2020 ERISA Litigation Trends Hint At What's Ahead This Year

By **Lars Golumbic, William Delany and Samuel Levin** (January 3, 2021)

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By any measure, 2020 was a record-setting year for litigation under the Employee Retirement Income Security Act. The U.S. Supreme Court issued four ERISA decisions, more than it has issued in a single year in the 45-year history of the statute.

And just over 200 new ERISA class actions were filed, an all-time record that represents a 80% increase over the number of ERISA class actions filed in 2019 and more than double the number filed in 2018.

As 2021 begins, this trend shows no sign of slowing down, with important developing issues related to fee and performance litigation for smaller retirement plans, COBRA notices, arbitration clauses and class action waivers, actuarial assumptions, cyber theft, and employee stock ownership plans, or ESOPs — among others.

Supreme Court: Standing, Statute of Limitations, ESOPs and Preemption

The Supreme Court's four ERISA decisions in 2020 touch on a diverse array of important topics.

In January 2020, in Retirement Plans Committee of IBM v. Jander, the court unanimously vacated a U.S. Court of Appeals for the Second Circuit decision, which held that participants in an ESOP plausibly alleged a breach of fiduciary duty claim by asserting that the price of company stock was inflated, and that plan fiduciaries should have disclosed certain losses that the company had experienced.[1]

In an unusual procedural posture, the Supreme Court did not rule that the Second Circuit's decision was incorrect, but instead remanded the case for further consideration in light of an amicus brief filed with the court by the federal government. The Second Circuit reinstated its original decision, and, in November, the Supreme Court declined to hear the case again.

As the Jander case proceeds, it may provide a new road map for other plaintiffs to pursue claims against ESOP fiduciaries holding public stock, after other courts had largely concluded such claims could not be plead in light of the Supreme Court's 2014 decision in Fifth Third Bancorp v. Dudenhoeffer.[2]

In February 2020, in Intel Corp. Investment Policy Committee v. Sulyma, the court unanimously held that plaintiffs do not necessarily have actual knowledge of a violation sufficient to trigger a three-year statute of limitations — instead of ERISA's default six-year statute of limitations — merely because they are in possession of, but did not read, information that would have triggered the shorter limitations period.[3]

Going forward, particularly for disclosures that are provided electronically, there may be a benefit to requiring participants to acknowledge that they have received and read the disclosures.

In June 2020, in Thole v. U.S. Bank NA, the court held, in a 5-4 decision, that participants in a defined benefit plan did not have standing to sue over the management of the plan's investments because they were still receiving the benefits to which they were entitled.[4] In a dissent, Justice Sonia Sotomayor accused the majority of rendering participants powerless to sue over "retirement-plan mismanagement until their pensions are on the verge of default."

It remains to be seen what effect Thole may have on standing issues in the context of defined contribution plans — including on the developing split among district courts regarding whether participants would have standing to press claims challenging investments in which they did not personally invest.

And in December 2020, in Rutledge v. Pharmaceutical Care Management Association, the court unanimously held that ERISA did not preempt an Arkansas law regulating pharmacy benefit managers, or PBMs.[5] The decision may open the door to increasing, and perhaps inconsistent, state regulation of PBMs, third-party administrators and other service providers.

The impact is likely to be particularly significant with respect to self-funded plans because state laws directly regulating them are preempted, but, as the court clarified in Rutledge, "regulations that merely increase costs or alter incentives for ERISA plans" are not.

Retirement Excessive Fee Litigation Moves Downstream to Smaller Plans

Historically, lawsuits challenging retirement plan fees and investment performance targeted the largest plans in the country, often sponsored by Fortune 500 companies or prominent universities. The biggest driver of the explosion in ERISA class actions in 2020 was a dramatic increase in the number of smaller plans facing these lawsuits, including plans with under 1,000 participants and less than $100 million in assets.

Some of the common allegations in these cases include: not using the lowest cost share classes of funds; not offering enough index funds; offering underperforming funds or funds affiliated with the plan's record-keeper; paying for record-keeping as a percentage of assets under management rather than per participant; and/or not submitting requests for proposal to multiple record-keepers.

We do not expect the pace of these lawsuits to slow down in 2021. Several new plaintiffs firms have entered this space, often filing a series of nearly identical lawsuits based solely on reviews of plans' publicly available Form 5500 filings, and some defendants have been sued multiple times. Unless district courts reject these lawsuits at the motion to dismiss stage of a lawsuit, plaintiffs firms will continue to be incentivized to file them in large numbers.

COBRA Notice Litigation Continues to Accelerate

2020 was also a record-breaking year for the number of lawsuits challenging the adequacy of Consolidated Omnibus Budget Reconciliation Act notices. Health plans are often required to send such notices to participants who have lost coverage under the plan.

These lawsuits generally allege technical violations in the language of the notices, including that language regarding penalties for submitting inaccurate information could discourage participants from electing COBRA coverage, and failing to provide the plan administrator's contact information.

In October, the U.S. Department of Labor filed an amicus brief in a case pending in the U.S. District Court for the Middle District of Florida, Carter v. Southwest Airlines Co. Board of Trustees, expressing its view that COBRA notices need not include the plan administrator's contact information if they list the plan's COBRA administrator's contact information, a position the court agreed with in granting a motion to dismiss in December.[6]

Rather than trying to establish that they have been harmed, the plaintiffs in these lawsuits generally focus on ERISA's statutory penalties for failing to provide required notices, which could be as high as $110 per day for each participant that received the inadequate notice. Although none of these cases resulted in an adverse judgment against defendants, plaintiffs have settled at least one case for in excess of $1 million.[7]

Given the very low cost of putting together these cookie-cutter lawsuits, we expect more similar lawsuits to be filed in 2021.

Arbitration Clauses and Class Action Waivers

There has been a growing trend, either by separate agreement or by plan amendment (or both), to bind participants in ERISA plans to arbitration agreements and waiver of class action claims. We expect this trend to accelerate, particularly following a number of favorable rulings, including on appeal.

Although most courts accept that agreements to arbitrate ERISA claims and waive classwide relief are generally enforceable, there continue to be some instances in which courts decline to enforce arbitration provisions.

For example, in August 2020, the U.S. District Court for the Northern District of Illinois issued a decision in Smith v. GreatBanc Trust Co., which held that an arbitration provision contained in a plan document could not be enforced because, among other reasons, the individual plaintiff did not receive notice of or agree to the amendment to the plan document, which contained the provision.[8]

The Smith case is on appeal to the U.S. Court of Appeals for the Seventh Circuit, and, if affirmed, could result in a circuit split with the U.S. Court of Appeals for the Ninth Circuit's 2019 decision in Dorman v. Charles Schwab Corp.[9]

Plans that do wish to add arbitration provisions to a plan document should consider whether it makes sense to communicate that change to plan participants and whether to couple the arbitration provision with a class action waiver. Companies may also want to review any arbitration or class action waiver provisions in employment agreements and make clear that those provisions apply to ERISA claims.

Since ERISA plaintiffs often have the option to choose whether to proceed individually or on behalf of the plan, having these provisions in both employee agreements and the plan document may maximize the likelihood of a successful motion to compel arbitration.

Challenges to Actuarial Assumptions Used by Defined Benefit Plans

There continue to be a number of lawsuits challenging assumptions used to calculate withdrawal liability assessed against a withdrawn employer to a multiemployer plan. Withdrawing employers have argued that plan actuaries inflate the amount of the plans' underfunding — and in turn, the amount of withdrawal liability — by using different assumptions to calculate withdrawal liability than are used for other purposes.

Although courts have held that there is no legal requirement to use the same assumptions, two district courts have nevertheless invalidated the use of different assumptions based on the facts presented to them. Appeals raising this issue are currently pending before the U.S. Courts of Appeals for the Sixth[10] and D.C. Circuits[11] and should help clarify whether this will be a viable challenge going forward.

Lawsuits challenging assumptions used by single-employer plans also continue to work their way through the courts. The allegations in these cases are generally that plans used unreasonable and outdated mortality assumptions to calculate optional forms of benefits offered by the plans — e.g., a single-life annuity versus a joint and survivor annuity — resulting in benefits that are not actuarially equivalent, as required by ERISA.

Although courts have denied motions to dismiss in most, but not all, of these cases, the U.S. District Court for the Northern District of Texas issued a decision in May denying the plaintiffs' motion for class certification in Torres v. American Airlines Inc., finding that the plaintiffs' proposed remedial changes to the plan's assumptions would actually harm certain participants.[12] Whether there is a second wave of lawsuits raising these issues may depend on the plaintiffs' ability in the pending lawsuits to obtain a favorable judgment in 2021.

Cybertheft Lawsuits

In October 2020, the U.S. District Court for the Northern District of Illinois issued a decision in Bartnett v. Abbott Laboratories, which is one of only a handful of decisions to date addressing potential ERISA liability in connection with cybertheft of participant account balances.[13]

In Bartnett, a hacker obtained access to a plan participant's account and was able to direct a $245,000 distribution to a new third-party bank account. The court denied the record-keeper's motion to dismiss, in which it had argued that it was not a fiduciary, but granted the plan sponsor and administrator's motion to dismiss.

The court explained that the plan sponsor was not a fiduciary and that the plan administrator did not breach its fiduciary duties because it did not maintain the website at issue or know of the unauthorized attempts to gain access to the account.

However, a prior lawsuit allowed similar claims to proceed against a plan administrator,[14] and the plaintiff in Bartnett has filed an amended complaint accusing the plan administrator of breaching its fiduciary duties by selecting a record-keeper that had previously been involved in data breaches.

In light of the risks presented by cybertheft, plan sponsors may want to take steps to understand the measures the plan's record-keeper has in place to prevent and respond to cybertheft incidents, educate participants on risks and best practices, and review any insurance policies or fidelity bonds to determine whether losses attributable to cyber theft are covered.

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Disclosure: Groom Law filed amicus briefs on behalf of clients in support of the defendants in both the Smith and Sofco appeals, and the firm represents Charles Schwab, GreatBanc Trust, Intel and American Airlines in matters unrelated to the discussion here.

[1] 140 S. Ct. 592 (2020).

[2] 573 U.S. 409 (2014).

[3] 140 S. Ct. 768 (2020).

[4] 140 S. Ct. 1615 (2020).

[5] Case No. 18-540, 2020 WL 7250098 (U.S. Dec. 10, 2020).

[6] Case No. 20-cv-01381, Docket Nos. 29, 43.

[7] Hicks v. Lockheed Martin Corp., Case No. 19-cv-00261, Docket Nos. 37, 41 (M.D. Fla.).

[8] Case No. 20-cv-02350, 2020 WL 4926560 (N.D. Ill. Aug. 21, 2020).

[9] 780 F. App'x 510, 514 (9th Cir. 2019).

[10] Sofco Erectors, Inc. v. Trustees of Ohio, Operating Engineers, Pension Fund, No. 2:19-CV-2238, 2020 WL 2541970 (S.D. Ohio May 19, 2020), appeal pending, Case Nos. 20-3639, 20-3671 (6th Cir.).

[11] United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co., 464 F. Supp. 3d 104 (D.D.C. 2020), appeal pending, Case No. 20-7054 (D.C. Cir.).

[12] Case No. 18-CV-00983, 2020 WL 3485580 (N.D. Tex. May 22, 2020).

[13] Case No. 20-CV-02127, 2020 WL 5878015 (N.D. Ill. Oct. 2, 2020).

[14] Leventhal v. MandMarblestone Grp. LLC, No. 18-CV-2727, 2019 WL 1953247 (E.D. Pa. May 2, 2019).