Portfolio Media. Inc. | 860 Broadway, 6th Floor | New York, NY 10003 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

ERISA Litigation In 2015 And A Forecast For The Year Ahead

Law360, New York (January 4, 2016, 5:32 PM ET) --


Brian D. Netter


Nancy G. Ross


Gary B. DeTurck

No surprise to the seasoned benefits attorney, 2015 was another banner year for ERISA litigation and set the stage for an active and pivotal 2016.

2015 — A Year in Review

The year began with the U.S. Supreme Court's much-anticipated decision in M&G Polymers USA v. Tackett. At issue was how to determine whether retiree benefits under a collective bargaining agreement have "vested," thus requiring the employer to pay such benefits for the life of each covered retiree. The underlying collective bargaining agreement in Tackett did not explicitly promise lifetime health care benefits, and the employer argued that any retiree medical obligations terminated when the collective bargaining agreement expired. The Sixth Circuit disagreed, invoking its long-standing Yard-Man presumption to infer an intent to provide lifetime health care benefits from the absence of an explicit durational limit. Reasoning that Yard-Man "plac[es] a thumb on the scale in favor of vested retiree benefits in all collective-bargaining agreements," the Supreme Court roundly rejected the presumption in favor of lifetime vesting. The court remanded the case and instructed the Sixth Circuit to reexamine the agreement using only "ordinary principles of contract law."

In Tibble v. Edison International, participants in a multibillion-dollar 401(k) plan sued to challenge the inclusion of higher-fee, retail-class mutual funds as plan investment options when lower-fee, institutional-class funds were available. The district court granted summary judgment to the defendants as to certain funds, holding that the ERISA's six-year statute of limitations barred the plaintiffs' claim because the defendants initially selected the mutual funds more than six years before the complaint was filed. The Ninth Circuit affirmed. The plaintiffs petitioned for certiorari, arguing that if it was imprudent to include retail-class mutual funds, then it was imprudent to retain them in the plan, as well. The defendant argued that the plaintiffs' theory amounted to the elimination of the six-year time limit and

that — absent a material change in circumstances since the original selection — fiduciaries have no duty to revisit and reverse earlier decisions. In a unanimous opinion authored by Supreme Court Justice Stephen Breyer, the court vacated and remanded the judgment of the Ninth Circuit. The court recognized the parties' agreement that fiduciaries have some ongoing responsibility to monitor plan investments and held that a claim addressing the duty to monitor would not be time-barred, if the alleged monitoring failure had occurred within the six-year look-back period. The court declined to address what a fiduciary must do to engage in prudent monitoring, leaving that issue for remand.

The Supreme Court's denial of certiorari in RJR Pension Investment Committee v. Tatum let stand the Fourth Circuit's lofty conception of the duty of prudence. The plaintiffs in Tatum — participants in the RJ Reynolds 401(k) plan — alleged that the plan's investment committee violated its duty of prudence by disposing of the plan's Nabisco stock. To decide whether to sell, the investment committee met for less than one hour and conducted no independent research. Within a year of the plan's liquidation of its Nabisco holdings, a bidding war drove up the value of Nabisco stock by almost 250 percent. The district court and the Fourth Circuit agreed that such perfunctory procedure fell short of prudence. However, the district court ruled that the decision to sell was itself "objectively prudent" because a reasonable and prudent fiduciary "could" have made the same decision after performing a proper investigation. The Fourth Circuit took exception to the district court's choice of modal auxiliary verb, holding that the proper standard was whether a reasonable and prudent fiduciary "would" have made the same decision. Because the district court applied the incorrect standard when analyzing whether the committee's procedurally imprudent decision-making nevertheless resulted in a prudent transaction, the Fourth Circuit remanded the case for further consideration.

The 2015 case law underlines the importance of two long-standing ERISA principles: the primacy of the written plan document and the importance of sound plan procedures. As demonstrated by Tibble and Tatum, employers would be wise to create and follow processes for prudent fiduciary decision-making, and to undertake periodic and systematic reviews of the plans they have a duty to monitor. To reduce litigation risks, plan fiduciaries should document their processes and the results of their monitoring efforts. Fiduciaries should not pick and choose among existing investments to monitor; rather, they should implement a regular, well documented procedure for periodic reviews of every plan investment.

2016 – New Development of Familiar Themes

In 2016, the Supreme Court will again attempt to articulate the remedies available under the ERISA's authorization of "appropriate equitable relief" — a nebulous concept that has triggered much litigation. The decision in Montanile v. Board of Trustees of the National Elevator Industry Health Benefit Plan, a case that was argued this fall, will determine whether "appropriate equitable relief" is available to a plan fiduciary that wants to recover an overpayment but cannot identify the particular fund that constitutes the overpayment. In Montanile, a beneficiary of an ERISA-governed health insurance plan received a benefit payment of more than $100,000 for injuries stemming from an automobile accident. After the beneficiary recovered an even greater amount in a lawsuit against another driver, the plan fiduciary sued to recover the benefit payment, invoking a plan provision requiring reimbursement of "any amounts received from another party."

On summary judgment, the district court ruled for the plan fiduciary and the Eleventh Circuit affirmed. The lower courts held that the settlement funds were subject to an equitable lien even if they were subsequently disbursed or commingled with other funds. A total of six federal courts of appeals have taken that view, while two courts have held that an equitable lien is unavailable unless the funds can be specifically identified at the time of suit. Recognizing the need for Supreme Court intervention, the plan

fiduciary (respondent here) agreed with the beneficiary (petitioner here) that certiorari was warranted. Practitioners eagerly await the decision in Montanile, as the issues involved are of tremendous importance to businesses that administer employee benefit plans governed by ERISA, particularly those with ERISA-governed health insurance plans (which are most often confronted with the need to recover overpayments).

The Supreme Court will also revisit the ERISA's preemption clause, as Gobeille v. Liberty Mutual Insurance Company asks the court to consider whether the ERISA preempts a Vermont statute that requires health insurers and health care providers to furnish certain reports, data and other information pertinent to the state's development of health care policy. Vermont's principal argument is that the collection of data imposes no significant burden on an industry already generating voluminous claims data in the ordinary course of business. Noting that at least twelve other states have enacted similar data-collection laws, Liberty Mutual responded that the provision of data would become burdensome if different states imposed inconsistent data requirements.

Oral argument revealed deep divisions among the justices: Supreme Court Chief Justice John Roberts and Justices Antonin Scalia and Samuel Alito suggested that collecting health care data was a fundamental component of the ERISA — and therefore preempted — because the Affordable Care Act provided the Labor Secretary broad authority to collect such data. But Justices Ruth Bader Ginsburg and Elena Kagan viewed the collection of health care data as completely separate from the ERISA's primary goals of uniformity and the protection of privately established employee benefits. However the court rules, Gobeille is likely to inject additional uncertainty into a rapidly evolving health care industry already struggling to keep pace with the statutory and regulatory reforms required by the ACA.

—By Brian D. Netter, Nancy G. Ross and Gary B. DeTurck, Mayer Brown LLP

Brian Netter is a partner in Mayer Brown's Washington, D.C., office and a member of the firm's supreme court and appellate practice.

Nancy Ross is a partner in Mayer Brown's Chicago office and a member of the firm's ERISA litigation practice.

Gary DeTurck is an employment and benefits associate in Mayer Brown's Chicago office.