

# How The ERISA Landscape May Shift This Year

By **Lars Golumbic, William Delany and Samuel Levin** (January 4, 2022)

2021 was another busy year for litigation under the Employee Retirement Income Security Act, with more than 125 new ERISA class actions filed — more than were filed in 2018 or 2019, but down from the all-time high in 2020, which saw more than 200 class actions filed for the first time in the 45-year history of the statute.

As 2022 begins, several key issues working their way through the courts are likely to reshape the landscape of ERISA litigation.

Within the next few months, the U.S. Supreme Court will weigh in for the first time on the pleading standard for challenges to excessive fees in retirement plans.

By contrast, at least for the time being, the Supreme Court does not appear interested in reviving stock drop lawsuits.

At the circuit court level, there were important new decisions in 2021 regarding the enforceability of arbitration agreements and class action waivers under ERISA, and the U.S. Court of Appeals for the Third Circuit agreed to hear an important interlocutory appeal regarding whether defined contribution plan participants can challenge investment options in which they were not invested.

And there continues to be a steady flow of health plan-related lawsuits in several areas, including with respect to Consolidated Omnibus Budget Reconciliation Act notices and mental health parity.

## **Supreme Court Poised to Provide Guidance on the Pleading Standard for Fee Cases**

The deluge of class actions challenging retirement plan fees and investment performance continued in 2021, and the Supreme Court is now poised to weigh in for the first time on the critical issue of what allegations are sufficient to state a plausible breach of fiduciary duty claim for excessive investment and record-keeping fees.

On Dec. 6, 2021, the Supreme Court heard oral arguments in *Hughes v. Northwestern*, which involves a challenge to investment and record-keeping fees in two 403(b) defined-contribution retirement plans maintained by Northwestern University.[1]

The U.S. District Court for the Northern District of Illinois dismissed the case for failure to state a claim, and the U.S. Court of Appeals for the Seventh Circuit affirmed the dismissal.

The Supreme Court's decision, likely arriving in the first half of 2022, is expected to help clarify the pleading standard for hundreds of fee class actions.

In particular, the briefing and oral argument raised several significant issues, including: (1) the use of institutional versus retail share classes and the relevance of revenue sharing; (2)



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the relevance of the overall mix of investment options offered by a plan; (3) the scope of any obligation to find and use less expensive investment options; and (4) the scope of any obligation to issue a request for proposals.

At the district court level, 2021 saw continued challenges to defined contribution plan participants' ability to challenge investments in which they were not invested.

These challenges have included arguments about whether the participants have Article III standing and whether they may serve as class representatives under Federal Rule of Civil Procedure 23.

In 2021, the Third Circuit agreed to hear an interlocutory appeal on this issue in *Boley v. Universal Health Services Inc.*, with oral argument expected in February of this year.[2]

While this issue would not eliminate defined contribution class actions, it could substantially affect their scope.

### **Jander Case Settles, But Fails to Attract New Stock Drop Lawsuits**

In 2020, in *Retirement Plans Committee of IBM v. Jander*, the Supreme Court issued its second decision involving the question of what plaintiffs must plead to allege a plausible breach of fiduciary duty claim against the fiduciaries of an employee stock ownership plan for holding allegedly inflated company stock.[3]

The Jander decision, however, did not resolve how to apply the Supreme Court's 2014 holding in *Fifth Third Bancorp v. Dudenhoeffer* that a plaintiff must allege "publicly disclosing negative information would [not] do more harm than good,"[4] and merely remanded the case for further consideration.

Jander settled in April 2021 for \$4.75 million.

Notwithstanding the Jander settlement, there has not been a further wave of stock drop lawsuits, which appear to have fallen out of favor among the plaintiffs bar.

The Supreme Court has also not shown interest in revisiting this topic. In May 2021, the court declined to review a U.S. Court of Appeals for the Eighth Circuit decision in *Allen v. Wells Fargo & Co.* holding that allegations that a fiduciary should have disclosed negative information earlier "is too generic to meet the requisite pleading standard." [5]

### **Developments Regarding Arbitration Clauses and Class Action Waivers**

There continues to be a trend — by separate agreement, by the establishment of a plan and/or by plan amendment — to seek to bind participants in ERISA plans to arbitration agreements and waivers of class action claims.

Although many courts have held that these types of provisions are generally enforceable, several decisions in 2021 demonstrate that the precise plan language used can be pivotal in determining the enforceability of these provisions.

In March 2021, in *Cooper v. Ruane Cunniff & Goldfarb Inc.*, the U.S. Court of Appeals for the Second Circuit narrowly construed an arbitration provision that covered "all legal claims arising out of or relating to employment," holding that it did not apply to planwide fiduciary breach claims because "the merits of [the] claim" did not "involve facts particular to an

individual plaintiff's own employment." [6]

And in September 2021, the Seventh Circuit held in *Smith v. Board of Directors of Triad Manufacturing* that an arbitration agreement precluding an award that had the "effect of providing additional ... relief to [anyone] other than the Claimant" was unenforceable because ERISA provides for certain relief benefiting all participants, such as the removal of a fiduciary. [7]

The Seventh Circuit was careful to note that it was not invalidating arbitration agreements or class action waivers in general, and explained that the agreement upheld in the U.S. Court of Appeals for the Ninth Circuit's 2019 *Dorman v. Charles Schwab Corp.* decision "lacked the problematic language present here." [8]

We expect more on this issue playing out at the appellate and district court levels in 2022.

Plans and plan sponsors should continue to monitor developments in this area, and be prepared to reassess the specific language in their plans' provisions.

### **COBRA Notice and Mental Health Parity Cases Continue**

The trend of lawsuits targeting the adequacy of notices that health plans are required to send under COBRA to participants who have lost coverage continued in 2021. These lawsuits generally allege technical defects in the language of the notices, and seek statutory penalties as high as \$110 per day per participant.

A new wrinkle in these lawsuits in 2021 was allegations that notices failed to adequately address expanded entitlements to COBRA coverage under the American Rescue Plan Act. [9]

Although none of the cases have resulted in an adverse judgment against defendants, we expect these lawsuits to continue given the very low cost of putting together cookie-cutter complaints and the fact that plaintiffs have obtained settlements in some cases.

2021 also brought increased scrutiny — by both the U.S. Department of Labor in audits and by private plaintiffs in litigation — of compliance with the Mental Health Parity and Addiction Equity Act.

Lawsuits brought under the MHPAEA generally allege that plans or administrators placed limitations on certain forms of mental health treatment that were not the same, or in parity, with comparable medical or surgical treatments, and commonly target limitations on wilderness therapy or residential treatment centers.

Given the success of some of these lawsuits, we expect them to continue to accelerate in 2022.

*Correction: A previous version of this article misspelled the second author's last name. The error has been corrected.*

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[1] [https://www.supremecourt.gov/oral\\_arguments/audio/2021/19-1401](https://www.supremecourt.gov/oral_arguments/audio/2021/19-1401).

[2] *Boley v. Universal Health Servs., Inc.*, 21-2014 (3d Cir. 2021).

[3] *Retirement Plans Committee of IBM v. Jander*, 140 S. Ct. 592 (2020).

[4] *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409, 430 (2014).

[5] *Allen v. Wells Fargo & Co.*, 967 F.3d 767, 774 (8th Cir. 2020), cert. denied, 141 S. Ct. 2594 (2021).

[6] *Cooper v. Ruane Cunniff & Goldfarb Inc.*, 990 F.3d 173, 175, 184 (2d Cir. 2021).

[7] *Smith v. Bd. of Directors of Triad Mfg., Inc.*, 13 F.4th 613, 621 (7th Cir. 2021).

[8] *Id.* at 623. See also *Dorman v. Charles Schwab Corp.*, 780 F. App'x 510, 512 (9th Cir. 2019).

[9] See, e.g., *Vazquez v. Wal-Mart Stores, Inc.* (M.D. Fla. Nov. 11, 2021); *Johnson v. McDonald's Corp.*, (S.D. Fla. Dec. 15, 2021).