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Eye On ERISA: A Chat With Groom Law's Litigation Chair

By **Emily Brill**

Law360 (June 4, 2021, 9:07 PM EDT) -- Lars Golumbic, the chair of the benefits-focused law firm Groom Law Group's litigation practice, predicts that the U.S. Supreme Court will end up tackling the hot-button issue of whether retirement plan sponsors can hardwire arbitration agreements into a plan's governing documents.

Lars Golumbic

Here, Golumbic chats with Law360 about some cases he's watching, how benefits law has changed over the course of his career, and what it takes to be a good Employee Retirement Income Security Act litigator.

This interview has been condensed and edited for clarity.

What issue in ERISA litigation are you keeping the closest eye on right now?

There are a number of cases winding their way through the district courts — one already decided in the Ninth Circuit — on the question of whether an employee stock ownership plan participant can be required to arbitrate an ERISA claim under the terms of a plan document.

The floodgates opened when there was a U.S. Supreme Court decision called Epic Systems v. Lewis in 2018 that upheld the use of provisions mandating individual arbitration of employment claims. Plan sponsors began amending plan documents to allow for arbitration of claims.

My prediction is this matter will ultimately go up to the Supreme Court. We've been involved in a number of cases at the district court level and filed an amicus brief in Smith v. GreatBanc on behalf of the American Benefits Council.

Can you talk about a recent case your firm's been involved in that has revolved around an interesting issue?

One is a case in the Eastern District of Wisconsin that's now on appeal to the Seventh Circuit. It's actually a couple of related lawsuits, but the one I'm speaking about had originated in Delaware bankruptcy court and involved a bankrupt company called Appvion whose headquarters were in Appleton, Wisconsin. The creditors in the bankruptcy had brought claims against the former directors and officers of the company, the plan trustee, and the valuation firm charged with preparing annual valuations of Appvion stock. The case was transferred to the Eastern District of Wisconsin, and the court there found on a motion to dismiss that all the claims against the defendants were preempted by ERISA. It's now in the Seventh Circuit.

I think this fact pattern is relatively unique, but there are always these questions of, "Should this be considered just a run-of-the-mill state law action brought under state law or bankruptcy law? Or, since these allegations center on core ERISA issues, do they fall under benefits law?" On a broader level, these are questions the court has to grapple with.

In an article you co-authored with your colleagues William Delany and Samuel Levin in Law360 this year, you note that 2020 was a record-setting year in benefits law — the Supreme Court issued four ERISA decisions, and just over 200 new ERISA class actions have been filed. What has it been like watching ERISA law change over the course of your career?

When I was coming up — I was a paralegal at Groom for a number of years before I was a lawyer — ERISA was just coming into play and being developed as a body of law. What you've seen is an evolution in the plaintiffs class action bar, which was typically comfortable in the securities setting but sort of discovered ERISA and pension plans and then health plans.

This began with stock-drop cases, against the Enrons of the world. Plaintiffs firms saw there was an ERISA component given the investment in company stock, and I think it opened the eyes of the class action bar between 25 and 30 years ago.

Slowly, you've seen more and more of those firms entering the space and developing new theories. The 401(k) fee suits are big now — of those 200 new class actions, over 100 fell under the excessive-fee umbrella. The sheer number and breadth of litigation was something you just didn't see when I was starting out at Groom.

The other part of it was the federalization of health care with the Affordable Care Act. Now you see more class actions being brought under components of the ACA, like the Mental Health Parity Act. With the advent of the ACA, we've seen a spike in litigation.

Do you think it's going to keep growing?

It's always hard to gaze into the crystal ball. I don't know if it's going to keep growing, but I don't think it's going to go away. What we're seeing is more and more accumulation of assets in retirement and health care. Given the sheer amount of our economy that's tied up in health care and pensions, I can't see it going away. But if the Supreme Court upholds the enforceability of mandatory arbitration, I think that would have an impact on new case filings.

What advice would you give a young lawyer interested in going into ERISA litigation?

It's a dynamic field. I'm the chair of our practice group, so I often will screen litigation candidates. From my standpoint, we tend to be more interested in people who've been out a few years, because it's hard to understand the subject matter if you're a young person who's never had a paycheck and doesn't know what it means to put money away in an IRA or 401(k) or pay for health care. Having that context is helpful.

But beyond that, we're looking for people with strong analytical skills, great brief-writing skills and who are intellectually curious. There's never a dull day. We can be busy, and at times we are overwhelmed, but we are never bored. It's not just the law that's interesting but the factual tapestry you're applying it to. It can truly be fascinating. The type of work that we do is demanding, the schedule is unpredictable. It's not for everybody. But I thoroughly enjoy it, and I think that, while we take the work we do for our clients very seriously, we don't take ourselves that seriously. I think that's a great approach.

--Editing by Abbie Sarfo.
