculation.\(^7\)

Because the Eleventh Circuit noted that the Code Section did not clearly address the issue, the Eleventh Circuit reviewed the legislative history, the I.R.S. regulations, and other sources.\(^8\) With respect to the legislative history, the Eleventh Circuit noted that both the Conference Committee Report\(^9\) and the Joint Committee Report\(^9\) indicated that amounts, whether constituting principal or interest, which were owing or that remained unpaid after December 31, 1982, were subject to compound interest calculations.\(^1\) The Eleventh Circuit also noted that Treasury Regulation Section 301.6622-1(c)\(^4\) states that unpaid interest (or other amount) that is compounded daily includes interest (or other amount) accrued but unpaid on December 31, 1982.\(^4\) The Eleventh Circuit also noted that other regulations supported the government’s interpretation.\(^4\)

Finally, the Eleventh Circuit reviewed similar cases in other circuits and noted that each court had found that the government had the authority to assess compound interest.\(^4\) As a result, the Eleventh Circuit affirmed the summary judgment of the district court.\(^4\)

B. Equitable Offset

Taxpayer in Charter Co. v. United States\(^7\) had purchased an oil refinery complex and marketing facilities from Signal Oil and Gas Company.\(^8\) Although taxpayer characterized the transaction as a tax-free reorganization, the I.R.S. determined that the acquisition was a taxable asset purchase.\(^4\) As a result, the I.R.S. determined a new basis for each of those acquired assets by allocating the purchase price between each asset. Because the marketing assets were sold after the acquisition, the different allocation had a collateral tax effect on the taxes paid as a result of the sale. The I.R.S. attributed a smaller amount of the purchase price to the

\(^{37}\) Id. at 1462.

\(^{38}\) Id.


\(^{41}\) 955 F.2d at 1463-64.

\(^{42}\) Treas. Reg. § 301.6622-1(c) (1988).

\(^{43}\) 955 F.2d at 1464 (quoting Treas. Reg. § 301.6622-1(c)).

\(^{44}\) Id. at 1465 (citing Treas. Reg. § 301.6622-1(f)(2) (1988)).

\(^{45}\) Id. at 1466 (citing Gannett v. United States, 877 F.2d 965 (Fed. Cir. 1989); Cohn v. United States, 872 F.2d 533 (2d Cir.), cert. denied, 493 U.S. 848 (1989); Purer v. United States, 872 F.2d 277 (9th Cir. 1989)).

\(^{46}\) Id.

\(^{47}\) 971 F.2d 1576 (11th Cir. 1992).

\(^{48}\) Id. at 1577.

\(^{49}\) Id.
oil refinery, resulting in an increase of taxpayer's tax liability for 1971 and 1972. Taxpayer paid the additional tax due and timely filed claims for a refund. The refund claims, however, failed to mention the marketing assets. After the I.R.S. denied taxpayer's refund request, taxpayer filed a lawsuit.50

At trial taxpayer stipulated to the majority of the factual and legal issues. Because the I.R.S. had received an independent appraisal placing an even lower value on the oil refinery than was calculated previously by the I.R.S., the government realized that it might be entitled to an equitable offset to any otherwise available refund to taxpayer. The district court held that the government was entitled to an equitable offset.51 Because taxpayer had failed to mention the marketing assets in its refund claim, however, the district court held that taxpayer could not now raise this argument.52

The Eleventh Circuit noted on appeal that, under Code Section 7422(a),53 a taxpayer may not sue for a tax refund unless it first files a refund claim with the government.54 Accordingly, the Eleventh Circuit affirmed the district court's holding that it could not consider taxpayer's claim with respect to the marketing assets.55 The Eleventh Circuit noted that, at a minimum, taxpayer must identify the essential requirements of each and every refund demand.56 The Eleventh Circuit noted that taxpayer had failed to meet this test in this case because its refund claim was silent on the marketing assets.57 Notwithstanding this fact, taxpayer argued that if the government was able to use an otherwise barred claim, it should be able to do the same. The Eleventh Circuit agreed with this argument.58 The Eleventh Circuit noted that equity is a two-way street.59 The Eleventh Circuit held that even though taxpayer had raised an issue apart from its refund claims, the issue could be asserted as an equitable setoff to the government's equitable excess depreciation offset.60 As a result, the Eleventh Circuit vacated and remanded the appeal.61

50. Id. at 1578.
51. Id.
52. Id.
54. 971 F.2d at 1579.
55. Id.
56. Id. at 1580 (quoting Sanders v. United States, 740 F.2d 886, 890 (11th Cir. 1984); Stoller v. United States, 444 F.2d 1391, 1393 (5th Cir. 1971); Alabama By-Products Corp. v. Patterson, 258 F.2d 892, 900 (5th Cir. 1958)).
57. Id.
58. Id.
59. Id. (quoting Union Pacific R.R. v. United States, 389 F.2d 437, 447 (Ct. Cl. 1968)).
60. Id. at 1581.
61. Id.
In a dissent, Judge Johnson noted that the majority's opinion allowed taxpayer to obtain indirectly what it could not obtain directly. The disserter noted that taxpayer had done nothing during a one-year period during which the parties negotiated over the figures to put the court on notice of the offset or the offset issue. Accordingly, using procedural grounds, Judge Johnson stated that taxpayer should be precluded from raising the issue on appeal.

C. Subchapter S Statute of Limitations

Taxpayer in *Fehlhaber v. Commissioner* was the sole shareholder of a small business corporation that had elected subchapter S status. The corporation, Fehlhaber Associates, Inc., timely filed its income tax return for its fiscal year ended November 30, 1985. Taxpayer also timely filed his 1985 individual tax return on or before April 15, 1986. The I.R.S. determined that the loss attributable to Fehlhaber Associates, Inc. had not actually been sustained and sent a statutory notice of deficiency to taxpayer dated April 12, 1989. Although the I.R.S. sent the notice to taxpayer within three years of the time that he had filed his individual income tax return, it was sent more than three years after the S corporation return was filed. Taxpayer filed a petition with the Tax Court protesting the I.R.S.'s deficiency determination. Relying on a Ninth Circuit decision entitled *Kelley v. Commissioner*, taxpayer moved for summary judgment on the grounds that the period of limitations related to the subchapter S corporation return and not the individual income tax return. The Tax Court denied taxpayer's motion and taxpayer appealed.

On appeal the Eleventh Circuit noted that Code Section 6501 establishes the statute of limitations. Because the only tax liability at issue was that of taxpayer and not the S corporation, the I.R.S. argued that the appropriate date was three years from the filing of taxpayer's individual income tax return. Taxpayer argued that because the disallowed loss was attributable to the S corporation, the appropriate date would be the filing

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62. *Id.* (Johnson, J., dissenting).
63. *Id.* at 1582.
64. *Id.* at 1582-83.
65. 954 F.2d 653 (11th Cir. 1992).
66. *Id.* at 654.
67. *Id.*
68. 877 F.2d 756 (9th Cir. 1989).
69. 954 F.2d at 654.
71. 954 F.2d at 654.
73. 954 F.2d at 654.
of the corporation's returns. The Eleventh Circuit noted that Congress had sought to replicate the "flow through" tax treatment of partnerships in creating subchapter S. Accordingly, the tax return filed by a subchapter S corporation is an informational return that does not reflect any corporate tax liability. Although taxpayer relied on the language of Code Section 6037, which requires that every S corporation file a return and states that any such return is treated for purposes of the statute of limitations as a return filed by a corporation, the Eleventh Circuit stated that the last provision of Code Section 6037 does not apply to a subchapter S corporation unless its return establishes that the corporation owes a tax. The Eleventh Circuit also stated that common sense dictated this result because an informational return could not actually establish an amount owed.

The Eleventh Circuit also reviewed the language of the Senate Report to Code Section 6037, which states that "[t]he filing by the corporation of its return does not affect the statute of limitations applicable to shareholders." Although the Eleventh Circuit noted that their decision in Fehlhaber brought them in conflict with the Ninth Circuit's opinion in Kelley, the Eleventh Circuit decided that the perceived unfairness that would result from a longer statute of limitations upon which Kelley was premised is usually not true since the large majority of S corporations are owned by a small number of shareholders, and because the I.R.S. has adhered to its position in regulations and litigation. Accordingly, the Eleventh Circuit affirmed the summary judgment of the Tax Court.

D. Tax Lien

In Capuano v. United States, an attorney brought a wrongful levy action under Code Section 7426 against the I.R.S. to recover his fee from seized funds. The Florida Highway Patrol arrested the attorney's client and seized $543,875 from the client's car. The attorney was entitled to receive a fee of $25,000 contingent upon the return of some of the seized funds. After negotiation, the government agreed to settle the mat-

74. Id. at 655.
75. Id.
77. 954 F.2d at 656.
78. Id.
79. Id. at 657 (quoting S. Rep. No. 97-460, 97th Cong. 2d Sess. 25, reprinted in 1982 U.S. CODE CONG. & ADMIN. NEWS 3253, 3275)).
80. Id. at 657-58.
81. Id. at 658.
82. 955 F.2d 1427 (11th Cir. 1992).
The attorney for $100,000 payable jointly to the attorney and his client. The settlement was filed on June 9, 1988. On July 7, 1988 the I.R.S. made an assessment against the attorney's client and caused a Notice of Levy to be served upon the United States Marshal. The attorney was notified on July 14, 1988 that the $100,000 settlement check had been made payable to the attorney, his client, and the I.R.S. Later, the attorney discovered that the I.R.S. had endorsed and negotiated the check and credited the entire amount to his client's tax account. The attorney filed the wrongful levy action following the denial of his motion to set aside the final judgment. After the district court ruled in favor of the government, the attorney appealed.

The Eleventh Circuit noted that there were three methods for the government to collect unpaid taxes. These methods are lien foreclosure, levy, and setoff. In Capuano the government asserted that it had exercised its right to setoff the client's tax debt even though it had done this by the process of levy. Accordingly, the government argued that there was no subject matter jurisdiction. The Eleventh Circuit, relying upon past Fifth Circuit precedent, stated that the levy procedures employed by the I.R.S. were not the same as setoff. The Eleventh Circuit also noted two other circuit opinions; one agreeing with its precedent and one disagreeing. The Eleventh Circuit stated that a levy procedure is used when property is in the hands of another person. Setoff, on the other hand, is used when one already had control of the property. Because the I.R.S. did not have control over the United States Marshal in this case, the Eleventh Circuit decided that it was faced with something that acted like a levy, was called a levy, and consequently was a levy.

With respect to the priority of the I.R.S.'s assessment for taxes and the attorney's lien, the Eleventh Circuit noted that a tax lien attaches when taxes are assessed and a demand for payment is made. Accordingly, the

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84. 955 F.2d at 1428.
85. Id. at 1428-29.
86. Id. at 1429.
87. Id.
88. Id.
89. Id.
90. Id. (citing United States v. National Bank of Commerce, 472 U.S. 713 (1985)).
91. Id. at 1430.
92. Id. (citing United Sand & Gravel Contractors, Inc. v. United States, 624 F.2d 733, 736 (5th Cir. 1980)).
93. Id. (citing Arford v. United States, 934 F.2d 229 (9th Cir. 1991) (agreeing); United States v. Warren Corp., 805 F.2d 449 (1st Cir. 1986) (disagreeing)).
94. Id. at 1431.
95. Id.
96. Id.
97. Id. at 1432.
Eleventh Circuit noted that the question of priority goes under the general rule of "first in time, first in right." Because the jeopardy assessment was created on July 7, 1988, long after June 9, 1988, the date the final judgment of forfeiture was entered and, consequently, the date the attorney's lien became choate, the Eleventh Circuit determined that the attorney's lien was due first priority. Accordingly, the Eleventh Circuit reversed the judgment of the district court.

E. Summons Enforcement

In United States v. Leventhal, an attorney had completed an I.R.S. Form 8300 without providing all the information required on the face of the form. Under Code Section 6050I, any person who receives cash receipts of more than $10,000 in the course of a trade or business is required to file an information return. In Leventhal the attorney listed cash receipts of $20,000 and $10,000, but refused to provide the remaining information because it was likely to result in a violation of the attorney/client privilege.

The I.R.S. served a summons on the attorney calling for the production of documents necessary to complete the Form 8300. The attorney refused and the I.R.S. filed a petition to enforce the summons in district court. The district court issued an order directing the attorney to show cause why the summons should not be enforced. In his response, the attorney noted that the information was protected by the attorney/client privilege and that he could not comply with the summons absent a court order directing such compliance. The district court ordered the attorney to provide only the names of the clients and no other information. The I.R.S. filed a motion seeking full enforcement of the summons. The district court denied the motion and the I.R.S. appealed.

On appeal the I.R.S. contended that it was entitled to enforcement of the summons in total because it met the four-prong test for judicial enforcement of a government summons. The Eleventh Circuit, citing

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98. Id. at 1433.
99. Id.
100. Id. at 1434.
101. 961 F.2d 936 (11th Cir. 1992).
102. Id. at 938.
104. 961 F.2d at 937.
105. Id. at 938.
106. Id. at 939.
107. Id.
108. Id.
109. Id.
110. Id.
United States v. Powell,"^{111} stated that "the I.R.S. must show (1) 'that the investigation will be conducted pursuant to a legitimate purpose,' (2) 'that the inquiry may be relevant to [that] purpose,' (3) 'that the information sought is not already within the [IRS'] possession,' and (4) 'that the administrative steps required by the [Internal Revenue] Code have been followed.'"^{112} In the instant case, the Eleventh Circuit noted that the I.R.S. had an affidavit attesting to all four elements of this test."^{113} Although the attorney argued that disclosure would violate the attorney/client privilege under Florida law, the Eleventh Circuit noted that the federal law of privilege applied."^{114} Citing a Second Circuit case, the Eleventh Circuit noted that even if the state law of privilege applied, the communication relating to fees is not confidential."^{115} Although there is a narrow exception if the identity of the client provides the "last link" from privileged to nonprivileged information, the Eleventh Circuit noted that the clients in these transactions were already under indictment for drug-related offenses."^{116} The Eleventh Circuit also noted that the fact that the clients had sought legal assistance did not constitute an admission of guilt."^{117} Accordingly, the Eleventh Circuit vacated the district court's order and remanded the case with the instruction that the court enter an order enforcing the I.R.S. summons in total."^{118}

III. ERISA

The Eleventh Circuit decided a substantial number of cases arising under ERISA during 1992. The most important cases are discussed below.

A. Preemption

In Sanson v. General Motors Corp.,"^{119} a retiree sued General Motors Corp. ("GM") based on a Georgia state fraud statute. Plaintiff alleged that GM fraudulently misrepresented to him that benefits under a special retirement program would not be offered to Lakewood assembly plant employees. As a result, plaintiff retired under GM's standard early retire-

\[[111] 379 U.S. 48 (1964).\]
\[[112] 961 F.2d at 939 (quoting 379 U.S. at 57-58).\]
\[[113] Id. at 940.\]
\[[114] Id.\]
\[[115] Id. (quoting United States v. Goldberger & Dubin, P.C., 935 F.2d 501, 505 (2d Cir. 1991)).\]
\[[116] Id. at 941.\]
\[[117] Id.\]
\[[118] Id.\]
plaintiff. After his retirement, GM offered the special program to employees at Lakewood.\textsuperscript{128}

Plaintiff sought to recover the additional benefits available under the special early retirement program as well as compensatory and punitive damages. After GM moved for summary judgment, the district court denied the motion and held that the state law claim was not preempted.\textsuperscript{129} After the Supreme Court's decision in *Ingersoll-Rand Co. v. McConnell*,\textsuperscript{130} GM requested the district court to reconsider. The district court agreed with GM and granted its summary judgment motion and plaintiff appealed.\textsuperscript{131}

On appeal the Eleventh Circuit noted that the language of ERISA Section 514(a)\textsuperscript{124} provides that state laws that relate to any employee benefit plan are preempted.\textsuperscript{124} The Eleventh Circuit noted that there are exceptions if the state law does not require the establishment or maintenance of an ongoing plan, or makes no reference to, or functions irrespective of, a plan.\textsuperscript{126} However, the Eleventh Circuit held that the statute in this case would not apply without the existence of a retirement plan.\textsuperscript{127} Plaintiff had alternately contended on appeal that even if ERISA preempted the state law, the district court abused its discretion in refusing to grant him the right to amend his complaint to state a claim under ERISA. The Eleventh Circuit, however, determined that plaintiff was neither a "participant" nor a "beneficiary" under ERISA and, consequently, had no right to bring an ERISA lawsuit.\textsuperscript{128} As a result, the Eleventh Circuit affirmed the judgment of the district court.\textsuperscript{129}

In a dissent, Judge Birch strongly disagreed with the majority's holding.\textsuperscript{130} Judge Birch stated that the Georgia fraud statute does not involve the existence of a pension plan, make reference to a pension plan, require the existence of a pension plan, and is not premised on the existence of a pension plan.\textsuperscript{131} Given the underlying purpose of ERISA to protect employees and beneficiaries in employee benefit plans, especially because plaintiff had no cause of action under ERISA, Judge Birch stated that the

\textsuperscript{120} 966 F.2d at 619.
\textsuperscript{121} Id.
\textsuperscript{122} 498 U.S. 133 (1990).
\textsuperscript{123} 966 F.2d at 620.
\textsuperscript{125} 966 F.2d at 620-21.
\textsuperscript{126} Id. at 621.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id. at 623.
\textsuperscript{130} 966 F.2d at 623 (Birch, J., dissenting).
\textsuperscript{131} Id. at 624.
majority's holding "is disappointingly pernicious to the very goals and desires that motivated Congress to enact pension laws in the first place."\textsuperscript{132}

Plaintiff in \textit{First National Life Insurance Co. v. Sunshine-Jr. Food Stores, Inc.}\textsuperscript{133} was an insurance company who had contracted with a chain of convenience stores to provide health benefits to the convenience stores' employees. When the convenience store chain terminated its policy and obtained coverage from another insurer, plaintiff filed an action asserting various state claims against the chain, including breach of contract, misrepresentation, and ERISA claims.\textsuperscript{134} The district court held that all of the state law claims were preempted by ERISA. At trial the district court determined that plaintiff was not entitled to relief under ERISA and entered judgment in favor of the defendant. Plaintiff appealed.\textsuperscript{135}

On appeal plaintiff alleged that its state law claims were not preempted because they do not "relate to" employee benefit plans. The Eleventh Circuit determined that the claims asserted by plaintiff had an obvious connection to the employee benefit plan in this case and, consequently, that the state law claims related to the health benefit plan and were preempted.\textsuperscript{136} Plaintiff next argued that the district court failed in refusing to order the defendant to render an accounting. The Eleventh Circuit determined that plaintiff was not entitled to the protections of ERISA because ERISA's fiduciary duties were designed to protect the plan and its beneficiaries rather than those who administer the plan.\textsuperscript{137} Because plaintiff and defendant entered into the policies as an arm's length transaction, the Eleventh Circuit determined that plaintiff was free to negotiate such terms, including an accounting, which plaintiff felt were necessary.\textsuperscript{138} The Eleventh Circuit also dismissed plaintiff's claim for damages arising out of the defendant's failure to ensure a minimum level of participation in the health insurance plan because it determined that the district court's decision that damages were too speculative was supported by the record.\textsuperscript{139} The Eleventh Circuit also dismissed plaintiff's claim for damages for benefits paid to employees of defendant who were not eligible under the health insurance plan because any claim for an equitable rem-

\textsuperscript{132} \textit{Id.} at 625.
\textsuperscript{134} \textit{960 F.2d} at 1548.
\textsuperscript{135} \textit{Id}.
\textsuperscript{136} \textit{Id.} at 1550 (citing \textit{Shaw v. Delta Air Lines, Inc.}, 463 U.S. 85, 97 (1983)).
\textsuperscript{137} \textit{Id}.
\textsuperscript{138} \textit{Id.} at 1551.
\textsuperscript{139} \textit{Id.} at 1551-52.
edy under ERISA, such as restitution, would be against the beneficiaries or the health care providers, not against defendant. Finally, the Eleventh Circuit affirmed the district court's denial of attorney fees to defendant.

In a special concurring opinion, Judge Clark agreed with the majority's holdings except for one point. Judge Clark stated that an employer who secures a medical insurance policy is a co-fiduciary under 29 U.S.C. § 1002(21)(A)(i) and, consequently, that an insurance company would be permitted to bring an action to attain an accounting necessary to allow the insurance company to properly administer the plan. In addition, the insurance company should be able to bring an action for premiums owed for insurance coverage even though such relief is not necessarily "equitable" under the statute. According to Judge Clark, any other result would frustrate the intention of the statute and cause insurance companies to be reluctant to engage in writing policies.

The final preemption case, Swerhun v. Guardian Life Insurance Co. was fairly straightforward. Plaintiff was covered under health insurance with defendant through her employer's health insurance plan. The plan covered chiropractic services, but defendant refused to pay chiropractic claims incurred by plaintiff. Plaintiff brought claims for breach of contract, construction of insurance policy contrary to the provisions of Florida law, and bad faith. After the case was removed to a federal district court, the district court granted defendant's motion to dismiss based upon preemption. Plaintiff appealed.

On appeal plaintiff argued that the bad faith claim survived preemption because the Florida statute was not a law regulating insurance and, consequently, it was not preempted due to ERISA's savings clause. Plaintiff cited FMC Corp. v. Holiday, a Supreme Court decision that apparently supported this analysis. The Eleventh Circuit, however, stated that the parties in FMC agreed that the relevant state law fell within the

140. Id. at 1552-53.
141. Id. at 1553-54.
142. Id. at 1554 (Clark, J., concurring).
144. 960 F.2d at 1554.
145. Id.
146. Id.
147. 979 F.2d 195 (11th Cir. 1992).
148. Id. at 196.
149. Id. at 196-97.
150. Id. at 197.
151. Id. at 199.
The Eleventh Circuit had previously held that the relevant statute fell outside the savings clause. Consequently, the Eleventh Circuit affirmed the district court’s order dismissing the case.

B. Exhaustion of Remedies

In Byrd v. MacPapers, Inc., a widow sued her deceased husband’s former employer under ERISA’s retaliatory discharge statute and for breach of fiduciary duty. The district court dismissed the first count for failure to satisfy Florida’s two year statute of limitations for actions to recover lost wages and dismissed the second count for failure to plead exhaustion of remedies. Although the court granted plaintiff twenty days to amend her complaint to plead exhaustion of remedies, she failed to do so within the applicable period. On appeal the major issues were the appropriate statute of limitations and whether the plaintiff must allege exhaustion of administrative remedies when suing for retaliatory discharge under ERISA.

On appeal the Eleventh Circuit noted that a federal court applying a statute for which Congress did not provide a statute of limitations must use the forum state’s statute of limitations for the most closely analogous action. The district court in this case had characterized plaintiff’s claim as one for the recovery of wages and utilized a two year statute of limitations. The Eleventh Circuit, however, determined that the Florida worker’s compensation retaliatory discharge suit, which instead had a four year statute of limitations, was the most closely analogous to ERISA’s retaliatory discharge suit.

With respect to the exhaustion of remedies requirement, the Eleventh Circuit noted that the policy considerations supporting this requirement included reducing the number of lawsuits under ERISA, providing a nonadversarial method of dispute settlement, providing uniform results within a company, and minimizing the cost of dispute settlement. The Eleventh Circuit held that the district court did not abuse its discretion.
in finding that plaintiff failed to plead exhaustion of administrative remedies.\textsuperscript{164} The Eleventh Circuit, however, reversed the district court's denial of an opportunity for plaintiff to amend her complaint to plead exhaustion of remedies.\textsuperscript{165}

C. Early Retirement Subsidy

\textit{In Aldridge v. Lily-Tulip, Inc. Salary Retirement Plan Benefits Committee},\textsuperscript{166} pension plan participants brought a class action claiming, among other things, that defendant employer had terminated a plan and failed to pay certain subsidized early retirement benefits due them.\textsuperscript{167} The participants argued that the language of ERISA, along with language found in the plan document, required the employer to fund the plan to pay participants subsidized early retirement benefits upon their satisfaction of certain age and service requirements after the termination.\textsuperscript{168} In their support, plaintiffs cited \textit{Mead Corp. v. Tilly},\textsuperscript{169} a case in which employers paid subsidized early retirement benefits to a similar class of participants.\textsuperscript{170} The district court dismissed plaintiffs' ERISA claim.\textsuperscript{171}

On appeal the Eleventh Circuit noted that present law prevented the plan sponsor from terminating the plan and from failing to provide the benefits claimed by plaintiffs.\textsuperscript{172} This law, however, applied only to plan terminations initiated on or after October 16, 1987.\textsuperscript{173} Although the Eleventh Circuit agreed that the \textit{Mead} case was similar to the instant case, the Eleventh Circuit noted that the issue in \textit{Mead} was whether funds could revert to the employer before paying subsidized early retirement benefits.\textsuperscript{174} In \textit{Aldridge} the issue was whether the plan sponsor would be required to add funds to the plan in order to provide the subsidized early retirement benefits.\textsuperscript{175} The Eleventh Circuit noted that the Pension Benefit Guarantee Corporation had filed an amicus curiae brief disagreeing with plaintiffs' position.\textsuperscript{176} All parties agreed that the Title IV distribu-

\begin{thebibliography}{99}
\bibitem{164} Id.
\bibitem{165} Id. at 161.
\bibitem{166} 953 F.3d 587 (11th Cir. 1992).
\bibitem{167} Id. at 589.
\bibitem{168} Id. at 590-91.
\bibitem{169} 490 U.S. 714 (1989).
\bibitem{170} 953 F.3d at 591 (citing 490 U.S. at 723).
\bibitem{171} Id. at 590.
\bibitem{172} Id. (citing Single Employer Pension Plan Amendments Act, Pub. L. No. 99-272, 100 Stat. 237 (1986)).
\bibitem{173} Id. at 592 (citing Omnibus Budget Reconciliation Act, Pub. L. No. 100-203, 101 Stat. 1330 (1987)).
\bibitem{174} Id. at 591.
\bibitem{175} Id.
\bibitem{176} Id.
\end{thebibliography}
tion provisions of ERISA only covered the priority of assets already contributed to a plan and did not require the contribution of additional funds.\textsuperscript{177} Although plaintiffs argued that the employer would be unjustly enriched by obtaining the services of employees with an illusory promise, the Eleventh Circuit stated that it was without authority to require more of the employer than the governing law demands.\textsuperscript{178} Although the Eleventh Circuit found the plaintiffs' policy arguments persuasive, it affirmed the district court's dismissal of the participants' ERISA claim.\textsuperscript{179}

IV. CONCLUSION

The lack of substantive tax cases decided by the Eleventh Circuit in 1992 continues to show the increasing importance to the tax practitioner of procedural cases as well as ERISA cases.

\textsuperscript{177} Id. (citing 29 U.S.C. § 1344 (1988)).
\textsuperscript{178} Id. at 592.
\textsuperscript{179} Id.