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A rollercoaster year for ERISA litigation

7 key takeaways from recent court cases that employers, brokers, and advisors need to be aware of as litigation increases in 2021.

BY SCOTT LEMPERT

Well, that was a fun, rollercoaster of a year in ERISA litigation. For the first time since its 1974 passing, the Supreme Court heard four ERISA cases, offering a little something for everyone – confirming ERISA's six-year statute of limitations as the standard in fiduciary breach cases, making standing to sue fiduciaries of defined benefit plans much more difficult, refusing to allow ERISA to preempt statute statutes regulating prescription drug reimbursements, and teasing that clarity would come to the Dudenhoeffer pleading standard.

2020 also saw a rise in 401(k) fee and fund selection cases, a focus on actuarial assumptions found in company defined benefit plans and also used to determine withdrawal liability from multiemployer plans, and the viability of arbitration provisions added to plans that require potential ERISA claims to be resolved exclusively by binding arbitration.

1. The Supreme Court weighs in on ERISA's limitation periods

In a unanimous decision, and clear win for the Plaintiffs' bar, The Supreme Court in Intel Corp. Investment Policy Committee v. Sulyma, confirmed ERISA's six-year statute of limitations as the standard for ERISA fiduciary breach actions. The contested issue in Sulyma was whether ERISA's shorter three-year statute of limitation is triggered when a plan participant receives fund information from the Plan – even if she did not read it.

If the Court agreed, this would effectively bar any ERISA action alleging plan mismanagement if that conduct was learned more than three years after receiving such plan disclosures.

The Court, however, found plan participants do not have the requisite "actual knowledge" of an ERISA fiduciary breach to begin the three-year statute of limitations through mere possession of information that would have triggered this shorter limitations period.

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Instead, the participant must "in fact have become aware of that information," rejecting Intel's argument that holding plan disclosures is sufficient because "he could acquire [the required level of knowledge] with reasonable effort." The decision leaves the door open for plan sponsors to use data showing that plan participants received and reviewed electronically disseminated disclosures as a means of demonstrating actual knowledge of the facts underlying a later filed fiduciary breach action.

2. Standing to file suits against defined benefit plan mismanagement became much harder

While largely providing six years to file suit, the Supreme Court also raised the bar on standing to sue over defined benefit plan mismanagement. Holding 5-4 in Thole v. U.S. Bank, Justice Kavanaugh, writing a short opinion for the majority, found that the plaintiffs in that case could not show financial harm, and therefore have no standing, because despite plan losses directly caused by fiduciary breach, these participants continue to receive their monthly pension checks.

The Court also found that violation of a statutory right is not sufficient for ERISA standing; concrete injury is required.

In a lengthy dissent, Justice Sotomayor disagreed that financial injury is a perquisite to establish standing, highlighting that under trust law, beneficiaries have standing to sue for breach of loyalty without any loss to the trust.

The dissent also argued that plan participants must have standing because, like a corporation, a plan needs someone to act on its behalf, and participants cannot expect fiduciaries to sue themselves, and it cannot be expected that the DOL will bring actions in all instances of alleged fiduciary breach.

In a sign of the perspective of at least one Trump-appointed justice, Justice Gorsuch joined Justice Thomas in his concurrence arguing that the Court's reliance on the common law of trusts in determining ERISA remedies is misplaced.

While the decision may have effectively ended some fiduciary breach cases in the defined benefit plan context, it will be interesting to see its impact on claims against fiduciaries of defined contribution plans.

Despite the majority distinguishing defined benefit plans (calling rights in these plans "more in the nature of … contract[s]") from defined contribution plans, in which participants' benefits are vested in individual accounts (and more like property rights), we have already seen standing for defined contribution participants challenged in district courts based on the Court's reasoning in Thole, and will assuredly see this tested more frequently in 2021.

3. ERISA cannot preempt state laws regulating costs

In a unanimous December 2020 decision on ERISA preemption, the Supreme Court in Rutledge v. Pharmaceutical Care Management Association, rejected a bid by pharmacy benefit managers (PBMs) to have courts ignore an Arkansas law that was enacted to increase prices PBMs pay to pharmacies when prescriptions are filled.

Over 40 states have passed such statutes in an effort to ensure profitability of pharmacies (pharmacies complain that without protection, PBMs frequently reimburse at levels below what wholesalers charge pharmacies to purchase drugs).

In Justice Sotomayor's short opinion, she explained that ERISA is "primarily concerned with pre-empting laws that require providers to structure benefit plans in particular ways," and that because this statute "merely affects cost … [in] a form of cost regulation" it does not have an "impermissible connection" to ERISA, and therefore is not preempted by ERISA.

The Court also found that the state statute does not impermissibly "refer to" ERISA (another requirement of preemption), stating that it "does not directly regulate health benefit plans at all, ERISA or otherwise.

It affects plans only insofar as PBMs may pass along higher pharmacy rates to plans with which they contract." The decision may result in increased insurance premiums to offset increases in PBM payments to pharmacies.

4. High court fails to provide clarity to Dudenhoeffer pleading standard

While the Supreme Court provided unprecedented guidance on a number of ERISA issues this year, the Court disappointed ERISA practitioners seeking clarity on its 2014 ruling in Fifth Third Bancorp v. Dudenhoeffer.

Dudenhoeffer held that plan participants in an ESOP could plausibly allege an ERISA breach of fiduciary duty by company executive fiduciaries with adverse insider information about the company (that could reduce the price of employer stock) only if these fiduciaries could not have concluded that revealing this information "would do more harm than good" to the plan.

This ambiguous standard led many courts to reason that such claims could not be pled. However, the Second Circuit found that workers in IBM v. Jander did satisfy the Dudenhoeffer standard by showing through empirical research that employees are generally better off with prompt disclosure of adverse company information than if executives fail to reveal it until much later.

Instead of ruling on whether the Second Circuit's decision was correct, or even whether the Court should find, as advocated by IBM, that ERISA can never obligate fiduciaries to use insider information, the Court remanded the case back to the Second Circuit.

In a victory for plan participants, the Second Circuit reinstated its initial decision, and in November, the justices declined to take up case again, therefore providing some direction for plan participants to challenge other ESOP fiduciaries holding public stock, but leaving all still questioning what exactly Dudenhoeffer means.

5. 401(k) fee and fund selection cases rise

2020 also saw a large increase in cases challenging fund selection, fund performance and fees concerning defined contribution plans. Past cases targeted some

of the largest employer plans, including those offered by Fortune 500 companies and large universities. But last year saw a rise in smaller plans subject to these allegations, many focused on the failure of fiduciaries to select the least expensive share class of even just one fund offered by a plan, conflicts of interest with recordkeepers (selecting funds that are in some fashion associated with the recordkeeper) and challenging recordkeeping fees.

In August, the Fourth Circuit held that inclusion and retention of a single stock fund, Tegna, Inc. (the former parent of Gannett Company), in Gannett's 401(k) could be subject to allegations of ERISA fiduciary breach.

Defendants sought Supreme Court review, and in early January of this year the Court asked plaintiffs to respond in what may be an indication that the case, Quatrone v. Gannett Co., may be heard.

This increase in cases against fiduciaries of 401(k) plans is not expected to abate in 2021.

6. Plaintiffs continue to focus on actuarial assumptions

While Thole may have made some cases against defined benefit plans more difficult, the standing decision did not hinder claims challenging allegedly outdated actuarial factors used to determine annuity payments in these plans.

In a nutshell, these cases contest outdated mortality tables – some more than 50 years old – used by some defined benefit plans to calculate optional forms of benefits (like a joint and survivor annuity).

Plan participants claim that old mortality tables do not take into account current life expectances and that because single-life annuity calculations do, those mortality tables result in joint and survivor annuity benefits that are not "actuarially equivalent" to single-life annuities, which ERISA mandates.

Most courts have thus far refused to dismiss these claims, but this year a court in the Northern District of Texas denied a class certification motion, finding a conflict among plan participants because if changes to mortality tables and other changes to plan benefit assumptions advocated by plaintiffs took effect, other plan participants would be harmed.

The case, Torres v. American Airlines, Inc. settled shortly after the class certification denial, so whether we will see an increase in the number of these claims filed in 2021 may depend on the success of cases currently in litigation.

Multiemployer plans have also become subject to challenges to actuarial assumptions. These cases are focused on withdrawal liability upon exiting a multiemployer plan under the Multiemployer Pension Plan Amendment Act.

The claims center on the use by plan actuaries of differing actuarial assumptions for ERISA minimum funding purposes and withdrawal liability, resulting in increased employer liability when withdrawing from a plan. There is currently a split in authority on whether using different assumptions is valid, and the issue is up on appeal in the Sixth and D.C. Circuits.

7. Decisions concerning binding arbitration provisions begin to take shape

Plan administrators' efforts to foreclose ERISA class actions from reaching federal courts through binding arbitration has found itself being litigated in 2020, and will continue to be fleshed out by courts in 2021.

Many courts have found these provisions to be enforceable, but 2020 saw the Northern District of Illinois in Smith v. GreatBanc Trust Co., refuse to require plaintiffs to seek resolution of their ERISA fiduciary breach claims through individual arbitration.

The district court in Smith found the plan's arbitration clause invalid because it impermissibly eliminates remedies authorized by ERISA and the plaintiff never consented to its inclusion in the plan. The case is on appear before the Seventh Circuit and should be decided in mid-2021.

Scott M. Lempert *is Of Counsel at **Cohen Milstein** and a member of the firm's Employee Benefits (ERISA) Practice Group. He joined the firm in 2016 and represents the interests of employees, retirees, and plan participants and beneficiaries in ERISA cases in the district court and on appeal.*

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