National Training

2024 ERISA Case Law Update

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Cunningham v. Cornell University

- Excessive fee case
- Plaintiffs -- employees Cornell's two DC plans
- Jumbo plans – 30K participants, $3.34 B assets,
- Significant bargaining power
- Defendants – plan fiduciaries (committee, Cornell)

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Cornell (cont.)

- Service providers – TIAA and Fidelity
- Investment management fees (buying, selling and managing investments)
- Recordkeeping (tracking account balances and providing account statements)
  - Flat fee – based on # of plan participants – "jumbo plans generally obtain lower flat fees"
  - Revenue sharing – fees based on portion of plan assets

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Cornell (cont.)

- Filed suit in February 2017 in SDNY
- Brought claims for b.o.f.d. loyalty and prudence
- Also PT claims
  - E.g., reasonable recordkeeping fee $35/participant, here between $115 to $184, and $145 to $200
- PT claims dismissed – dismissal upheld by 2nd C.

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Cornell (cont.)

- PT claims supplement ERISA duties of P&L
- ERISA 406(a) bars PT between plan and a "party in interest"
- 406(a)(1)(C) bars transactions that "constitute[] a direct or indirect furnishing of goods, services or facilities between the plan and the party in interest."

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Cornell (cont.)

- Party-in-interest includes 9 separate entities that can contract with or provide services to a plan
- (not at issue here)

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Cornell (cont.)

- ERISA 408 lists 20+ exceptions to 406(a)(1)'s list of prohibited transactions
- ERISA 408(b)(2)(A) provides exemption for a contract "for **services necessary** for the establishment or operation of the plan … if no more than **reasonable compensation** is paid therefore." (emphasis added)

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Cornell (cont.)

- Circuit split re. ***pleading*** PT claim
- Some apply text as written, plaintiff must plausibly allege "arrangement" … "exchange for services rendered" by "party in interest". Defendant then invoke exemptions as affirmative defense. 8th and 9th

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Cornell (cont.)

- Other courts hold plaintiffs must plead more – e.g., facts indicating transaction "intended to benefit" party in interest (3rd), transaction looks like self dealing (7th), or prior relationship between fiduciary and service provider (10th).
- Here, Second Circuit held plaintiff must plausibly allege facts negating at least some of 408 the exemptions.

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Cornell (cont.)

- Cert granted -- Argument January 22, 2025
- Question presented: Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by 29 U.S.C. § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in the provision's text.

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Cornell (cont.)

- Thoughts?
  - Apply 406 "as written" with 408 affirmative defense?
  - Or read 408 broadly – be part of 406??
  - Both sides argue other side – absurd results
  - Trust law -- where burden on fiduciary?
  - Court create new standard a la *Dudenhoeffer*?
  - Apply holding to other types of ERISA plans?

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"Forfeiture Suits"

- Dozen+ cases – often filed with other fee claims in DC plans (like in *Cornell*)
- Claims employer contributions to employee 401(k) accounts, e.g., matching, profit sharing
- When participant leaves employment before fully vesting, nonvested portion – "forfeiture"
- Plaintiffs:
  - forfeitures should be used to pay plan admin costs
  - Not be used to offset company contributions to new employees' matches
  - Violations – prudence/loyalty, PT, violates ERISA anti-inurement provision
- Defendants:
  - IRS reg allow use of forfeited funds to reduce employer contributions
  - Plan terms allowing funds to be used to offset company contributions (sponsor vs. fiduciary function)
  - No inurement if funds not returned to plan sponsor (stayed in plan)

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Forfeitures (cont.)

- Courts:
  - MTDs granted (*Clorox*, *HP*, *Thermo Fisher, BAE Systems*)
  - MTD denied (*Intuit, Qualcomm*)
- DOL brought suit – different fact pattern, sued plan sponsor for using forfeited funds to reduce employer contributions, where doing so contrary to plan documents, i.e., failure to follow plan terms

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"Actuarial Equivalence"

- Cases started in 2018
- Participant in DB plan (in nutshell):
  - select single life annuity (monthly payment rest of participant's life at retirement)
  - joint and survivor annuities (annuity for the participant's life plus contingent annuity to spouse rest of spouse life), e.g., 50%, 75%, 100%.

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AE (cont.)

- ERISA: J&S annuity must be "**actuarial equivalent** of a single annuity for the life of the participant."
- Plaintiffs claim
  - plans using **outdated mortality tables**, leading to lower payouts, e.g., from 50s, 70s
  - Mortality rates have generally improved

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AE (cont.)

- Lawsuits generally survive motions to dismiss, though class cert can be difficult b/c alternate proposed assumptions may harm some class members – competing experts re. "reasonable"

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Arbitration Clauses

- Plan documents often contain arbitration clauses, which include class action waiver
- In tension with ERISA 502(a)(2) – gives participant right to bring a representative suit on behalf of the plan due to breach of fiduciary duty
- **Effective Vindication Doctrine –** arbitration provision would bar plaintiff vindicating statutory right
- Ruled in favor of participants: 2nd, 3rd, 6th, 7th, 10th, pending in 9th

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Loper Bright

- *Loper Bright* reversed deference under *Chevron*
- Under *Chevron*, if Congressional intent on a statute was ambiguous, then courts defer to agency as long as "permissible construction"
- Under *Loper Bright*, court doesn't have to defer agency
- DOL rules:
  - 2024 investment advice (pending in 5th)
  - ESG investing (pending in Texas district court)
  - Will Trump DOL continue defending?

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