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As the new year progresses we are hopeful that some positive trends on the ERISA litigation front that started in 2022 will continue. Courts have begun to push back against conclusory allegations in so-called "fee" cases and have rejected suits that simply compare administrative fees without also comparing the services rendered for those fees. Still, we must exercise caution, as there appears to be no letup in case filings, and plaintiffs continue to develop novel theories of liability and spin new arguments around old theories. Also, evolving plan-related cyber exposures and new Department of Labor (DOL) enforcement initiatives keep us vigilant.

Our guest contributor to this newsletter, José Jara of Fox Rothschild, is a long-time ERISA practitioner with varied experience ranging from DOL enforcement work to defending complex ERISA claims. José walks us through some of the recent cases that have led us to cautious optimism, and gives us his take on cyber exposures, as well as a summary of certain changes in the recently passed SECURE Act 2.0.

Rhonda Prussack, *Editor*

Recent ERISA Excessive Fee Cases – A Trend in Favor of Plan Sponsors

The Supreme Court in *Hughes v. Northwestern* highlighted the standard set forth in its prior decision in T*ibble v. Edison Int'l*, which is for fiduciaries to conduct a regular, independent evaluation of each investment to determine whether that investment should prudently be included in the menu of options. Applying the same principles to *Hughes*, the Court held that the 7th Circuit erred in focusing solely on the variety of investment options in the plans since fiduciaries are still required to remove imprudent investments, such as those that charge excessive investment fees. According to the Court, "[i]f the fiduciaries fail to remove an imprudent investment from the plan within a reasonable time, they breach their duty" and in remanding the case, the Court stated that the 7th Circuit "should consider whether the plaintiffs have plausibly alleged a violation of the duty of prudence as articulated in *Tibble*."

The progeny of cases from the *Hughes* decision proves beneficial for plan sponsors. In another case in the 7th Circuit, *Albert v. Oshkosh Corporation et al.*, the plaintiff alleged breaches of the fiduciary duty of prudence by:

- Allowing the plan to pay high fees to its record keeper as compared to other comparable plans;
- Selecting and failing to remove investments that charged excessive investment fees;
- Offering too many actively managed funds with higher investment fees than passively managed investments; and,
- Authorizing the plan to pay excessive investment advisory fees to its advisor, when the plan could have hired similar advisors with lower costs and better performance records.

In August 2022, the *Oshkosh* court affirmed the dismissal of all the claims, limiting the holding of *Hughes* to just the rejection of the assumption that offering an array of high- and low-cost investment options insulates fiduciaries from liability.

The 7th Circuit made clear that fees are not to be considered in a vacuum but in comparison to the quality of the services being provided. It cited its prior decision in *Hecker v. Deere & Co.*, which stated that "nothing in ERISA requires every fiduciary to scour the market to find and offer the cheapest possible fund (which, might, of course, be plagued by other problems)." The court found that the plaintiff's record-

keeping claim alleging that the defendant paid excessive fees based on the fees paid by similarly sized plans is without merit since the comparison does not consider the quality or type of services provided by its current service provider. In addition, the 7th Circuit acknowledged that the 6th Circuit, in *Smith v. CommonSpirit Health*, has also recently held that no claim exists when the allegations in the complaint failed to allege fees were excessive in relation to the services rendered.

As for the actively managed funds theory, the court in *Oshkosh* found that the fact that the actively managed funds charge higher fees than index funds is not enough to state a claim since the actively managed funds may produce higher returns. Further, the court referred again to the 6th Circuit in *Smith*, which stated that failing to offer actively managed funds to those participants eager to take on more or less risk may itself be imprudent. In dismissing the claim, the court held that allegations that the defendants failed to consider materially similar or less expensive investment options are not detailed enough to provide a sound basis for comparison.

Finally, regarding the investment advisor fees claim, the court found that the plaintiff's claim was "paper thin." In doing so, the court explained that the plaintiff did not explain why its advisor's fees were excessive and unreasonable as compared to other service providers. Again, the court found that the plaintiff failed to make any allegations that the fees were excessive relative to the services rendered and therefore dismissed this claim as well.

In October of 2022, the 8th Circuit in *Matousek v. MidAmerican Energy Co.* continued this favorable trend. The Court stated that "we have been clear that the key to stating a plausible excessive-fees claim is to make a like-for-like comparison," which requires sound and meaningful benchmarking. With respect to recordkeeping services, the court echoed the other Circuits and could not infer imprudence unless similarly sized plans spend less on the same services.

With respect to the investment claims, the Court found that the complaint provided no sound comparisons. In particular, the court determined that the investment comparisons in the complaint: (1) missed "details [as to] whether they hold similar securities, have similar investment strategies, and reflect a similar risk profile;" (2) provided aggregate data which fails "to connect the dots in a way that creates an inference of imprudence;" and (3) were "just different."

These Circuit Court decisions appear to create a favorable precedent for plan sponsors in narrowly applying the holding in *Hughes*. It is clear from these cases that for a complaint to survive, there must be allegations of meaningful comparisons of the fees being charged with the quality and/or type of services being provided. These trends from the Circuit Courts have trickled into 2023 with several district courts dismissing these cases.

The trend in favor of plan sponsors also continues in a separate line of ERISA cases filed in 2022. The suits, all filed by the same firm, alleged that it was "currently in vogue" for plan fiduciaries to "chase" investment options with low fees and that defendants breached their fiduciary duty under ERISA by selecting certain target date funds ("TDFs"), while failing to consider whether the funds could generate higher returns than other TDFs. These cases triggered outrage in the ERISA community, in part because the funds at the heart of these suits were well-regarded and highly-rated, and because the plaintiffs drew conclusions based on cherry-picked data. Further, the irony that this plaintiffs' firm has been a prolific filer of suits demanding that fiduciaries "chase" low fees is not lost on anyone.

Of these cases filed, *Tullgren v. Booz Allen Hamilton Inc.* and *Hall v. Capital One Fin.*, filed in the U.S. District Court for the Eastern District of Virginia, were dismissed. More recently, the U.S. District Court for the Western District of Washington, dismissed the *Beldock v. Microsoft Corp.*, case, holding that: (1) the plaintiffs' prudence claim fails because they only pled that the defendants could have chosen other investment vehicles that performed better and thus, failed to plausibly plead facts that would make it more probable than not that a fiduciary breach has occurred; and, (2) as to the loyalty claim, the plaintiffs failed to allege defendants acted with the intent to benefit themselves or a third party.

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Cybersecurity and ERISA

The common saying in the cybersecurity world is not *if* a cyber breach will occur but *when* will a breach occur. Defined contribution plans (such as 401(k) or 403(b) plans) alone have trillions of dollars in assets, making them a prime target for cybercriminals. While the DOL has not issued regulations regarding cybersecurity protocols, it has issued some informal guidance for selecting plan service providers and best practices for participants. See: https://www.dol.gov/agencies/ebsa/key-topics/retirement-benefits/cybersecurity.

In litigation, there is a line of cases involving theft of plans assets. Recently, in *Disberry v. Emp. Relations Comm. of the Colgate-Palmolive Co.*, filed in the U.S. District Court for the Southern District of New York, a participant's account valued at $750,000 was stolen in a complex international scam. The participant lived in South Africa. The cybercriminal was able to communicate with the recordkeeper's benefits call center and eventually change the participant's address to one in Las Vegas, Nevada. The cyber thief was able to then request a distribution of the entire amount and caused a check to be mailed to the new address.

The defendants - the plan sponsor committee, the recordkeeper, and the bank custodian - filed a motion to dismiss the case. The bank custodian was able to get out of the case as the court found that they were not fiduciaries and were following instructions in the ordinary course when it issued the check.

However, as to the recordkeeper and committee, the motion was denied. The court found the recordkeeper could possibly be a functional fiduciary because they could provide directions to the bank to issue distributions, and they missed several "red flags," creating a nexus between their authority and control and the wrongdoing alleged in the complaint. As to the committee, the court found sufficient allegations of failing to monitor its recordkeeper and to detect and prevent fraud and theft. The case now proceeds to discovery.

SECURE 2.0

SECURE 2.0, part of The Consolidated Appropriations Act of 2023, expands opportunities for increased retirement savings in employer-sponsored plans (e.g. by increasing the age for required minimum distributions, expanding auto-enrollment and contribution escalation, expanding coverage to part-time workers, higher catch-up limits, etc.).

Certain provisions of SECURE 2.0 may offer some relief from fiduciary liability by providing guidance on remedying errors and amending ERISA to permit a fiduciary to determine whether or not to seek recovery of an inadvertent overpayment. Further, fiduciaries will not be deemed to have breached their fiduciary duty if a plan has established prudent procedures to prevent or minimize overpayments and the fiduciary has followed those procedures.

SECURE 2.0 expands the relief available under the IRS' voluntary correction program, the Employee Plans Compliance Resolution System (EPCRS). Now under the EPCRS Self-Correction Program, any "eligible inadvertent failure" can be corrected within a reasonable time after the error is detected and before the IRS finds the error.

Some sections of SECURE 2.0 signal congressional concern about plan investments, plan funding, and the ability of plan participants to make informed decisions regarding distributions from pension plans. The DOL will be required to update regulations within two years to address performance benchmarks for asset allocation funds (e.g. target date funds). This may provide much-needed guidance for plan fiduciaries (or a roadmap for plaintiffs). Starting in 2024, annual funding notice requirements for defined benefit pension plans will change to clarify the plans' funding status and include disclosure of the "percentage of plan liabilities funded," the average return on assets for the plan year, and whether the assets are sufficient to fund liabilities that are not guaranteed by the Pension Benefit Guaranty Corporation (PBGC). And finally, notices will have to be sent 90 days in advance to defined benefit plan participants who are offered temporary distributions via a lump sum window. The notices must describe how the lump sum amounts will be calculated and the ramifications of electing a lump sum, among other requirements. Notice must also be provided to the DOL and PBGC prior to the window opening and after it closes. This provision will take effect after the DOL issues final regulations after December 29, 2023.

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