Litigation Developments
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Overview of Topics to be Covered

• Where do we stand with "company stock" cases

• Arbitration
  • Recent Decisions
  • Pros and Cons of Including Arbitration Clauses and Class Action Waivers

Overview of Topics to Be Covered, cont.

• Roundup of Other Recent Supreme Court ERISA Cases
  • Standing in cases involving alleged defined benefit plan losses
  • When does "actual knowledge" exist for purposes of statute of limitations
Overview of Topics to be Covered

- “Grab Bag” of general litigation related topics

Where Do We Stand On Company Stock?

- Background
  - In the 2000s, many cases challenged decisions to include company stock as an investment option; plaintiffs challenged this decision when value of company stock dropped precipitously and caused disproportionate losses
  - Prior to 2014, most courts applied “presumption of prudence” to a fiduciary's decision to include company stock as a 401(k) investment option

Company Stock, cont.

- *Dudenhoeffer v. Fifth Third Bank*, (U.S. Sup. Ct., 2014)
  - Did away with the “presumption of prudence”
  - Imposed a new, even tougher standard for plaintiffs to overcome just to plead a viable “stock drop” case
• Dudenhoeffer, cont.

  Now, plaintiffs must plausibly allege an alternative action that the defendant could have taken, consistent with securities laws, that a prudent fiduciary would not have viewed as more likely to harm the plan than help it.

  Most courts following Dudenhoeffer have dismissed so-called “stock drop” cases, finding that plaintiffs failed to plead viable alternative actions fiduciaries could have taken.


  Plaintiffs alleged that, had the fiduciaries made an earlier disclosure of substantial losses sustained by IBM’s microelectronics division, the losses sustained by the plan would have been less.

• Jander v. IBM, cont.

  The district court dismissed plaintiffs’ complaint. The Second Circuit reversed, which would have allowed plaintiffs’ claims to proceed.

  In briefs before the Supreme Court, the parties focused more on concerns regarding potential inconsistency with what is required by securities laws.
Company Stock, cont.

- Supreme Court – remanded the matter to the Second Circuit for further consideration of the arguments that the parties focused upon at the Supreme Court.

- In a concurring opinion, Justice Kagan emphasized that when disclosure of inside information does not conflict with the securities laws, ERISA may require its disclosure (even if the securities laws do not).

Company stock, cont.

- Takeaways from Jander
  - It remains to be seen whether alleging that an earlier disclosure of facts that would inevitably have to be disclosed satisfies Dudenhoeffer. (Several courts rejected that approach before Jander.)
  - What’s a fiduciary to do?
    - Note that Justice Kagan emphasized that ERISA fiduciaries might have to disclose issues when doing so does not violate the securities laws, even if the securities laws do not mandate disclosure.
    - What does that mean?
      - Fiduciaries walk the “razor’s edge.”

Company Stock, cont.

- What’s a fiduciary to do?
  - Note that Justice Kagan emphasized that ERISA fiduciaries might have to disclose issues when doing so does not violate the securities laws, even if the securities laws do not mandate disclosure.

- What does that mean?
  - Fiduciaries walk the “razor’s edge”—avoid disclosing when securities laws preclude it, but risk failing to disclose when ERISA requires it.
Arbitration and Class Action Waiver Provisions

• Most of the recent action in this area has been in the Ninth Circuit.

• Munro v. USC [9th Cir., July 2018]
  • Employees of USC signed employment agreements that included arbitration provisions

Arbitration and Class Action Waiver Provisions

• Munro v. USC, cont.
  • Provision required arbitration of "all claims ... that Employee may have against the University or any of its related entities ..."

Arbitration and Class Action Waiver Provisions

• Munro v. USC, cont.
  • The Court analyzed "whether the [arbitration agreement] encompasses the dispute at issue."
  • Held: ERISA fiduciary breach claims are brought not for the individual benefit, but for the benefit of the plan – therefore, the arbitration provision did not govern the dispute.
Arbitration and Class Action Waiver Provisions

• What if the provision is in the plan itself?
  • Dorman v. Charles Schwab & Co., (9th Cir., 2019)

  • The Schwab 401(k) plan included a provision waiving class actions and requiring individual arbitration of plan-related disputes.

• Dorman v. Charles Schwab, cont.

  • The provision also stated that if the class action waiver was held to be unenforceable, then any class action had to be litigated in court (and not arbitration). [This way, any individual claims would not be appealable, but more significant class-wide decisions would be appealable.]

Arbitration and Class Action Waiver Provisions

• Dorman v. Charles Schwab, cont.

  • Defendants moved to compel individual arbitration.

  • District court denied the motion, in part on the grounds that plaintiff’s claims belonged to the plan, and were not brought on his own behalf.

  • Ninth Circuit held: Prior Ninth Circuit authority (Amaro v. Continental Can, 9th Cir. 1984) is overruled – ERISA claims are arbitrable, because the Supreme Court has decided that arbitrators are competent to interpret and apply federal statutes.
Arbitration and Class Action Waiver Provisions

• Dormon v. Charles Schwab, cont.

• Since the plan itself (to whom the claims belonged) consented to arbitration of ERISA claims, plaintiff’s claims fall within the ambit of the provision.

  • Question: How can a plan “agree” to include a provision in the plan? The plan is created by its sponsor, which decides what provisions to include in the plan. And note — the provision doesn’t directly benefit the plan — rather, it benefits the plan sponsor.

Arbitration and Class Action Waiver Provisions

• The “brass tacks” regarding arbitration and class action waivers:
  • So it’s available (at least in the Ninth Circuit) to resolve ERISA breach of fiduciary duty claims … but do you want it?

  • Pros:
    • Potentially quicker resolution than litigation in court.
    • If class action waiver is enforceable, then there is a chance of limiting award to losses sustained by each individual plaintiff.
    • Potentially less expensive process.

Arbitration and Class Action Waiver Provisions

• Cons:
  • No right, or very limited right, to appeal arbitrator’s decision.
  • Arbitrators are not obligated to support their decisions with (often defense friendly) legal analysis.
  • Potential for multiple individual proceedings (with commensurate additional expense)
Defined Benefit Plan Litigation Developments

• Thole v. U.S. Bank, (8th Cir., 2017)
  • Plaintiffs challenged investment of defined benefit plan assets – 100% of plan assets were invested in equities – and alleged that the plan suffered a loss of $1.1 billion relative to what it would have lost if investments were more diversified
  • Held: When a defined benefit plan is overfunded, a participant in that plan lacks standing to bring suit for losses to the plan.

Defined Benefit Plan Litigation Developments

• Thole v. U.S. Bank, cont.
  • The Supreme Court heard oral argument on January 13, 2020.
  • Reading the tea leaves ... the Court generally seemed skeptical that standing exists when there's no real threat to payment of any individual plaintiff's benefit.

Other Supreme Court News

• ERISA’s Three Year “Actual Knowledge” Statute of Limitations
  • Intel Corp. Inv. Policy Committee v. Sulyma
    • Question: Does “actual knowledge” mean when all relevant information was actually disclosed to plaintiff, even if there is no proof that he actually reviewed the information?
    • Oral argument December 4, 2019
Other Supreme Court News, cont.

• In January 2020, the Supreme Court denies cert in Brotherston v. Putnam

• This case reflects a circuit split regarding who (as between the defendants and the plaintiffs) has the burden of proof in ERISA fiduciary breach case.

• The upshot: it’s easier for plaintiffs to prevail in some circuits (First, Second, Fourth, Fifth, Eighth) than others (Sixth, Ninth, Tenth, Eleventh).

Grab Bag

• What do I do, and for whom do I do it?

• Problems arise when one “team member” controls the flow of communication to the plan sponsor/client.

Grab Bag, cont.

• Example:
  • Long time investment adviser for cash balance plan controls the flow of information to the plan sponsor/fiduciary.
  • Adviser seeks input from actuary regarding whether a particular product (in this case, an index annuity product) may be used as a DB plan investment.
  • Actuary assumes – incorrectly - that plan sponsor is “in the loop.”
Grab Bag, cont.

- Insurance issues
  - One way or another, virtually every litigated case involves insurance issues.
    - Does coverage exist?
      - Absent insurance coverage, the cost of paying defense costs falls on the defendant.
      - The age old fallacy: If I don’t have insurance, they won’t bother to sue me.

Grab Bag, cont.

- Insurance issues, cont.
  - Is it the right kind of coverage?
    - General errors and omissions insurance typically excludes coverage for claims involving fiduciary breaches under ERISA.
    - Fiduciary liability insurance coverage often covers the expense of defending ERISA-related claims, even benefit claims.
    - Broker-dealer provided coverage for registered representatives:
      - Is this good enough?

Questions?