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3 Hot ERISA Issues The High Court May Tackle This Term

By **Emily Brill**

Law360 (October 26, 2018, 4:29 PM EDT) -- Employers concerned about when and how workers can sue over retirement plan issues and where the burden of proof falls in those suits may get their answer from the U.S. Supreme Courtthis term.

Law360 takes a look at three cases that would answer key questions dogging Employee Retirement Income Security Act fiduciary-breach suits — when they can be arbitrated, when they can be brought in the case of a traditional pension plan, and who must prove a connection between financial losses and fiduciary misconduct in court — and which attorneys say are ripe for high court review.

Thole v. US Bank

The question of when workers can sue over traditional pension plan mismanagement comes to the Supreme Court by way of Thole v. US Bank, a case appealed to the court in June. Most recently, the high court invited the U.S. solicitor general to file a brief in the case on Oct. 1.

With this case, the high court could resolve a circuit split on Article III standing in ERISA suits involving defined-benefit pension plans.

This case caught ERISA attorneys' eyes because it asks a question of key importance to employers with these plans: Can workers sue over plan mismanagement when defined-benefit pension plans are fully funded?

The Second, Third and Sixth circuits have said yes. They found that a violation of workers' ERISA rights was enough to justify a claim for injunctive relief.

The Eighth Circuit, in the Thole case, said no. It held that workers haven't suffered harm sufficient to justify a lawsuit if their plan is fully funded.

"The case is important because if the court were to disagree [with the Eighth Circuit] and allow lawsuits where no harm is suffered, it would open the floodgates for litigation over pension plan management, with broad ramifications," said Nancy Ross, a partner at Mayer Brown LLP.

Ross, who represents companies, called this litigation "expensive and distracting."

Plaintiffs' attorney R. Joseph Barton, the chair of Block & Leviton LLP's employee benefits group, took another view of these lawsuits. He said financial harm isn't the only type of harm an employer can cause a plan. If an employer steals money from the plan, for example, that's a form of harm, even if the company funds the plan at the end of the day, he said.

"I think the fundamental thing that's the problem with the argument [in Thole] is harm under Article III [of the Constitution] is not necessarily monetary," Barton said in August.

Munro v. USC

If the justices want to weigh in on whether arbitration agreements can scuttle ERISA class actions, they could grant the University of Southern California's soon-to-be-filed writ of certiorari petition in Munro v. USC. USC committed to filing that petition on Oct. 15.

The saga that led to the case began when USC's new hires signed paperwork to start their jobs.

The university requires workers to sign arbitration agreements, waiving their right to file suits against the school in court, when they accept jobs there. The agreement requires workers to resolve all claims against the university in individual arbitration sessions.

But when a group of workers led by Allen Munro sued the school over how it handled its employee retirement plan, they didn't bring their claim in arbitration.

Citing a provision of ERISA that allows workers to sue on behalf of a plan, and saying the plan hadn't signed an arbitration agreement, they said they were allowed to bring the case in court.

A California federal judge agreed with them, and on appeal, the Ninth Circuit did, too. Now, USC is asking the Supreme Court to review its motion to compel arbitration in the case.

There hasn't been a circuit split on the issue, and attorneys say Munro v. USC might not be the perfect vehicle for the high court to explore ERISA arbitration. Instead, they say Dorman v. Charles Schwab, which is still in the Ninth Circuit, may make a better vehicle.

But it's not out of the question for the Supreme Court to smile upon USC's petition, according to attorney Robert Rachal of Holifield Janich Rachal Ferrera PLLC. The court has been staunchly pro-arbitration for about two decades now, he said, and they've scooped up many cases concerning this topic over the years.

"Arbitration issues seem to grab their attention, and I think it's because at least five of the justices tend to be very pro-arbitration," Rachal said. "The court hasn't necessarily been a pro-plaintiff or pro-defendant court on ERISA procedures. But it has ruled in favor of arbitration, as far as I know, every time over the past 20 years. It's been unequivocally pro-arbitration."

The attorney representing USC's workers, Jerome Schlichter of Schlichter Bogard & Denton LLP, has said he hopes the high court doesn't take up USC's petition.

"Requiring individual employees and retirees to separately bring claims for fiduciary breach is simply saying that those claims won't be brought," Schlichter said after USC committed to petitioning the high court. "The amount of money [individual workers stand to gain] is less than the cost of expert witnesses

and bringing the action, along with the document discovery and the need to reinvent the wheel in each case."

USC has until Nov. 29 to file its petition.

Brotherston v. Putnam Investments

If the high court wants to consider who bears the burden of proof in fiduciary-breach claims — an issue that has pitted five appellate courts against four others — Brotherston v. Putnam Investments would make an apt vehicle for exploring that topic if Putnam chooses to appeal.

Decided by the First Circuit on Oct. 15, the suit revolves around the same issue that plagued Pioneer Centres Holding v. Alerus Financial, a burden-of-proof case the high court was considering taking up until a settlement was reached in September. The high court never granted cert in Pioneer Centres, though it asked for the solicitor general to weigh in.

On Oct. 24, Putnam Investments announced its intention to petition the high court in this case.

In this case, a class of Putnam Investments workers led by John Brotherston accused their employer of violating ERISA by allegedly using the company 401(k) plan to line Putnam Investments' pockets at workers' expense.

The class accused the company of stacking its retirement offerings with in-house mutual funds that cost workers millions of dollars more each year than similar non-Putnam funds.

The burden-of-proof issue arose when a Massachusetts federal judge asked workers to prove that Putnam's 401(k) investments were imprudent choices when stating their fiduciary-breach claim.

The judge shouldn't have asked workers that, the First Circuit ruled. Instead, the judge should have asked the workers to show that a loss and a fiduciary breach occurred.

Once the workers have shown that, the burden shifts to the company to prove there was no connection between the loss and the alleged fiduciary breach, the appellate court said. In other words, it's up to the company, not the workers, to prove the funds were prudent, the court said.

The First Circuit's decision placed it in line with the Second, Fourth, Fifth and Eighth circuits and in opposition to the Sixth, Ninth, Tenth and Eleventh circuits.

Employers and workers often don't need to touch the issue of who must prove that a fiduciary breach and a loss were connected, said Rachal. In many cases, the connection between the breach and the harm is so clear that the issue of proving it never comes up, he said.

But in the cases where the connection is unclear, determining where the burden falls is very important, he said.

"In the cases where it does matter, it's obviously a critical issue," Rachal said.

He said the case is ripe for Supreme Court intervention because right now, there's an almost exactly even split on the issue.

“ERISA law is supposed to be uniform across the country,” Rachal said. “The main thing [high court intervention would do] would be give some uniformity.”

--Additional reporting by Braden Campbell, Danielle Nichole Smith and Adam Lidgett. Editing by Rebecca Flanagan and Alanna Weissman.

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