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Defending ERISA Class Actions Amid an Evolving Litigation Landscape: Best Practices for Counsel and Fiduciaries

Recent Cases, Emerging Trends, and Defense Strategies Involving the Duty of Prudence, Investment Offerings, and Other Issues for Plan Sponsors

WEDNESDAY, AUGUST 24, 2022

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

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Clarissa A. Kang, Angel L. Garrett and Dylan D. Rudolph

August 24, 2022

Recent ERISA Class Action Developments and Trends

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ERISA Class Action Litigation

- Wave of ERISA class action lawsuits started in or around 2006 with the complaints alleging excessive fees in 401(k) plans
- Since then, there have been numerous waves of other types of ERISA class actions:
  - 2014: Class action lawsuits involving the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA)
  - 2016: Class actions involving more than a dozen universities' 403(b) retirement plans
  - 2018: Class action actuarial equivalence lawsuits against at least 13 plan sponsors and fiduciaries
- Cases in recent years indicate that there is trend targeting specific funds, such as TDFs, and focusing on performance
- In 2021, more than 125 ERISA class actions were filed

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Hughes v. Northwestern Univ. (S. Ct. 2022)

- Supreme Court reversed 7th Circuit's decision to uphold dismissal of the plaintiffs' claims for relief
- Held that the 7th Circuit's decision was inconsistent with Court's prior decision in *Tibble v. Edison* (S. Ct. 2015)
- Incorrect to dismiss claims on grounds that the plan offered funds that the plaintiffs admitted were prudent (i.e., passively managed options)
- Court acknowledged that "[a]t times, the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs, and courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise"

Davis v. Salesforce.com, Inc. (9th Cir. 2022)

- On April 8, 2022, the 9th Circuit reversed a district court's order granting motion to dismiss with prejudice
- The panel held that the plaintiffs sufficiently stated an imprudence claim based on allegations that the committee should have replaced the plan's funds with:
  - Allegedly "lower cost" share classes; and
  - Collective investment trust versions
- On the share class claim, the panel found that the defendants' argument - that difference in price between the share classes was because the plan's funds offered revenue sharing - was just an "alternative explanation"

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Kong v. Trader Joe's, Co. (9th Cir. 2022)

- On April 15, 2022, a different panel of 9th Circuit judges reversed a lower court's order granting the defendants' motion to dismiss with prejudice
- Court held the plaintiffs sufficiently stated claims based on allegations that the plan should have offered "lower cost" share classes
- Also found that the argument about the revenue sharing component was "unavailing" at the pleading stage and more facts needed to be developed
- Further held that the plaintiffs sufficiently stated a claim based on the plan's recordkeeping fees

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Smith v. Common Spirit (6th Cir. 2022)

- On June 21, 2022, 6th Circuit affirmed dismissal of claims that a plan should have offered passively managed, instead of actively managed funds
- Held that the plaintiff had not plausibly pleaded that plan fiduciaries acted imprudently "merely by offering actively managed funds…"
- Nothing wrong with allowing participants to select active funds in hopes of above-average returns
- Court noted that "no case" says a plan fiduciary acts imprudently merely by offering actively managed funds as opposed to passively managed options

Forman v. TriHealth, Inc. (6th Cir. 2022)

- On July 13, 2022, the 6th Circuit partially revived claims that were dismissed by the lower court
- Noted that many of the plaintiffs' claims had been resolved by the *Common Spirit* decision, and affirmed dismissal of those claims (based on allegations of active management and underperformance)
- Revived claims that the court found were not covered under *Common Spirit,* based on allegations that the plan offered more expensive share classes when less expensive share classes were supposedly available (cited *Trader Joe's*)

Jane Doe v. United Behavioral Health (N.D. Cal)

- Self-funded health plan provided coverage for autism but expressly excluded coverage for Applied Behavioral Analysis ("ABA"), a treatment for autism
- United Behavioral Health ("UBH") denied the plaintiff's request for coverage of ABA
- Held that exclusion of ABA was a violation of the Mental Health Parity and Addiction Equity Act (MHPAEA) and that UBH, as the plan administrator, had a fiduciary duty to follow the law even if that required UBH to disregard an express plan term

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UnitedHealth's MHPAEA Lawsuits

- Comprised of several lawsuits:
  - *Doe v. UnitedHealth Group, Inc.* (E.D.N.Y.)
  - *Smith v. United Healthcare Ins. Co.* (E.D.N.Y.)
  - *Walsh v. United Behavioral Health and UnitedHealth Care Ins. Co.* (E.D.N.Y)
  - *James v. UnitedHealth Group Inc.* (E.D.N.Y)
- The plans contained a tiered reimbursement policy that reduced the "allowed amount" by 25% when treatment provided by a psychologist, and 25% to 35% when provided by a masters-level social worker
- A class of more than 110,000 plaintiffs, along with the Department of Labor and New York state attorney general challenged this policy
- Settlement reached: United agreed to eliminate the policy and pay class members $10 million (55-70% of estimated financial impact of the policy)

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Actuarial Equivalence Lawsuits

- Beginning in December 2018, a wave of ERISA class-action lawsuits emerged alleging that companies were using outdated mortality tables in calculating alternative forms of benefits under defined benefit pension plans.
- 13 lawsuits have been filed against the following plan sponsors and the plans' fiduciaries across the country
- Currently, 3 active cases
  - Two cases are awaiting a decision on plaintiffs' motion to certify the class
  - For the last case, a motion to dismiss has been denied and the parties are currently in the discovery phase

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Actuarial Equivalence Lawsuits (cont.)

- *Masten, et al. v. Metro. Life Ins. Co., et al.,* No. 18-cv-11229 (S.D.N.Y.);
  - Over 1800 individuals in the proposed class

- *Scott, et al. v. AT&T, Inc., et. al*, No. 20-cv-07094 (N.D. Cal.)
  - Approximately 300,000 individuals in the proposed class

Actuarial Equivalence Lawsuits (cont.)

- *Torres, et al. v. Am. Airlines, Inc., et al.* No. 18-CV-00983 (N.D. Tex.)
  - Motion for class certification denied because the plaintiffs cannot adequately represent all of the proposed class members

- *Smith, et al. v. U.S. Bancorp, et al.,* No. 18-CV-3405 (D. Minn.)
  - Motion for class certification denied because commonality, typicality, and adequacy requirements for class certification were not met. Also, this action is not suitable for class treatment.

LITIGATION STRATEGIES AND DEVELOPMENTS

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CLASS CERTIFICATION

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Class Certification

- Claimants must meet the requirements of Federal Rule 23(a) and (b) to obtain certification of a class
- Rule 23(a) requires that claimants meet a four-part test:
  - Class so **numerous** that joinder of all members is impracticable;
  - **Common** questions of law and fact;
  - Claims or defenses of the representative parties are **typical** of the claims and defenses of the class; and
  - Representative parties will fairly and **adequately** protect the interests of the class.

Class Certification

- Rule 23(b) is satisfied if:
  - (1) Bringing separate lawsuits would create a risk of
    - (A) inconsistent or varying results between individual class members; or
    - (B) results for individual members that would be dispositive of interests of other members of the class
  - (2) Defendant's alleged misconduct applies generally to the whole class, so final injunctive or declaratory relief is appropriate for the entire class; or
  - (3) Questions of law or fact that are common to class members predominate over questions that only affect individual members, and a class action is superior

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Class Certification

- *Chavez v. Plan Benefit Services* (W.D. Tex. 2022)
  - "Courts regularly certify classes of participants in ERISA plans"
  - "Cases seeking to remedy fiduciary breaches under ERISA have fit within Rule 23(b)(1)(B) and been certified as such" (collecting cases)
  - "Advisory Committee Note to Rule 23 advises that Rule 23(b)(1)(B) takes in situations charging a breach of fiduciary duty"
- *Wachala v. Astellas US* (N.D. Ill. 2022)
  - "Numerous courts have held that claims for breach of fiduciary under ERISA 502(a)(2) are paradigmatic examples of claims appropriate for certification under Rule 23(b)(1)"

Class Certification

- *Leber v. Citigroup 401(k)* (S.D. N.Y. 2017)
  - "The structure of ERISA favors the principles enumerated under Rule 23(b)(1)(B), since the statute creates a 'shared' set of rights among the plan participants by imposing duties on the fiduciaries relative to the plan…"
  - "… [ERISA] even structures relief in terms of the plan and its accounts, rather than directly for the individual participants"
- *Marshall v. Northrop Grumman* (C.D. Cal. 2017)
  - "As numerous courts have noted, a classic example of a Rule 23(b)(1)(B) action is one which charges a breach of trust by an indenture trustee or other fiduciary…"

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Class Certification

- *Boley v. Universal Health Services* (3d Cir. 2022)
  - First circuit court to apply the *Thole v. US Bank* case in a case involving a defined contribution plan
  - *Thole* held defined benefit plan participant lacked standing under Article III to bring an ERISA claim where their benefits were not affected
  - UHS raised a similar standing challenge in the context of class certification, arguing that the named plaintiffs had not suffered any injury in fact
  - Court rejected that argument, finding named plaintiffs could assert claims based on losses allegedly caused by investments that the named plaintiffs did not invest in

Class Certification

- Cases where certification was denied:
  - *Tolbert v. RBC Capital* (S.D. Tex. 2016)
    - Plaintiffs' claimed injuries would only exist if the plan was not a "top hat" plan, which would exclude it from certain requirements under ERISA
    - Claimed that this question of whether the plan qualified as a "top hat" plan was common to the class
    - Court held that, among other issues with the plaintiffs' claims, the commonality provision also requires that the class members "suffered the same injury" and that the plaintiffs had not demonstrated that the class members had suffered any injury in fact

Class Certification

- Cases where certification was denied (cont.):
  - *Torres v. Am. Airlines, Inc*. (N.D. Tex.)
    - Motion for class certification denied because the plaintiffs could not adequately represent all proposed class members
  - *Smith v. U.S. Bancorp* (D. Minn.)
    - Motion for class certification denied because commonality, typicality, and adequacy requirements for class certification were not met

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Pleading Standards

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Pleading

- Impact of *Hughes v. Northwestern Univ.* varied across decisions issued since the Supreme Court's decision
  - *Lauderdale v. NFP Retirement, Inc.* (C.D. Cal. Feb. 8, 2022), the court, relying on *Hughes*, held that the plaintiffs sufficiently alleged that the defendants failed to engage in a prudent process.
  - *Mator v. Wesco Distribution, Inc.* (W.D. Penn. April 7, 2002), the court says explained that "the Supreme Court's holding [in *Hughes*] neither shifts the pleading standards in Plaintiff's ERISA claims nor changes this Court's prior or current analysis of Plaintiff's complaint or amended complaint"
- *Salesforce* and *Trader Joe's* decision are both unpublished, so not binding but may be cited by plaintiffs as persuasive authority

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ARBITRATION UPDATE

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Arbitration Update

- ***Dorman v. Charles Schwab Corp.* (9th Cir. 2019)**
  - Fiduciary breach claims brought on behalf of a plan could be arbitrated where the plan "agreed" to the arbitration (i.e., it is in the plan document)
  - Enforced class action waiver

- ***Cooper v. DST Systems, Inc*. (2d Cir. 2021)**
  - Reversed order from S.D. N.Y. compelling arbitration
  - Incorrect that an arbitration provision in employment agreement barred ERISA claims because the claims "related to" the plaintiff's employment

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Arbitration Update

- ***Henry v. Wilmington Trust NA* (D. Del. 2021)**
  - Denied motion to compel arbitration
  - Arbitration provision was in the plan document
  - Need evidence that parties expressly consented to arbitration
  - Appeal to 3d Circuit is pending

- ***Smith v. Board of Dir. of Triad Man., Inc*. (7th Cir. 2021)**
  - Joined "every other circuit to consider the issue" in recognizing that ERISA claims are generally arbitrable
  - Held this case could *not* be arbitrated because provision in plan would have waived a statutory right to pursue relief that extended beyond the plaintiff (e.g., removing a plan fiduciary)

Arbitration Update

- ***Cedeno v. Argent Trust Co.* (S.D. N.Y. 2021)**
  - Arbitration provision was not enforceable, agreeing with *Smith*
  - Language in the plan document was impermissible because it limited plan wide relief
  - Appeal to 2d Circuit is pending; amicus brief filed by DOL arguing that claims should not be arbitrated

- ***Harrison v. Envision Management Holding* (D. Col. 2022)**
  - Denied motion to compel arbitration based on provision in plan
  - Following *Smith,* the court said provision was not enforceable because it would have disallowed ability to seek plan wide relief
  - Appeal to 10th Circuit is pending

Arbitration Update

- ***Holmes v. Baptist Health So. Flo. Inc*. (S.D. Fl. 2022)**
  - District court enforced arbitration provision, finding that the 11th Circuit had not used "effective vindication" doctrine from *Smith* to void an arbitration provision
  - Waiver of remedies associated with class actions were permissible
- ***Hawkins v. Cintas Corp.* (6th Cir. 2022)**
  - Affirmed order denying motion to compel arbitration of provisions in employment agreements
  - Consistent with prior decisions to consider this issue

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