U.S. Administration on Aging
Pension Counseling & Information Program
2021 National Training Conference
Presented by
The Pension Rights Center

CASE LAW UPDATE

October 29, 2021

Elizabeth Hopkins, Esq.
Kantor & Kantor LLC

The Topics

- Standing to Sue
- Excessive Fees and Investment Mismanagement
- Arbitration
- Recalculation of Benefits
- Statute of Limitations
- Venue and Plan Forum Selection Clauses

STANDING TO SUE

- ERISA broadly empowers plan participants and beneficiaries to sue for benefits, for losses to the plan and for injunctive and other appropriate equitable relief.

- But Article III of the U.S. Constitution limits the jurisdiction of federal courts to cases and controversies.

Standing: *Thole v. U.S. Bank*, (2020)

- Retirees who were participants in a defined benefit pension plan brought suit alleging fiduciary breaches cause $750 million in plan losses
- Losses cause the plan to become underfunded, but after being sued, U.S. Bank shored up the funding status.
- Court held that because participants had been paid all of their pension benefits to date, they had not suffered an “injury in fact: and thus lacked Article III standing to sue.

Post-Thole Standing Decisions

- *Scott v. UnitedHealth Group, Inc.*, 2021 WL 2018839 (D. Minn. May 20, 2021) -- No standing where cross-plan offsetting caused injury to plans, not participants.
- *Boley v. Universal Health Servs., Inc.*, 498 F. Supp. 3d 715 (E.D. Pa. 2020) – Standing where losses alleged in defined contribution accounts.
- *In re Omnicom ERISA Litig.*, 2021 WL 3292487 (S.D.N.Y. Aug. 2,2021) – Same for funds in which plaintiffs were invested (but not for funds not invested in)
- *Gonzalez De Fuente v. Preferred Home Care of N.Y.*, 858 Fed. App'x 432 (2021) – No standing to challenge mismanagement of healthcare plan where participants received all their promised healthcare benefits.

Excessive Fees and Plan Mismanagement

- *Hughes v. Northwestern University*, No. 19-1401 (S. Ct.)
  - Participants in two 403(b) defined contribution pension plans offered by Northwestern sued alleging that fiduciaries breached their duties by paying retail rather than institutional fees for mutual funds and failed to negotiate competitive recordkeeping fees, again considering the plan size.
  - District court held that participants failed to plausibly allege a breach because participants could have chosen other investment options, and Seventh Circuit affirmed.
  - Government filed brief supporting cert. and supported Plaintiffs on merits.
  - Question in Supreme Court is whether allegations that plan paid fees that substantially exceeded those in available alternative investments sufficient to state a claim for breach of fiduciary duty.
  - Argument on December 6, 2021.

Other Plan Mismanagement Issues

- *In re Quest Diagnostics Inc. ERISA Litigation*, No. 20-07936, 2021 WL 1783274 (D.N.J. May 4, 2021) – Stated a claim where alleged that funds underperformed benchmarks by 427 and 801 basis points.
- *Mator v. Wesco Distribution Inc.*, No. 2:21-CV-00403-MJH, 2021 WL 4523491 (W.D. Pa. Oct. 4, 2021) – Failed to state an excessive fee case where complaint failed to provide meaningful benchmarks and failed to specify level of services for fees.
- *Forman v. TriHealth Inc.*, No. 1:19-cv-613, 2021 WL 4346764 (S.D. Ohio Sept. 24, 2021) – Failed to state excessive fee and underperformance case where failed to provide comparable benchmarks and underperformance was very small.

One More Plan Mismanagement Case

- *Reetz v. Lowe's Companies, Inc.*, No. 5:18-CV-00075-KDB-DCK, 2021 WL 4771535 (W.D.N.C. Oct. 12, 2021) – After bench trial, judge held that investment manager (Aon Hewitt) did not commit any fiduciary breaches even though it used its position to cross-sell its services to the plan and to recommend and maintain a newly form Aon fund even though the fund did very poorly year after year.

Arbitration

Background:

- *Dorman v. Charles Schwab*, 934 F.3d 1107 (9th Cir. 2019) – Holding that because arbitration provision was in plan document, plan had consented to arbitration and fiduciary breach claims brought by participant in defined contribution plan were subject to provision.
- Munro v. Univ. of S. Cal., 896 F.3d 1088 (9th Cir. 2018) – Holding that because arbitration agreement was in individual employment agreement and not in plan document, it was not agreed to by plan and was inapplicable to fiduciary breach claim for plan losses.

Arbitration

More Recent Cases:

- *Henry v. Wilmington Trust*, No. 1:2019cv01925, 2021 WL 4133622 (D. Del. Sept. 10, 2021) – Arbitration provision added many years after named plaintiffs ceased employment was inapplicable to class action alleging that ESOP fiduciaries breached their duties by overpaying for company stock.
- *American Family Life Assur. Co. of N.Y. v. Baker*, No. 20-1435, 2021 WL 772281 (2d Cir. March 1, 2021) – Requiring arbitration by former employees under a provision that excluded ERISA claims from the scope of arbitration.

Arbitration

- *Hursh v. DST Sys., Inc.*, No. 4:21-mc-09017, 2021 WL 4526849 (W.D. Mo. Oct. 4, 2021) and *Eisenberger v. DST Sys., Inc.*, No. 4:21-cv-09022, 2021 WL 4710820 (W.D. Mo. Oct. 8, 2021)
  - Following fiduciary breach lawsuit by 401(k) participants, DST argued that claims were subject to mandatory arbitration and court in Missouri agreed. Hundreds arbitrated their claims and obtained awards in their favor.
  - Some DST employees filed suit in New York and that court held the arbitration provision did not cover fiduciary breach claims and certified a class action.
  - DST then sought to get out of the arbitration awards, arguing that claims were not arbitrable after all. Court said no go DST: you asked for it, you got it.

Recalculation of Benefits

- *Bafford v. Northrop Grumman Corp.*, 994 F.3d 1020 (9th Cir. 2021)
  - Two participants in NG Pension Plan, who had benefits recalculated downward by more than 60% after retirement, brought class action claiming fiduciary breaches by fiduciaries at NG and by Alight, the TPA, and negligence under state-law by Alight.
  - District court dismissed entire case holding that calculation of benefits is not fiduciary activity and state-law claims against Alight were preempted by ERISA regardless of whether Alight was a fiduciary.

Recalculation of Benefits: *Bafford*

- Ninth Circuit affirmed in part, reversed in part:
  - Agreed that calculation of benefits is not fiduciary activity, relying on DOL IB.
  - Distinguished *Sullivan-Mestecky v. Verizon Communications Inc.*, 961 F.3d 91 (1st Cir. 2020), which concluded that a participant could sue an employer for fiduciary breach based on the imputed negligence of the ministerial benefits administrator because entities act as fiduciaries where they communicate with plan members about benefits.
    - Ninth Circuit said *Sullivan-Mestecky* was limited to communications through written plan materials, like SPDs, or through individual consultations with benefit counselors.
  - Reversed district court on claims against the plan administrator for failure to provide accurate pension benefit statements.
  - Reversed district court on state-law claims: ERISA does not preempt negligence and misrepresentation claims against Alight as a non-fiduciary.

Recalculation of Benefits: Other Recent Cases

- *Mabry v. ConocoPhillips Co.*, 2021 WL 2805358 (D. Alaska July 6, 2021): Following *Bafford* court concludes that state-law claims were not preempted and allows plaintiffs to amend complaint to assert claim for failure to provide pension benefit statements.
- *Wallace v. International Paper Co.*, 509 F. Supp. 3d 1045 (W.D. Tenn. 2020): Allowing both ERISA and state-law claims to go forward against both International Paper and Alight for miscalculation of benefits and other misstatements.
- Other cases holding that *Bafford* defeats ERISA fiduciary breach claims for miscalculations but not state-law claims: *Morris v. Aetna Life Ins.*, 2021 WL 3509553 (C.D. Ca. Aug. 9, 2021); *Dutra v. Recology*, 2021 WL 4722959 (N.D. Ca. April 26, 2021).

Statute of Limitations

- *Intel Corp. Investment Policy Committee v. Sulyma*, 140 S. Ct. 768 (2020): Plaintiff does not have "actual knowledge" for purposes of three-year statute of limitations based on disclosures that he receives but does not read.
- Strict reading of actual knowledge provisions means six-year SOL will usually apply for fiduciary breach claims. *E.g.*, *Browe v. CTC Corp.*, 2021 WL 4449878 (2d Cir. Sept. 29, 2021) (requires knowledge of all the material facts underlying the breach but not knowledge of underlying law; the fact that some of class reps had knowledge of misappropriation of plan assets defeated fiduciary's claim that statutory period barred the suit).

Venue Under Section 502(e)(2) and Forum Selection Clauses

- ERISA Section 502(e)(2), 29 U.S.C. 1132(e)(2), provides that a civil action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found."
- **But**, contractual forum selection clauses are considered valid and enforceable, except in very limited circumstances. *Atl. Marine Construction Co. v. U.S. Dist. Court for the W. Dist. Of Tex.*, 571 U.S. 49 (2013).

Venue Under ERISA and Forum Selection Clauses

- *In re Becker*, 993 F.3d 731 (9th Cir. 2021)
  - Participants in 401(k) plan brought suit for fiduciary breach in the Northern District of California
  - Plan contained a forum selection clause stating that claims must be brought in the District of Minnesota.
  - District court transferred case and plaintiffs petitioned for writ of mandamus asking the Ninth Circuit to rescind the transfer order.
  - The Ninth Circuit refused, reasoning that ERISA's transfer would not defeat ready access to the courts and noting that ERISA's venue provision is permissive, and the defendants picked a valid venue under that provision (*i.e.*, where they may be found).
    - Court joined the Sixth and Seventh Circuits in this conclusion.