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ERISA litigation spiked in 2016, with a flurry of excessive fee class actions filed against fiduciaries of 401(k) plans, similar suits brought against university 403(b) plans, and a spate of cases filed against religiously affiliated medical facilities.

Read on for more about this unprecedented tide of ERISA litigation, from contributing attorneys Michael J. Prame, Mark Bieter, and Ada B. Esedebe of Groom Law Group.

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401(k) Fee Class Actions – New Players and Intense Activity

In general, the allegations in recent 401(k) excessive fee suits follow the blueprint of those filed in the past, claiming that plan fiduciaries breached ERISA duties of loyalty and prudence by offering investment options that carried high fees and performed poorly. The complaints also allege that fiduciaries engaged plan record keepers without conducting an open bidding process, allowing the service providers to collect unreasonable fees and retain excessive revenue sharing.

Notable about the fee suits in 2016 is the growing list of firms that brought them. Besides Schlichter Bogard & Denton, the St. Louis firm that has been most active in these matters over the past decade, there were several firms that brought multiple fee cases in jurisdictions across the country, including Bailey & Glasser LLP; Nichols Kaster, PLLP; Kessler Topaz Metzler & Check LLP; Sanford Heisler LLP; and Schneider Wallace Cottrell Konecky Wotkyns LLP.

A number of these new suits were "proprietary fund" cases. Besides the typical excessive fee allegations, these cases charge that the fiduciaries breached ERISA duties by selecting mutual funds and other investment options that were managed by affiliates of the plan sponsor (typically a bank or insurance company), and not chosen in the best interests of participants but in order to increase revenue or "seed" new funds that were being introduced to the market.

The increased activity by plaintiffs' firms may be a natural result of the significant eight figure settlements that have been reached in such cases in recent years, along with the continued reluctance by courts to dismiss ERISA fee lawsuits at early stages based on recent Supreme Court precedent. There were some signs, however, that the case law could be shifting, with two district courts' dismissal of excessive fee cases over the past year.

The first came last August in *White v. Chevron Corporation*, when the Northern District of California dismissed an excessive fee lawsuit by several participants in Chevron's 401(k) plan. The court concluded that there was no "plausible inference that defendants breached their fiduciary duties and/or duties of loyalty and prudence." Among other significant conclusions, the court found that the plan's investment in a money market fund instead of a stable value fund met the requirements of the plan's stated investment policy, and that fiduciary decisions should be evaluated in the context of when they are made, and not with 20/20 hindsight. Still, the *Chevron* holding represented a significant departure from many courts' conclusions at the motion to dismiss stage. It should be noted, however, that the court's decision afforded the plaintiffs the option of filing a revised complaint, which they did and for which there has been no ruling at the time of publication of this newsletter.

The second decision came on the last business day of 2016, when the U.S. District of Connecticut dismissed a putative class action, *Rosen v. Prudential Ret. Ins. & Annuity Co.* Among other things, the plaintiff alleged that Prudential, the plan's recordkeeper, engaged in prohibited transactions and breached fiduciary duties by negotiating revenue sharing payments in exchange for selecting mutual funds in the plan's investment lineup. The court dismissed all claims, holding that Prudential was not a fiduciary since it lacked authority over the selection of funds in the plan lineup. In addition, even if Prudential were a fiduciary in some aspects of servicing the plan, the court sided with precedent across multiple circuits holding that revenue sharing is a common practice in the industry, and, therefore, the complaint failed to state a claim. Unlike the *Chevron* court, the District of Connecticut dismissed all claims with prejudice.

It is too early to determine whether these two rulings represent a trend in excessive fee cases, although it is likely that both will be heavily cited by defendants. On a positive note, on January 31st of this year a magistrate judge for the U.S. District Court for the District of Rhode Island recommended granting the defendant's motion to dismiss in *Barchock v. CVS Health Corp.*, rebutting plaintiffs' claims of imprudence in the selection and monitoring of investments within the plan's stable value fund. Conversely, at least two new excessive fee suits have been filed in 2017, and at least two more have failed in their motions to dismiss.

U.S. Supreme Court Agrees to Hear "Church Plan" Appeals

In December of 2016, the U.S. Supreme Court granted petitions for writs of *certiorari* in three church plan cases: *Dignity Health v. Rollins*; *Saint Peter's Healthcare System v. Kaplan*; and *Advocate Health Care Network v. Stapleton*.

These cases are part of a recent wave of dozens of church plan lawsuits filed across the country. The plaintiffs in these lawsuits claim that the pension plans offered by religiously affiliated healthcare systems do not qualify for ERISA's church plan exemption. The key issue before the Supreme Court will be whether only a "church" may establish a church plan, or whether a plan established by a non-profit organization that is controlled by or associated with a church may also qualify. In *Kaplan, Stapleton*, and *Rollins*, the U.S. Courts of Appeal for the Third, Seventh, and Ninth Circuits all found that a church plan must be established by a church.

In its order granting *certiorari*, the Supreme Court consolidated the *Rollins, Kaplan*, and *Stapleton* cases, and allotted a total of one hour for oral argument. The Supreme Court has set a briefing schedule, with oral argument expected to occur in March 2017, and a decision anticipated in or before June 2017.

ERISA Fee Litigation Enters New Territory: 403(b) Plans

Within a matter of days last August, twelve class action lawsuits were filed against prominent universities in multiple U.S. district courts across the country, alleging that the schools breached ERISA fiduciary duties owed to participants in their retirement plans. Although the general allegations in these suits are similar to those in the 401(k) fee cases, they represent a sea change in ERISA litigation. They involve 403(b) plans, which are offered to employees of educational and charitable organizations and have not been the focus of much ERISA fiduciary breach litigation in the past, with significant implications for universities and health care institutions.

Apart from the novelty of their non-profit targets, the university lawsuits include two key allegations that are different from those made in the earlier fee cases. First, they allege that plan fiduciaries violated ERISA by offering largely duplicative sets of investment options—in some cases more than 400 options—that caused participants to suffer from "decision paralysis." The plaintiffs claim that having so many investment options created unnecessary complexity in lineups that should only consist of about 15 investment options. In plaintiffs' view, the inclusion of so many options also failed to capitalize on the plans' leverage to reduce investment related fees, which harmed participants.

Second, the plaintiffs allege that the universities' plans carried high fees because the sponsors engaged multiple recordkeepers to service the plan, without adequately investigating and negotiating in the "highly competitive" market for such services. The plaintiffs claim that the universities should have consolidated to a single recordkeeper, which would have lowered the administrative fees.

Although similar claims have been made in 401(k) excessive fee litigation, these two allegations aim at the essential structure of 403(b) plans. University plans began as simple programs to help teachers and staff save for retirement, with little central oversight by administrators and an open approach that allowed multiple investment option and service providers to work with employees directly.

The lawsuits are at the early stages and there have been no resolutions on any pending motions to dismiss. But any such rulings will address a number of significant questions, most fundamentally whether ERISA fiduciary standards that have been applied in the 401(k) plan litigation context will be extended to 403(b) plans.

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