ERISA Litigation Faces New Frontiers In 2024

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In 2023, just over 100 new class actions were filed under the Employee Retirement Income Security Act — the lowest number filed since 2018, largely driven by fewer new cases alleging excessive fees in retirement plans.

Following the dip in new cases in 2018, an all-time record of more than 200 new class actions were filed in 2020. Whether there is a similar expansion in the number of ERISA cases filed in 2024 and beyond is likely to depend on the resolution of several key issues.

Federal district courts continue to work through how to apply circuit court decisions from 2022 on the proper pleading standard for excessive fee cases. And new federal circuit court decisions from 2023 could reshape litigation over prohibited transaction claims.

Plaintiffs firms continue to explore new theories. In 2023, they filed new lawsuits challenging the use of plan forfeitures, sought named plaintiffs for new lawsuits challenging health plan fees, and filed a record number of actuarial equivalence lawsuits. The U.S. Department of Labor's latest attempt to broaden the definition of an investment advice fiduciary could also lead to new litigation in 2024.

Retirement Plan Excessive Fee Litigation Slows

Following several federal circuit court opinions ruling in favor of defendants in 2022 — including the U.S. Court of Appeals for the Sixth Circuit's Smith v. CommonSpirit Health decision, which Law360 identified as one of the biggest benefits rulings of 2022 because it "start[ed] ... a trend among circuit courts to focus on valid comparisons in the pleadings of ERISA excessive fee cases" — fewer new cases alleging excessive fees in retirement plans were filed in 2023.

This year and beyond, one of the most important issues in ERISA litigation will be how stringently district courts apply the pleading standard set forth in CommonSpirit and similar appellate decisions at the motion to dismiss stage, and the extent to which plaintiffs firms will be able to adapt their allegations to survive motions to dismiss.

Historically, many excessive fee cases that survive motions to dismiss result in settlements. While such settlements remain commonplace, Yale University and B. Braun Medical both successfully prevailed in their respective trials in 2023 in cases challenging their retirement plans' investments and recordkeeping fees.

If defense victories at trial become more common, the cost of settling cases may drop, which may cause plaintiffs firms to reevaluate which cases are worth bringing.

Circuit Courts Disagree on Prohibited Transactions

While circuit courts have begun to coalesce around pleading standards for bringing excessive fee cases under ERISA's duty of prudence, circuit splits emerged in 2023 regarding the allegations necessary to sustain a prohibited transaction claim.

ERISA presumptively prohibits transactions with parties that have a relationship to a plan — a so-called party in interest — but contains a series of exemptions that permit those transactions if certain conditions are met, often including that the terms of the transaction are reasonable.

In Cunningham v. Cornell University in November 2023, the U.S. Court of Appeals for the Second Circuit held that a plaintiff cannot survive a motion to dismiss merely by alleging that a presumptively prohibited transaction occurred.

Instead, the Second Circuit held that a plaintiff must plausibly allege both that a prohibited transaction occurred and that no exemption applies, disagreeing "with the Eighth Circuit that, at the pleading stage, the ... exemptions should be understood merely as affirmative defenses."

In Bugielski v. AT&T Services Inc. in August 2023, the U.S. Court of Appeals for the Ninth Circuit held that amending an existing recordkeeping contract constituted a prohibited transaction because the recordkeeper was already a party in interest, disagreeing with the U.S. Court of Appeals for the Third Circuit that it "would be absurd" "to prohibit necessary services" unless there was "an element of intent to benefit a party in interest."

Several industry groups asked the Ninth Circuit to rehear the case, arguing in a September 2023 amicus brief that the decision "undoes years of litigation establishing the pleading burden ERISA plaintiffs have in challenging retirement plan fees" and "create[s] enormous litigation risks." The Ninth Circuit declined to rehear the case.

The U.S. Supreme Court may ultimately need to decide how to apply ERISA's prohibited transaction rules to cases challenging the reasonableness of fees.

In the meantime, plaintiffs firms may increasingly bring prohibited transaction claims challenging recordkeeping fees, in an attempt to circumvent the pleading standards established by CommonSpirit and similar decisions.

Plaintiffs Lawyers Explore Health Plan Fee Litigation

Effective as of the end of 2021, ERISA was amended to require that service providers of health plans disclose both their direct and indirect compensation in a manner similar to what was already required of service providers to health plans under the DOL's 408(b)(2) regulations.

A plaintiffs firm, Schlichter Bogard & Denton, has been seeking information from large plan sponsors on their health plan fees, running targeted ads looking for named plaintiffs for class actions, and has publicly stated that it intends to explore health plan fees as an area of litigation as it has done with respect to retirement plan fees.

While it remains to be seen whether health plan fee litigation will proliferate as retirement plan fee litigation has, 2024 may bring several test cases that could shape the future litigation landscape over health plan fees.

New Theory Challenging Plan Forfeitures

In late 2023, a series of class actions were filed challenging the widespread practice of using plan forfeitures — the nonvested portion of a former employee's account balance — to offset employer contributions.

The lawsuits allege that using plan assets to offset employer contributions is self-dealing that violates ERISA's prohibited transaction rules and ERISA's fiduciary requirement that plan assets be "for the exclusive purpose" of paying benefits or plan expenses.

While motions to dismiss have been filed, no substantive rulings have yet been issued in these cases. If courts rule in the plaintiffs' favor, plans could be required to alter their practices and/or the language in their plan documents.

Resurgence of Actuarial Equivalence Lawsuits

Beginning in late 2018, a series of class actions were filed alleging that actuarial assumptions used to calculate certain forms of annuities — including joint-and-survivor annuities, which ERISA mandates defined benefit plans offer — were unreasonable and violated ERISA's requirement that the annuities be "the actuarial equivalent of a single [life] annuity."

Among other alleged flaws, the plaintiffs claimed that plans were using outdated mortality tables, which led to lower payouts.

While these lawsuits generally survived motions to dismiss, two federal district courts refused to certify classes because the alternate proposed assumptions would have harmed some participants in the plan.

Following the $59 million settlement in Cruz v. Raytheon Co. — in the U.S. District Court for the District of Massachusetts in 2021 — filings have increased, with a record nine new class actions filed in 2023, up from four in 2022. As courts continue to generally rule in plaintiffs' favor at the motion to dismiss stage, these lawsuits may continue.

Litigation Against DOL Regarding Investment Advice Fiduciaries

In 2016, the DOL significantly expanded its long-standing definition of an investment advice fiduciary to cover first-time investment advice — where the parties had no pre-existing relationship — and rollovers from ERISA plans to individual retirement accounts.

The U.S. Court of Appeals for the Fifth Circuit invalidated the DOL's new definition in 2018, holding that it improperly expanded the scope of ERISA fiduciary status "in vast and novel ways."

The DOL tried to achieve some of the same ends in a 2020 interpretation, which resulted in decisions in 2023 from federal district courts in Florida and Texas holding that the DOL improperly conflated distinctions Congress drew between ERISA plans and individual retirement accounts.

On Oct. 31, 2023, the same day the DOL unveiled its latest proposal to expand the definition of an investment advice fiduciary, President Joe Biden delivered remarks from the White House in support of the proposal.

The new proposal bears a number of similarities to its 2016 rule. If the proposal is adopted in substantially similar form, it is likely to face challenges in court that could have significant ramifications across the industry.

Conclusion

As courts weigh in on new theories and decide how to apply recent circuit court decisions, 2024 may reshape the ERISA litigation landscape for years to come.

Furthermore, novel theories of recovery will likely be tested at the motion to dismiss, class certification and summary judgment phases of litigation in the coming year.

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Disclosure: Groom Law represented CommonSpirit in Smith v. CommonSpirit Health and B. Braun Medical in Nunez v. B. Braun Medical Inc., and filed an amicus brief on behalf of the *American Council of Life Insurers* ***in the Texas litigation challenging the DOL's interpretation of an investment advice fiduciary.***

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