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Case Law Update

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The Topics

1. Relevant Documents
2. The Forum
3. Barriers to a Judicial Hearing
4. Standard of Review
5. Substantive Issues

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Relevant Documents

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Access to Relevant Documents

- *Browe v. CTC Corporation*, 2018 WL 5095677 (D. Vt. Oct. 18, 2018).
  - Plan terminated in 2004 and used existing plan funds to pay business and operating expenses while failing to provide disclosures to participants or preserve documents.
  - In granting statutory penalties to the plaintiff, the District Court held that in light of the totality of the circumstances, it agreed that there should be a consequence for the Plan Administrators' failure to comply with ERISA's reporting and disclosure requirements.
  - The plaintiffs' suggestion of a statutory penalty of $766,500 per Plan Participant is exorbitant and unsupported by the factual record.
  - The court awarded $2,000 in statutory penalties to be paid by the defendants in addition to the Restoration Award of $350k.

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Misrepresentation by Omission in SPD

- *Pearce v. Chrysler Grp. LLC Pension Plan*, 893 F.3d 339 (6th Cir. 2018).
  - Relying on the SPD and conversations with the employer, the plaintiff rejected a buyout offer on the basis that he would remain eligible for supplemental early retirement benefits.
  - The plaintiff was terminated after rejecting the buyout offer, and then his claim for early retirement benefits was denied based on the pension plan's unambiguous terms excluding vested terminated participants.
  - The Court held that because the plaintiff did not have access to the pension plan and the employer "had the advantage in the information asymmetry, consistently and repeatedly directed [the plaintiff] to the SPD", and the SPD "misleadingly omitted the exclusion for vested terminated participants", and the plaintiff relied on the SPD to his detriment, he could assert a claim for reformation under ERISA Section 502(a)(3).

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Non-SPD Representations That Are Inconsistent With Plan Documents

- *Schuman v. Microchip Tech. Inc.*, 302 F. Supp. 3d 1101, 1116 (N.D. Cal. 2018).
  - The plaintiffs alleged that the defendant breached fiduciary duties by telling employees that the plan had expired and therefore, the defendants had no obligation to pay benefits provided for under the Plan.
  - As a result of the defendant's statements, employees were unaware that the Plan was still in existence and that they had the ability to file a claim for benefits and enforce their rights under ERISA.
  - The court held that the plaintiffs sufficiently alleged a breach of fiduciary duty, and the claim survived a motion to dismiss.

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The Forum:
Where is the Case Heard?

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Forum Selection Clauses

- *Robertson v. Pfizer Ret. Comm.*, No. 18-0246, 2018 BL 269276, 2018 EBC 269276, 2018 WL 3618248 (E.D. Pa. July 27, 2018), *sub. nom. Robertson v. US District Court for E. District of PA, pet. for cert. filed* (U.S. Apr. 23, 2019) (No. 18-1341).
  - Issue: whether benefit plans governed by ERISA can force lawsuits over plan benefits into the company's preferred court. At issue the retirement package of a former Pfizer Inc. executive.
  - Since 2014, the Third, Sixth, Seventh, and Eighth Circuits have all upheld these clauses from ERISA challenges.
  - The U.S. Labor Department has long taken the opposite view, filing multiple supporting briefs arguing against these clauses.
  - Eleven law professors filed an amicus in support of the petition arguing that companies cannot unilaterally limit the courts in which workers can sue over their employee benefits because it violated ERISA's policy of giving benefit plan participants "ready access to the Federal courts."
  - Response due 6/27/19.

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Forum Selection Clauses

- *Kelly v. Liberty Life Assurance Co.*, No. 17-139-DLB, 2018 U.S. Dist. LEXIS 11895, at *8-9 (E.D. Ky. Jan. 25, 2018).
  - SPD and plan had different language concerning forum selection
  - The plan document was silent on forum except to say that one-year limitations period must be applied "in any forum where suit is initiated," while the SPD said any suit following a benefit denial shall be initiated "in a state or federal court located in Allegheny County, Pennsylvania.
  - Court found clauses were complimentary, not in conflict

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Arbitration

- *Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018).
  - The Ninth Circuit refused to compel arbitration because fiduciary breach claims are, by their nature, plan claims and the plan did not consent to arbitrate.
  - Petition for rehearing en banc was filed, arguing that the decision flips the Supreme Court's presumption in favor of arbitrability on its head and treats section 502(a)(2) claims as plan-wide claims that cannot be arbitrated without the plan's consent. Rehearing was denied.

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Arbitration

- *Brown v. Wilmington Tr.*, N.A. , 2018 BL 262035, S.D. Ohio, No. 3:17-cv-00250, 7/24/18 (order denying defendant's motion to compel arbitration)
  - Plaintiff did not have to arbitrate her ESOP lawsuit challenging a $165 million stock sale to the plan.
  - The transaction at issue—the Henny Penny stock sale to its employee stock ownership plan for $165 million—took place in 2014. The arbitration clause was added more than two years later, in January 2017. During this time, the investor had already left her employment at Henny Penny and completely cashed out of the plan.
  - The addition of the arbitration clause doesn't necessarily bind individuals who have ceased all participation in the plan and whose cause of action accrued before the modification took place.
  - Rice rejected the arguments of Henny Penny and Wilmington Trust that because the fiduciary breach claims belong to the plan, and the plan consented to arbitration, it didn't matter that the investor didn't personally agree to arbitrate the claims.

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Arbitration

- *Dorman v. Charles Schwab & Co., Inc.*, 2018 WL 467357 (N.D. Cal. Jan. 18, 2018), on appeal to Ninth Circuit, Case No. 18-15281, argued June 14, 2019.
  - Whether court should compel arbitration of a proposed class action accusing Charles Schwab of loading its employees' retirement plan with its own high-cost funds to profit from fees.
  - A former employee filed a lawsuit on behalf of a plan under §§ 502(a)(2)-(3). The plan document contained an arbitration clause, which included language waiving participants' right to proceed via class action.
  - The court held: (1) because arbitration clause had been unilaterally adopted by the plan sponsor, a plan document drafted by fiduciaries "should not prevent plan participants and beneficiaries from vindicating their rights in court," and
  - (2) Arbitration clause in the plan document was unenforceable because the plan document was only executed after the plaintiff had received a full distribution of his account balance and ceased participation in the plan. The court reasoned that it would be inequitable to enforce an arbitration provision that was only included in the plan after the plaintiff stopped participating, and that to hold otherwise "...would allow a plan defendant to amend the plan documents unilaterally at any time, even after a participant has brought suit against the defendant, and put the participant at a disadvantage."

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Barriers to a Judicial Hearing

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Accrual of Statute of Limitations: Supreme Court Preview

- *Intel Corp. Investment Policy Committee v. Sulyma,* 909 F.3d 1069 (9th Cir. 2018), *cert. granted,* 2019 US Lexis 3991 (U.S. June 10, 2019) (No. 18-1116).
  - ***Issue:*** Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

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Standing: Supreme Court Preview

- *Thole v. U.S. Bank, N.A., pet. for cert. filed,* (U.S. Jan. 11, 2019) (No. 18-926).
  - ***Issues:*** (1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof; and (2) whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof.
  - Solicitor recommended granting cert on question 2
  - Set for conference June 20

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Exhaustion of Internal Claims and Procedures

- *Elbling v. Crawford & Co.*, No. 16cv2951-L(KSC), 2018 BL 111185 (S.D. Cal. Mar. 28, 2018).
  - Exhaustion of the internal claims and appeals process was not required prior to filing suit because of a pension plan's permissive rather than mandatory plan language.
  - The plan stated that "within 60 days after receiving notice from the Committee that a claim has been denied, in whole or in part, a Claimant … <u>may</u> file with the Committee a written request for review of the denial of the claim."

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Standard of Review

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Standard of Review: De novo Review Applies to Both Law and Fact Conclusions.

- *Ariana M. v. Humana Health Plan of Tex., Inc.*, 884 F.3d 246 (5th Cir. 2018)
- Issue: Where the plan documents do not grant the administrator discretion, what standard will a court employ when reviewing adverse benefit determinations?
- 8 circuits have held that a de novo standard of review is applied to all aspects of the claim review.
- Fifth Circuit had been the de novo standard will apply only to legal interpretations of plan terms, while the abuse of discretion standard will apply to administrators' factual determinations.
- The Fifth Circuit reversed its precedent in an 8-6 *en banc* hearing to achieve uniformity with other circuits

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Standard of Review: Delegating Discretion to Decision Maker.

- *Miller v. PNC Fin. Serv. Group, Inc.*, 278 F. Supp.3d 1333 (S.D. Fla. 2017).
  - Regardless of which party has the burden of showing that abuse of discretion is the proper standard of review. Here Plan failed to properly delegate its discretionary authority to claims administrator.
  - Claims administrator does not have the "full and exclusive authority to determine all questions of coverage and eligibility," the "full power" to construe ambiguous provisions, or full discretion to "determine whether a claimant is eligible for benefits."

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Standard of Review: Conflict

- *Kirkendall v. Halliburton, Inc.*, 760 Fed. Appx. 61 (2d Cir. 2019).
  - Plaintiffs, a group of participants who continued with the business after the sale of business and eventually reached the required early retirement age, argued that their service after the sale should count because they continued working for the same business, *i.e.*, whether plan participants could "grow into" early retirement eligibility for benefits they accrued before the plan sponsor sold their employer's business.
  - The plan's benefits committee determined that participants could not earn service credit after the sale because they were no longer employed by an entity related to the plan sponsor.
  - Plaintiffs' alleged the defendant suffered from a "categorical potential conflict of interest"—because it both funded the plan and was the claim's decision-maker. The court held that the conflict did not affect the application of the abuse of discretion standard of review in the absence of a showing by the plaintiffs that the conflict actually affected the plan administrator's decision-making.
  - Applying that standard of review, the court concluded that it could not overturn the benefits committee's decision denying the claim, even though the Court believed the plaintiffs' reading of the plan language was "more reasonable."

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Substantive Issues

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Who's Covered: Classification of Workers

- *Jammal v. Am. Family Ins. Grp.*, 2017 U.S. Dist. LEXIS 120684 (N.D. Ohio 2017), *rev'd*, 914 F.3d 449 (6th Cir. 2019) (applying *Darden* factors, reversed lower court finding insurance agents properly classified as independent contractors).
- *Dynamex Operations West, Inc. v. Superior Court of Los Angeles*, No. S222732 (Cal. Sup. Ct. Apr. 30, 2018) (for purposes of wage orders, presumption that workers are employees).
- *Uber Technologies, Inc.*, No. 596722 (NY Unemployment Insurance Appeal Board July 12, 2018) (for unemployment purposes, Uber drivers are employees).

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Equitable Remedies and Recoupment

- *Carpenter Tech. Corp. v. Weida*, 300 F. Supp. 3d 663 (E.D. Pa. 2018).
  - A participant in a healthcare plan that contained a subrogation clause, was injured in car accident where the Plan paid the participant's medical bills and the participant received a settlement from the other driver.
  - The Court found that since the plaintiff immediately deposited the settlement funds into a joint bank account, shared with his wife, and the funds were dissipated on living expenses, the Plan was not able to place an equitable lien on the settlement funds because they were no longer traceable.
  - The Court held that the moment the settlement proceeds were deposited into the joint account was when they were converted from specifically identifiable funds to joint property of a married couple owned by tenancy by the entireties.

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Preemption: Slayer Statute

- *Laborers' Pension Fund v. Miscevic*, 880 F.3d 927, 931–33, 63 EB Cases 1668 (7th Cir. 2018).
  - Spouse killed husband who was entitled to retirement benefit. Plan filed interpleader action to determine who is the proper beneficiary.
  - "A person who intentionally and unjustifiably causes the death of another shall not receive any property, benefit, or other interest by reason of the death."
  - ERISA does not preempt an Illinois slayer statute that barred a widow who killed her husband from receiving pension benefits under his plan, noting that *Egelhoff* seems to suggest that ERISA does not preempt state slayer statutes.

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Plan Assets: Participant Contributions Withheld By Employer

- *Wis. Masons 401(k) Fund v. Froode*, No. 16-CV-676-JDP, 2018 WL 1401205 (W.D. Wis. Mar. 19, 2018).
  - Defendant was responsible for remitting employee contributions to 401(k) plan and union dues to union, but was late in remitting contributions (and failed to remit dues). Pursuant to CBA, interest was owed on the late contributions, but defendant failed to pay it.
  - Funds sued to recover the contributions and interest on the basis of breach of fiduciary to the extent that he exercised any authority or control respecting management or disposition of plan assets.
  - Unpaid contributions, actually withheld from wages by the employer, to which the Funds are legally entitled by the governing documents, are 'plan assets' giving rise to fiduciary status, but that amounts due and owing to the Funds that were never withheld by the employer such as contractually assessed interest are not.

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Does the Use of "Old" Mortality Tables Deprive Participants of Benefits?

- Under ERISA and the Code, benefits payable to a married participant under a defined benefit pension plan generally must be paid in the form of a "joint-and-survivor annuity," which means that the participant is paid a benefit until the participant dies, and the participant's surviving spouse receives at least 50% of the participant's benefit for the remainder of the spouse's life. Pension plans typically offer other optional forms of benefits.
- ERISA generally requires that all forms of benefits be no less than the amount that is "actuarially equivalent" to a single life annuity. To meet this actuarial equivalence requirement, plans use both interest rate and mortality assumptions to convert the baseline single life annuity benefit to another form of benefit. The mortality assumption at issue in these lawsuits measures the anticipated life expectancy of a participant population at a given age.

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Does the Use of "Old" Mortality Tables Deprive Participants of Benefits?

- When calculating lump sum benefits, ERISA requires that pension plans use the Treasury Assumptions. The Treasury mortality tables are prescribed by regulation by the Treasury Secretary and are required to be revised at least every 10 years to reflect "the actual experience of pension plans and projected trends in such experience."
- With respect to calculation of other optional forms of benefits, ERISA does not prescribe particular actuarial assumptions. Instead, the plan document typically provides the interest and mortality assumptions and/or a "conversion factor"— the factor resulting from the combination of the interest and mortality assumptions— to be used to convert benefits from a single life annuity to the elected optional form. These plan-governed assumptions, which were typically developed in consultation with the plan's actuary, are used to calculate benefits such as joint-and-survivor and preretirement annuity benefits.

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Does the Use of "Old" Mortality Tables Deprive Participants of Benefits?

- The plaintiffs challenge the use of mortality tables that are older than the mortality tables currently prescribed by the Treasury Secretary for lump sum, etc. payouts. For example, some plans employ 1971 and 1984 mortality tables used by the insurance industry.
- Plaintiffs allege that these tables are "outdated" and do not reflect significant mortality improvements since the tables were developed. The result, is that plaintiffs receive lower benefits than those to which they would be entitled if the plans used "reasonable" actuarial assumptions, *i.e.*, the Treasury Assumptions.
- Plaintiffs maintain that this result violates ERISA's requirements that normal retirement benefits be nonforfeitable and that optional forms of benefits be at least actuarially equivalent to a participant's single life annuity benefit. The plaintiffs seek payment of the difference between their benefits calculated using the assumptions provided under the plan versus using the assumptions prescribed under the Treasury regulations for lump sums. The aggregate amount of this difference is alleged to be in the tens of millions of dollars.

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Does the Use of "Old" Mortality Tables Deprive Participants of Benefits?

- Defendants have filed motions to dismiss in four of the seven cases, and additional motions are expected in the remaining three cases. While the defendants advance many arguments, common themes, and the crux of many of the defendants' positions are that ERISA does not require any specific actuarial assumptions for the optional forms of benefits at issue in these cases, and that the Treasury regulations' "reasonableness" requirement that the plaintiffs rely on is satisfied and/or is not applicable here.
- Defendants include MetLife, American Airlines, PepsiCo, U.S. Bancorp, Rockwell Automation, Anheuser-Busch, and Huntington Ingalls.

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Suspension of Benefits

- *Cohen v. Retail, Wholesale & Dep't Store Int'l Union & Indus. Pension Plan*, No. CV 18-1430, 2019 WL 2357584 (E.D. Pa. June 4, 2019).
  - Plaintiff worked as a bakery manager for Pathmark Stores and participated in the Defendant Pension Plan as a union member. When Pathmark's bankruptcy led to the closure of his store, Plaintiff began working as an assistant bakery manager for Giant Supermarkets, making less money than he was before. He applied for and was denied retirement benefits due to his current employment.
  - The court found that the decision to deny his benefits was not arbitrary and capricious based upon the Trust terms and his disqualifying employment in the jurisdiction of the Union and in the same, trade, craft or occupation.
  - The fact that Pathmark filed for bankruptcy is irrelevant to the analysis. The purpose of reemployment suspension clauses is not intended to prohibit competition with the former employer. If Plaintiff could collect retirement benefits in addition to his wages from Giant, that would subsidize Giant's low-wage hiring practices and suppress wages for other plan participants. The court also found that the Board's structural conflict and the procedural irregularity of making a late decision did not make their decision arbitrary and capricious.

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Suspension of Benefits

- *Meakin v. California Field Ironworkers Pension Trust*, No. 18-15216, __F.App'x__, 2019 WL 2375194 (9th Cir. June 5, 2019).
  - In 2018, the Trustees approved Plaintiff's "Golden 85" pension application as well as his work application to continue working for the same employer in a different position. In 2011, the Trustees entered into a voluntary compliance plan with the IRS and adopted procedures that would cease improper distributions to putative retirees who never actually retired. Subsequently, the Trustees denied Meakin's pension because he had not completely refrained from employment or activity in the construction industry.
  - Meakin challenged the denial of benefits, arguing that the denial was unlawful as an impermissible cutback of an accrued benefit or because of equitable estoppel.
  - The court held that the new interpretation was not unreasonable; "administrators are not shackled to original interpretations." The interpretation did not constitute a cutback because it did not involve a new condition, rather enforcement of an existing condition. Equitable estoppel does not apply because there are no "extraordinary circumstances" and such relief would contradict written plan provisions since Plaintiff never retired and payment of the pension would contradict written terms of the Plan.

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ERISA's Duty To Inform: Distinguishing Between Existing and Possible Benefits

- *Kovarikova v. Wellspan Good Samaritan Hospital*, No. 1:15-CV-2218, 2018 WL 2095700 (M.D. Pa. May 7, 2018).
  - Plaintiff alleged that defendants misrepresented to her that her retirement benefit plan would not change or would only change to her advantage after the residency program that she participated in was terminated, and that she relied on that misrepresentation in suspending her search for a new job.
  - On reconsideration of its prior ruling, the district court realized that it had misapplied Third Circuit precedent as it pertains to the duty to inform. It thus reversed course and ruled that while plan fiduciaries have an affirmative duty to ensure that participants inquiring about *existing* benefits receive relevant information, they do not have a duty to inform participants inquiring about *future* benefits of possible changes to the plan unless they are under serious consideration at the time of the inquiry.
  - Because there was no evidence that plaintiff was misinformed about *existing* benefits at any time, or that changes to future benefits were under serious consideration at the time the inquiries were made, they were not material misrepresentations, and the court granted summary judgment dismissing the case.

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ERISA's Duty To Inform: Misrepresentation

- *In re DeRogatis*, 904 F.3d 174 (2d Cir. 2018), *on remand*, No. 14 Civ. 8863 (CM) (S.D.N.Y. June 13, 2019).
  - A beneficiary brought suit against plan trustees for benefits and breach of fiduciary duties of loyalty and prudence involving misrepresentations made to a participant and his beneficiary before the participant's death regarding how and when they should apply for benefits under a pension plan and a welfare fund. The district court granted summary judgment to defendants, and the beneficiary appealed to the Second Circuit.
  - With respect to the pension plan at issue, the Second Circuit affirmed summary judgment because the SPD clearly communicated the benefit eligibility requirements.
  - With respect to the welfare fund, the Second Circuit reversed the district court's decision finding that the beneficiary may be able to show a fiduciary breach. The Second Circuit ruled that drawing all reasonable inferences in the beneficiary's favor, the record supported the assertion that neither the plan documents nor the fiduciary's agents clearly explained how the participant's retirement would impact health care coverage given a "murky" SPD, a certain letter, and other statements made.
  - On remand, the district court held ERISA "allows Plaintiff to 'surcharge' the trustees of one ERISA plan for a breach of trust that caused her to lose benefits under another, related plan.

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Burden of Proof in Fiduciary Breach Claim: Supreme Court Preview

- *Putnam Investments, LLC v. Brotherston,* 907 F.3d 17 (1st Cir. 2018), *pet. for cert. filed,* (U.S. Jan. 11, 2019) (No. 18-926).
  - (1) Whether an ERISA plaintiff bears the burden of proving that "losses to the plan result[ed] from" a fiduciary breach, as the U.S. Courts of Appeals for the 2nd, 6th, 7th, 9th, 10th and 11th Circuits have held, or whether ERISA defendants bear the burden of disproving loss causation, as the U.S. Court of Appeals for the 1st Circuit concluded, joining the U.S. Courts of Appeals for the 4th, 5th and 8th Circuits; and
  - (2) whether, as the U.S. Court of Appeals for the 1st Circuit concluded, showing that particular investment options did not perform as well as a set of index funds, selected by the plaintiffs with the benefit of hindsight, suffices as a matter of law to establish "losses to the plan."
- CVSG on 4/22/19.

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Employer Stock Claims: Supreme Court Preview

- *Retirement Plans Committee of IBM v. Jander,* 910 F. 3d 620 (2d Cir. 2018), *cert. granted*, No. 18-1165 (June 3, 2019).
  - Whether ERISA plaintiffs can survive a motion to dismiss when they make general allegations that the costs of undisclosed fraud grow over time?
  - Under the Supreme Court's 2014 decision in *Fifth Third Bancorp. v. Dudenhoffer,* a plaintiff bringing such a claim must allege that a fiduciary in the defendant's position could not have concluded that taking a different action "would do more harm than good to the fund."
  - This case alleges that the fiduciaries of IBM's stock-ownership plans violated their duty of prudence under ERISA by continuing to invest the plan's funds in IBM's stock even though they knew the stock's market price was artificially inflated.

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Robo-Investment Advice

- Record keepers for large 401(k) plans have been defending litigation over investment advice provided by the Financial Engines investment advice algorithm. (This kind of arrangement is commonly referred to as "robo-advice.") The lawsuits claim that fees collected by record keepers for investment advice were unreasonably high, because the fees exceeded the amount actually paid to Financial Engines. The suits claimed that the record keepers did not provide services of sufficient value to justify retaining the spread between the amount charged and the amount actually paid to Financial Engines.
- Four district courts ruled that the record keepers were not acting as fiduciaries in setting fees at a level that allowed them to retain an amount in excess of what was paid to Financial Engines and thus plaintiffs could not proceed with claims that the record keepers breached fiduciary duties or engaged in prohibited self-dealing.
- In three of these cases, the courts gave the plaintiffs a chance to replead their claims. The courts noted the responsibility of plan sponsors or their designees to review fee arrangements for investment advice (as well as other services) to ensure that the total amount paid is reasonable.
- *Patrico v. Voya Financial, Inc.*, No. 16-7070, 2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018) (denying leave to amend); *Scott v. Aon Hewitt Financial Advisors, LLC, et al.*, No. 17 C 679, 2018 WL 1384300 (N.D. Ill. Mar. 19, 2018); *Chendes v. Xerox HR Solutions, LLC*, 2017 WL 4698970 (E.D. Mich. Oct. 19, 2017); and *Fleming v. Fid. Mgmt. Tr. Co.*, No. 16-CV-10918-ADB, 2017 WL 4225624 (D. Mass. Sept. 22, 2017).

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State Payroll Deduction Programs

- Numerous states are helping individuals increase their retirement security by providing access to simple, low-cost, retirement savings programs through an employer.
  - Payroll deduction IRAs, Multiple Employer Plans, Marketplace Retirement Programs
- Payroll Deduction IRAs have generated the most litigation.
  - *ERIC v. Read*, Case No. 3:17-cv-01605-YY (D. Ore. 2018).
    - Challenging required reporting by employers which offered retirement plans.
  - *Howard Jarvis Taxpayers Association, et al. vs. the California Secure Choice Retirement Savings Program*, No. 2:18-cv-01584-MCE-KJN, 2019 BL 112929 (E.D. Cal. Mar. 28, 2019).
    - ERISA neither regulates nor preempts the CalSavers program.
    - Program is not an ERISA covered plan.

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State Fiduciary Laws

- The industry fought tooth and nail against the DOL fiduciary rule and won its case.
- The states have been saying – hmmm, I don't think so.
  - Nevada imposes a fiduciary duty on broker-dealers, sales representatives, and investment advisers who give investment advice.
  - New York imposes a "best interest" standard on insurance brokers" sale of life insurance and annuity contracts.
  - New Jersey proposal to "impose a fiduciary duty on all New Jersey investment professionals, requiring them to place their clients' interests above their own when recommending investments."
  - Massachusetts is proposing a "Table of Fees for Services" requirement.
- The SEC best interest regulation package squarely tees up the preemption issue for the judiciary.

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Church Plans

- Under *Advocate Health Care Network v. Stapleton*, 137 S. Ct. 1652, 1663 (2017), a plan maintained by a principal-purpose organization "qualifies as a 'church plan,' regardless of who established it."
- The Tenth Circuit subsequently held that a plan was "maintained" by a principal-purpose organization where it was administered by an internal benefits committee of a church-associated hospital that sponsored the plan. *Medina v. Catholic Health Initiatives*, 877 F.3d 1213, 1224–27 (10th Cir. 2017).
- District courts have reached inconsistent conclusions on these issues. *Compare Smith v. OSF Healthcare Sys.*, 349 F. Supp. 3d 733, 740–43 (S.D. Ill. 2018) (following *Medina*), and *Sanzone v. Mercy Health*, 326 F. Supp. 3d 795, 802–06 (E.D. Mo. 2018) (same), *with Rollins v. Dignity Health*, 338 F. Supp. 3d 1025, 1035–37 (N.D. Cal. 2018) (holding, on a motion to dismiss, that it is plausible the requirement that a church plan be "maintained" by a principal-purpose organization is not satisfied were a plan is merely administered by an internal committee of a hospital).

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Still
No Jury Trial

- *Tracey v. Massachusetts,* 760 Fed. Appx. 61, 2019 EBC (2d Cir. 2019).
  - Jury demand in a case alleging that the MIT 401(k) plan fiduciaries breached their duties by charging unreasonable administrative and management fees, engaging in prohibited transactions and failing to monitor those to whom the fiduciaries delegated their responsibilities.
  - The court held that plaintiffs had no Seventh Amendment right to a jury trial because actions under ERISA to remedy alleged violations of fiduciary duties are equitable rather than legal in nature.
  - Also relied on the "great weight of authority" concluding that claims by plan participants against plan fiduciaries are analogous to claims against trustees typically heard only in a court of equity.

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