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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

4 ERISA Cases That Could Be Game-Changers

By **Braden Campbell**

Law360 (April 2, 2018, 1:48 PM EDT) -- Employee benefits lawyers are keeping a close eye on a handful of battles over retirement plan management that are winding their way through the appeals courts.

Some circuits are set to address the standards for alleging fiduciaries mishandled workers' retirement funds, and the U.S. Supreme Court is being asked to take up a case that could clarify how the burden of proof can shift in lawsuits accusing plan fiduciaries of causing a loss.

Here, Law360 looks at the cases that could shape how courts analyze Employee Retirement Income Security Act claims.

A 'Litany' of Defense Wins

A class of University of Pennsylvania workers is asking the Third Circuit to revive a suit alleging the school mismanaged its workers' retirement assets in an appeal that could affect similar suits being argued in district courts around the country.

The Eastern District of Pennsylvania in September said the funds Penn offered workers, the fees it paid and the contracts by which it paid them were reasonable**.** U.S. District Judge Gene Pratter's ruling was the first to dismiss such a suit entirely; other courts hearing similar cases had merely trimmed the claims.

Holifield Janich Rachal Ferrera PLLC partner Robert Rachal called the Penn suit an "exemplar" of challenges to plans organized under Tax Code Section 403(b), an analogue of Section 401(k) that lets public schools and certain others set up tax-sheltered benefits plans.

"It has kind of the litany of allegations which you see in 403(b) cases," Rachal said. "It's kind of a whole litany of issues on which you've got a very good, defense-friendly ruling."

These allegations include that Penn paid multiple record-keepers to track the plan's assets, that it paid plan administrators a fee based on the plan's total value rather than a flat rate, and that it offered retail-class investments rather than the cheaper, institutional-class alternatives available to plans of a certain size — all steps that squandered workers' investments.

Experts note that other courts have trimmed some claims and preserved others when considering

allegations of mismanagement of so-called university plans. This makes the Penn case an important first test of a dispositive ruling in a 403(b) case, which could lay the groundwork for a U.S. Supreme Court appeal, they say.

"Right now, [these cases are] really at the whim of the particular judge who is deciding them," said Nancy Ross, co-chair of the ERISA litigation practice at Mayer Brown LLP. "We need more shape and guidance."

The case is Jennifer Sweda et al. v. the University of Pennsylvania et al., case number 17-3244, in the U.S. Court of Appeals for the Third Circuit.

A Burden-of-Proof Battle

The Supreme Court could soon decide whether to take up a case asking where the burden of proof lies in cases where workers claim an ERISA fiduciary caused a loss.

An employee stock ownership plan for a group of workers at Pioneer Centres Holding Co., which operates Land Rover dealerships, has asked the U.S. Supreme Court to review a Tenth Circuit ruling in a dispute with Alerus Financial NAover the plan's failed bid to buy Pioneer.

The Tenth Circuit affirmed a lower court in June, finding that Alerus, which the stock ownership plan had hired as a "transactional trustee," did not need to disprove the allegation that it caused the plan a loss by torpedoing the transaction.

According to the opinion, the stock ownership plan's trustees had sought to buy the company through the plan — a benefits structure that invests workers' funds in their employers' stock — but the deal fell through after Alerus wouldn't sign off on it because of contract disputes with Pioneer's founder.

Pioneer was later sold to a third party for millions more than the stock ownership plan offered, prompting the plan and its trustees to allege Alerus breached its fiduciary duty by costing them the chance to buy the company.

The district court did not say whether Alerus caused the deal to fall through. Instead, U.S. District Judge Raymond Moore ruled the plan hadn't shown that it suffered a loss, noting that Land Rover, whose approval was needed to consummate the deal, didn't give the go-ahead.

The plan's petition asks the justices to decide whether workers who bring ERISA suits bear the full burden of showing a loss, as it says the Sixth, Ninth, Eleventh and now Tenth circuits have ruled, or whether a fiduciary must show a loss wasn't its fault once workers lay out a basic breach of duty case, as the plan says the Second, Fourth, Fifth and Eighth circuits have held.

A Supreme Court decision could make it harder or easier for employers across the country to escape ERISA suits, according to Laura Hammargren, a Mayer Brown partner.

"Establishing absence of loss can be a lot harder than establishing loss," she said. "I think that would be a really interesting issue for the court to weigh in on."

The Supreme Court on March 19 asked the solicitor general to present the government's position on the petition.

The case is Pioneer Centres Holding Co. v. Alerus Financial NA, case number 17-667, in the Supreme Court of the United States.

Is 'Self-Dealing' Enough?

The First and Eighth circuits are considering appeals that attorneys say could set the standards for analyzing claims in a subset of ERISA suits known as "proprietary funds" cases.

The appeals — Brotherston v. Putnam Investments LLC in the First Circuit and Meiners v. Wells Fargo & Co. in the Eighth Circuit — ask the courts to reverse wins by the financial giants on claims they swindled workers by offering their own products as investment options.

Workers have filed about 20 of these proprietary funds suits, Rachal said, with these being two of employers' only wins so far.

After a two-week trial in the District of Massachusetts, U.S. District Judge William G. Young in June rejected claims that Putnam breached its duties of loyalty and prudence to workers, saying "self-dealing alone" doesn't suggest a fiduciary was disloyal and that the workers didn't describe specific bad management decisions that support their claims of imprudence.

The case was the first of the proprietary fund suits to go to trial, giving the appeal significant precedential value in the First Circuit — and potential persuasive value outside it.

In the Eighth Circuit, Wells Fargo workers are asking the court to reverse a decision dismissing their claims.

The workers alleged in Minnesota federal court that Wells Fargo breached its fiduciary duty by offering them its own funds over better-performing funds from other institutions and by making these funds the default for workers who didn't allocate their investments to other offerings.

But the claims failed because the Vanguard funds the workers pointed to weren't similar to the Wells Fargo funds, U.S. District Judge David Doty said in May, ordering the first full dismissal of a proprietary fund case.

"Most of the plaintiffs have been surviving motions to dismiss; this is a little different," Rachal said. "Everybody is watching to see what the Eighth Circuit says."

The cases are Brotherston et al. v. Putnam Investments LLC et al., case number 17-1711, in the U.S. Court of Appeals for the First Circuit; and Meiners v. Wells Fargo & Co., case number 17-2397, in the U.S. Court of Appeals for the Eighth Circuit.

--Editing by Jeremy Barker and Katherine Rautenberg.
