Litigation Update: Two Perspectives

WESTERN PENSION & BENEFITS COUNCIL, SEATTLE CHAPTER

THURSDAY, APRIL 4, 2019

PRESENTED BY:

RICHARD BIRMINGHAM, DAVIS WRIGHT TREMAINE L.L.P.

ERIN RILEY, KELLER ROHRBACK L.L.P., SEATTLE, WA

Actuarial Assumptions

- Four lawsuits filed in 12/2018 allege that corporate defined benefit pension plans relied on outdated information, e.g., mortality tables, to calculate alternative forms of benefits. Defendants are: Met Life, US Bank, Pepsico, American Airlines
- Background – pension plans offer normal form of benefit – single life annuity commencing at normal retirement age (normally 65). Most plans offer alternative forms of benefits – retire early, benefits for surviving spouse.
- To calculate alternative forms of benefits, alternative benefits "actuarial equivalent" to normal form of benefit.
- Allegation is that defendants used ***unreasonable*** assumptions to calculate actuarial equivalence of normal form of benefit.
- Defendants have moved to dismiss – no decisions yet.

Actuarial Assumptions

Defense Tips:

- Treas. Regs. – Consistently applied reasonable actuarial assumptions
- ERISA – Actuarial equivalent of a single life annuity
- Can't reduce accrued benefits
- Have discussion with actuary
- Monitor case decisions

DC Plan Fee Litigation

- Typical Defendants:
  - Excessive fees: 1) Plan Sponsor – imprudent selection of funds; 2) Plan Sponsor/ financial institutions for offering proprietary funds; 3) Plan Sponsor / University 403(b)
  - Claims against Service Providers
- Claims in general:
  - Causes of action: breaches of fiduciary duties of prudence & loyalty, and PT claims
  - excessive investment fund fees, administrative and recordkeeping fees, etc.
  - excessively risky alternative investments

DC Plan Fee Litigation

- Current Landscape:
  - Claims against plan sponsor:
    - MTD: some claims *generally* survive, *compare Johnson v. Providence Health & Servs.*, 2018 WL 1427421 (W.D. Wash. Mar. 22, 2018) and *White v. Chevron Corp.*, 2017 WL 2352137 (N.D. Cal. May 31, 2017), aff'd, 2018 WL 5919670 (9th Cir. Nov. 13, 2018).
    - Trial: *Sacerdote v. NYU*, 328 F. Supp. 3d 273 (S.D.N.Y. 2018) (no ERISA violations).
  - Claims against Service Providers:
    - *Santomenno v. Transamerica Life Ins., Co.*, 883 F.3d 833 (9th Cir. 2018).
    - *Teets v. Great-West Life & Annuity Ins. Co.*, No. 18-1019 (10th Cir. Mar. 27, 2019).
    - Fidelity: two recent cases and DOL investigation re. fees charged to mutual funds

DC Plan Fee Litigation

Defense Tips:

- Know all fees that you are paying – contract fees; revenue sharing; float income
- Have fees benchmarked by third party
- Know how fees are allocated – by plan; by fund; per capita
- Have third party monitor performance
- Take minutes of committee meetings
- Have investment guidelines and adhere to them

Employer Stock Held in ESOPs/401(k) Plans

- Following *Fifth Third Bancorp v. Dudenhoeffer*, 134 S.Ct. 2459 (2014), almost all cases dismissed at MTD stage. *See, e.g.*,
  - *Graham v. Fearon*,721 F.App'x 429 (6th Cir. 2018). Dismissal affirmed – finding that disclosure of the negative information might have been more harmful than beneficial due to the risk of market over-reaction.
  - Kopp v. Klein, 894 F.3d 214 (5th Cir. 2018) Dismissal affirmed – finding that no cognizable allegation that public information was not fair assessment of stock's value and disclosure of the negative info might have been more harmful than beneficial.
- But then: *Jander v. Ret. Plans Comm. of IBM*, 910 F.3d 620 (2nd Cir. 2018). Survived Motion to Dismiss – alleged it was imprudent not to disclose the underperformance of a company division based on market studies that early disclosure would have mitigated the eventual decline of the stock.
  - Petition for writ of certiorari filed on 3/4/2019

Employer Stock Held in ESOPs/401(k) Plans

- New stock drop case filed against Boeing related to 737 MAX 8 crashes

Defense Tips:

- Give participants right to divest (prior to age 55) if not an ESOP
- Monitor the stock and keep minutes
- Make third party stock reports available to participants on your web page
- Send educational pieces on diversification to participants

Defined Benefit Litigation

- In 2002, 8th Circuit held that employee did not have standing to sue over alleged mismanagement of their defined benefit pension plan because the plan was fully funded. *Harley v. Minn. Mining & Mfg.*, 284 F.3d 901 (8th Cir. 2002).
- 17 years later…8th Circuit holds same. *Thole v. U.S. Bank*, 873 F.3d 617 (8th Cir. 2018).
- Circuit Split – Second, Third and Sixth Circuits disagree with the Eighth, ruling that a violation of worker's ERISA rights is enough for standing.
- Petition for writ of certiorari filed on 6/22/2018
- On 10/1/2018, Supreme Court asked Solicitor General to file brief…

Defined Benefit Litigation

Defense Tips:

- Standing is a powerful defense to any defined benefit lawsuit
- Western District of Washington has followed the 8th Circuit decision
- Monitor Supreme Court docket

Statute of Limitations

- A claim that an ERISA fiduciary breached duty of prudence must be brought within six years after "the date of the last action which constituted a part of the breach or violation" or within three years after "the earliest date on which the plaintiff had **actual knowledge** of the breach or violation." 29 USC § 1113.
- What constitutes "actual knowledge"?
- The Ninth Circuit held that a worker doesn't automatically develop **actual knowledge** of an ERISA violation when he receives financial documents; the employee has to actually read the documents and get a sense of the type of wrongdoing that occurred. *Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069 (9th Cir. 2018).
- Cert petition filed 2/26/2019

Statute of Limitations

Defense Tips:

- For benefit claims, Plan can have its own limitations period
- Suggest one year from denial of claim
- Add venue clauses so lawsuits can only be filed where you are headquartered
- If Supreme Court reviews, consider additional language based on its decision

Arbitration Clauses

- Can arbitration clauses—in an employment document and/or plan document—stop a worker from filing a fiduciary breach claim under ERISA § 502(a)(2) on behalf of a plan?
- If the arbitration clause includes a class waiver, is the worker precluded from filing a fiduciary breach claim under ERISA § 502(a)(2) for plan-wide relief?
- 9th Circuit held arbitration clause can't stop worker from filing 502(a)(2) claim. *Munro v. U.S.C.*, 896 F.3d 1088 (9th Cir. 2018). Cert petition denied.
- *Dorman v. Charles Schwab & Co.*, 2018 WL 467357 (N.D. Cal.). On appeal to 9th Circuit.

Arbitration Clauses

Defense Tips:

- Mention employee benefit plan in the arbitration clause
- Munro's employment agreement stated claims against the University – claims against the University and any employee benefit plan sponsored by the University
- Place arbitration provision in the plan document
- Consider whether a federal forum without jury is better than arbitration

Burden of Proof

- Who must prove that a fiduciary breach **caused** a loss?
- The 6th, 7th, 9th, 10th and 11th Circuits have held that an ERISA plaintiff bears the burden of proof
- The 1st, 4th, 5th and 8th Circuits have held that an ERISA defendant bears the burden of proof
- *Putnam Investments, LLC v. Brotherston*, 907 F.3d 17 (1st Cir. 2018).
  - In *Putnam*, the plaintiffs alleged that defendants breached their fiduciary duties of loyalty and prudence by offering exclusively proprietary mutual funds in the plan, without consideration of nonproprietary investment alternatives, despite alleged issues with performance and fees. *Putnam* made its way to a bench trial, where the judge refused to hold Putnam liable for having an investment process that was "no paragon of diligence," explaining that the plaintiffs had failed to show any losses because, even without an "objective process," the plan could "still end up with prudent investments, even if it was the result of sheer luck."
  - On appeal, the First Circuit reversed. The First Circuit explained that there are three elements to a breach of prudence claim — "breach, loss, and causation" — and that the plaintiffs had proved the first two elements by showing that the defendants failed to monitor the plan investments independently, and that those plan investments underperformed alternative investments.
  - This left the element of causation. The First Circuit explained that, because the plaintiffs had made a prima facie showing of a violation and loss, the burden shifts to the defendants to disprove causation.
- Petition for writ of certiorari filed on 1/11/2019.

Burden of Proof

Defense Tips:

- Burden of proof goes hand in hand with standing
- The inability to prove a loss is a powerful defense in the 9th Circuit
- If 1st Circuit decision is upheld, there will be more fiduciary litigation as the burden of "disproof" will be on the defendants

Cross Plan Offsets

- Defined: Payment from one plan is reduced by the TPA because of an overpayment made by another plan to the same provider
- Ex.: Carrier processes Employee A's claim of Dr. X and pays $1,000. Later determines that it should have paid $800. But Dr. X refuses to return the money. Carrier processes a similar claim for another company. It pays Dr. X $600, in order to recoup the $200.
- ERISA Violation: Using Plan assets for own benefit
- *Peterson v. UnitedHealth Group, Inc.*, 17-1744 (8th Cir. Jan. 15, 2019). Eighth Circuit ruled that UnitedHealth not allowed to offset overpayments to providers from certain health plans by withholding payments to those providers from other health plans—where offsetting not in plan document and practice may violate ERISA. Cert Petition to be filed.

Cross Plan Offsets

Defense Tips:

- Contact TPA about whether they use this practice
- If so, ask them to stop
- Request an indemnification and hold harmless if they have engaged in this practice

AHP Litigation

State of NY v. *Department of Labor,* 18-1747 (D.D.C. March 28, 2019)

- Expansion of Employer definition to include groups without true commonality of interest was unreasonable
- Expansion to allow self-employed was unreasonable, as those individuals that historically been excluded from ERISA
- Twelve Jurisdictions were involved: California, Delaware, D.C. , Kentucky, Maryland, Mass., New Jersey, New York, Oregon, Penn., Virginia and Washington
- Regulation was a pretext for undermining the ACA
- Loss of revenue in the individual insurance market and increased regulatory cost gave States standing to sue
- The regulations had a severability provision; therefore, remand back to see whether some of regulations could be saved
- More likely an appeal or a legislative fix. We haven't seen the last of this regulation.

Mental Health Parity

- Mental Health Parity Act of 1996 ("MHPA 96")
- Paul Wellstone and Pete Domenic:
  Mental Health Parity and Addition Equity Act of 2008 ("MHPAEA")
- MHPAEA Regulations published July 1, 2014
- 2018 DOL published self-compliance tool kit and FAQs
- Governs group health plans covering more than 50 employees

Mental Health Parity – Prohibitions

- Prohibits financial requirements (coinsurance and copays) that are more restrictive than financial requirements applied to substantially all medical/surgical benefits (limitation must be applied to 2/3 of all medical/surgical benefits)
- Prohibits treatment limits (such as visits or pre-certification) that are more restrictive than that applied to substantially all medical/surgical benefits
- Does not mandate coverage but if coverage provided must be in line with analogous medical/surgical conditions

Mental Health Parity – Litigation

- Blanket exclusion of Autism Spectrum Disorder when other experimental or behavioral treatments are provided
- Denial of Wilderness Therapy to treat mental health and substance abuse disorders when residential treatment for other conditions permitted
- Exclusion of residential treatment centers for medical health when not imposing such conditions on medical/surgical conditions
- Plan provides for lower reimbursement rates for mental health providers

Mental Health Parity (cont'd.)

Defense Tips:

- Review Plan Document
- Does it contain different treatment limitations, certification requirements or financial limitations that do not apply to 2/3 of your medical/surgical benefits?
- If so, discuss with your Plan Administrator

Fiduciary Rule

- In 2016, the DOL replaced a 1975 five-part test identifying the conditions under which an investment adviser would be deemed a plan fiduciary.
- Courts initially rejected challenges to the fiduciary rule…
- However, on March 15, 2018, a split panel in the Fifth Circuit vacated the rule *in toto*, holding that Congress had not given the DOL the authority to "expand[] the scope of DOL regulation" to the individual retirement account market, as the rule purported to do. The Fifth Circuit's analysis largely focused on whether the definition of "investment advice" provided by the rule conflicted with the term "investment advice" used in ERISA (29 U.S.C. § 1002). *Chamber of Commerce v. Department of Labor*, 885 F.3d 360 (5th Cir. 2018).
- DOL did not challenge the Fifth Circuit's ruling, and mandate issued on June 21, 2018 officially vacating the fiduciary rule.
- What now?
- DOL: issue revised fiduciary rule in 9/2019
- SEC: proposed standard of care for broker-dealers and investment advisors
- States: Nevada, Connecticut, NY, NJ, Maryland, Illinois…

Fiduciary Rule

Defense Tips:

- Even though the DOL rule failed, it is now easier to have your consultants agree to fiduciary status
- Make sure your Claims Administrators acknowledge fiduciary status, including fiduciary status on appeal
- Make sure your Investment Consultants acknowledge fiduciary status when you hire them to benchmark performance

Summary of Defense Tips:

- Adopt written procedures and guidelines
- Review Plan documents for problem areas
- Discuss areas of litigation with your attorney and actuary
- Adopt limitation periods and venue clauses
- Handle every dispute as a claim and utilize claim review procedures
- Establish an administrative record for review under an abuse of discretion standard of review
- Don't ignore plaintiff's counsel until after a lawsuit is filed – if they request documents, respond and subject such claims to your claim and appeal process

Questions?