

Benefits Group Of The Year: Cohen Milstein

By Emily Brill

Law360 (January 31, 2020) -- Cohen Milstein Sellers & Toll PLLC sent a proposed class action with high stakes for pensioners' court access to the U.S. Supreme Court, and continued inking multimillion-dollar settlements for suits accusing hospitals of misusing an ERISA exemption in 2019, earning the firm a spot among Law360's 2019 Benefits Practice Groups of the Year.

Cohen Milstein's Washington, D.C.-based benefits practice group, which employs eight lawyers, is a major part of the approximately 100-attorney law firm, said Michelle Yau, a partner in the group.

"While we're not one of the two largest groups by numbers, our group is an important piece of our firm's commitment to protecting American workers and their rights," she said.

The firm's most visible work in 2019 was its successful Supreme Court petition in *Thole v. US Bank*, an Eighth Circuit ruling that held that pensioners can't sue over fiduciary breaches when their plan is fully funded. The high court picked up the case in June and heard oral arguments in January.

The case could have a wide-ranging impact on who can bring Employee Retirement Income Security Act suits, whether they pay into a defined-benefit pension plan or a 401(k) plan. Though the case concerns only defined-benefit plans, its impact could spill over into the 401(k) plan space, some attorneys watching the case have speculated.

Karen Handorf, who chairs the practice group, said Cohen Milstein's presence in the high court speaks to its abilities as a law firm.

"The fact we've had two cases in the Supreme Court over the past few years says something about our ability to push the envelope," Handorf said.

The firm's other Supreme Court case over the past several years — 2017's *Advocate Health Care Network v. Stapleton* — had an impact on some of its 2019 work, which also concerned hospitals allegedly misusing an ERISA exemption intended for churches and their affiliates.

Cohen Milstein pioneered this form of litigation, Handorf and Yau said. As a result, they've drawn attention to a little-known practice — hospitals claiming an ERISA exemption due to religious ties — and scored multimillion-dollar settlements for their clients.

In June 2019, Cohen Milstein settled a so-called "church exemption" case with SSM Health Care for \$60 million. The firm also moved forward on a \$100 million settlement to similar litigation against Dignity



Health, inking the deal in June 2019, though it is not yet approved.

Settlement figures provided by Cohen Milstein indicate the firm has scored more than \$578 million for its "church exemption" clients since 2017, not counting the \$100 million Dignity Health deal.

Cohen Milstein didn't win the Advocate Health case in the high court, with the Supreme Court ruling that hospitals can claim the church exemption. But Handorf said she still considers the church exemption litigation a success for the firm.

"I think what we've accomplished is we brought something that was hidden from view into the light. A lot of the participants we represented didn't even know their plans weren't covered by ERISA," she said.

In addition to shining a light on a benefits-related issue, the litigation has resulted in hospitals making promises to employee benefit plans that they might not have made otherwise, such as funding commitments, Handorf said.

"This litigation has made it, in a way, a better environment for people who were promised benefits by religiously affiliated organizations," she said.

The US Bank litigation and the church exemption cases weren't the firm's benefits team's only accomplishments in 2019. The practice area — which has doubled its ranks since 2007 — also beat a motion to dismiss an ERISA suit accusing BlackRock of breaching its fiduciary duties by directing workers' retirement savings toward proprietary investment funds.

Some minor claims were trimmed when a California federal judge partially granted and partially denied the motion to dismiss in September 2019, but "the entire case, essentially, survived," Yau said.

She said this case is significant because of the self-dealing allegations against BlackRock, and what Yau describes as the company's attempts to throw up its hands and absolve itself of fiduciary responsibility.

"BlackRock is the fiduciary and trustee, but it's paying itself excessive fees — many times what any plan, much less collective trust fund, of the huge size we're talking about does," Yau said. "And their legal defense is to totally disavow that they have any fiduciary responsibility for their fees."

Yau called the size of the case "dramatic" because BlackRock's collective trust funds hold more than \$500 billion in assets. She said the case, which heads next to a ruling on Cohen Milstein's clients' class certification motion, addresses a transparency problem.

"There is no public disclosure about how these funds are managed, what they're invested in, and what fees are charged," Yau said. "This type of self-dealing can happen when there's no light shined on it."

--Additional reporting by Danielle Nichole Smith. Editing by Adam LoBelia.

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