

## ERISA Cases To Watch In 2019

By **Emily Brill**

*Law360 (January 1, 2019, 12:03 PM EST)* -- The Second Circuit's surprise revival of an IBM stock-drop suit and the Ninth Circuit's generous interpretation of how to beat a three-year deadline for filing fiduciary-breach claims in a suit against Intel shook the benefits world last year, landing those cases on a list of six legal battles that benefits lawyers should keep an eye on in 2019, experts say.

In addition to the IBM and Intel cases, benefits lawyers should stay up to date on what's happening at the U.S. Supreme Court, which could elect to decide when parties can arbitrate Employee Retirement Income Security Act fiduciary-breach claims and who bears the burden of proof in those cases.

And attorneys should watch a legal drama playing out in New York federal court centered on bias allegations against the judge who oversaw a pivotal ERISA trial against New York University before rejoining Cravath Swaine & Moore LLP as a partner. If the plaintiffs get their way, a class of over 20,000 current and former NYU workers could get another trial in a case whose outcome stands to affect not only NYU, but dozens of other universities facing similar lawsuits.

Here, Law360 discusses six of the biggest benefits cases to watch in 2019.

### **Sacerdote v. NYU**

An already dramatic case reached a new level of spectacle in October, when a class of NYU workers asked for a new trial in *Sacerdote v. NYU* because former U.S. District Judge Katherine B. Forrest was allegedly considering a job with a firm chaired by an NYU trustee when she ruled in the university's favor.

The workers argued that Judge Forrest should have handed off the case when she began interviewing for a partnership at Cravath Swaine & Moore LLP because firm chairman Evan Chesler's close ties to the university gave him a stake in the outcome of the case.

The university fired back in November, saying the class exaggerated Chesler's level of involvement with NYU and wrongly implied that Judge Forrest would feel pressure to impress Chesler in order to get the job, which she began in September.

Mayer Brown LLP partner Nancy Ross, who attended the *Sacerdote v. NYU* trial, thinks the class' bias allegations are off the mark.

"She conducted the trial with the utmost professionalism. Frankly, I thought she gave the plaintiffs a much longer leash than deserved," said Ross, who co-chairs her firm's ERISA Litigation practice. "She was very thorough."

Compounding the case's significance is the fact the NYU case was the first of roughly two dozen ERISA cases against universities' retirement plans to go to trial, attorneys say.

"It's the first case of these twenty-something cases that was actually tried, so everybody's looking to it," Ross said. "Although it won't be legally binding in other jurisdictions, it will carry a lot of weight. That's why plaintiffs are trying so hard to overturn it."

The case accuses NYU of allowing its retirement plan to charge excessive fees and make mediocre investments. A hearing on the class' motion for a new trial is set for Jan. 9 in New York City.

The case is *Sacerdote et al. v. New York University*, case number 1:16-cv-06284, in the U.S. District Court for the Southern District of New York.

### **Jander v. IBM**

Four years after the Supreme Court's Fifth Third Bancorp v. Dudenhoeffer ruling, many plaintiffs' firms had just about given up on suing companies that include their own plummeting stock in workers' 401(k) plans. Then, in December, the Jander v. IBM ruling arrived.

The first worker-friendly decision in a so-called "stock-drop" case in a long time, Jander v. IBM revived IBM employees' claims that the company breached its fiduciary duty under ERISA by failing to take action on 401(k) investors' behalf when it knew IBM stock was about to plummet.

Most stock-drop suits bite the dust because judges decide a prudent fiduciary might think taking action before a stock decline would do more harm than good. The "more harm than good" standard, laid out in Dudenhoeffer, is relatively easy to meet, attorneys say.

But in the Second Circuit's IBM ruling, a panel of judges held that no prudent fiduciary would think it proper to keep workers' retirement savings invested in company stock after learning IBM's microchip division was losing \$700 million per day, even though the company maintained publicly that the business was doing well.

IBM at least could have told savers or halted the trade of company stock before paying another company \$1.5 billion to take the microchip division, sending stocks plummeting, the Second Circuit said.

The Second Circuit's decision doesn't establish a standard itself; the ruling simply described the level of conduct that must occur to flout the "more harm than good" standard. In that sense, the ruling "creates more questions than answers" for employers, Ross said.

"We can't take the IBM opinion and use it as a litmus test for how to prudently operate a company stock fund," said Ross. "That, to me, is the greatest problem."

Attorneys would do well to keep an eye on the case itself, which could be appealed to the Supreme Court directly or receive full Second Circuit review, and on the case law that develops from the ruling,

experts said.

"I think what's likely in the next year or two is that plaintiffs' attorneys are going to be emboldened by the IBM decision, because it's kind of cracked the door back open to pursue company stock-decline cases," said Joe Faucher, a director at Trucker Huss APC.

The case is *Jander v. International Business Machine et al.*, case number 17-3518, in the U.S. Court of Appeals for the Second Circuit.

### **Sulyma v. Intel Corp.**

Once a worker has actual knowledge that his employer mismanaged the company retirement plan, he has three years to sue. But what constitutes actual knowledge? That's the question the Ninth Circuit grappled with in *Sulyma v. Intel Corp. Investment Policy et al.*, a case that wrapped up in the appellate court in November.

A Ninth Circuit panel ruled that a worker doesn't automatically develop actual knowledge of an ERISA violation when he receives financial documents; the employee has to actually read the documents and get a sense of the type of wrongdoing that occurred.

"There was, at the district court level, some confusion about what actual knowledge meant in the Ninth Circuit," said R. Joseph Barton, an attorney for the proposed class of Intel workers. "The Ninth Circuit recognized that actual knowledge is what it means — actual knowledge of facts. We're not going to presume you have certain knowledge."

As a result, West Coast defense attorneys can no longer rely on the three-year statute of limitations to thwart ERISA fiduciary-breach claims at the motion-to-dismiss stage, Ross said.

"The way it's written makes it virtually impossible to show that a plaintiff had actual knowledge at the motion-to-dismiss stage, because you'd have to have the plaintiff's deposition, which you wouldn't have at that early stage," Ross said.

Like the IBM ruling, the Intel decision should drive attorneys to pay attention to resulting case law and watch for appeals. Appellate courts are split on what triggers the three-year statute of limitations in ERISA fiduciary-breach claims, so the issue may make its way to the Supreme Court, attorneys said.

If the Ninth Circuit's ruling stands, Ross said she worries it could incentivize forum-shopping.

"The plaintiffs bar is going to view the Ninth Circuit as one of the easier circuits to bring claims that would be stale in other jurisdictions," Ross said.

The case is *Christopher Sulyma v. Intel Corp. Investment Policy et al.*, case number 17-15864, in the U.S. Court of Appeals for the Ninth Circuit.

### **Thole v. U.S. Bank**

In 2002, the Eighth Circuit issued a first-of-its-kind decision that eroded workers' ability to sue their pension plans for breaches of fiduciary duty. The ruling — *Harley v. Minnesota Mining and Manufacturing Co.* — held that employees of the company currently known as 3M couldn't sue over the

alleged mismanagement of their pension plan because the plan was fully funded.

Fast forward 17 years, and the Supreme Court may decide whether the Eighth Circuit made the right call. The appellate court's recent ruling in *Thole v. U.S. Bank* employed the same reasoning as the 3M decision, shooting down claims that U.S. Bank mishandled workers' retirement savings.

Like the 3M workers, the U.S. Bank workers didn't have standing to sue because their pension plan was fully funded, the Eighth Circuit reasoned.

"I think there's a lot of interest ... to see if the line of thinking in the early 3M case is really correct," said Andrew Oringer, the co-chair of Dechert LLP's ERISA and executive compensation group. "The question of whether a participant in a fully funded defined-benefit plan has standing to bring a fiduciary-breach claim is without a doubt a significant question."

It's also a question that has spurred a circuit split. The Second, Third and Sixth circuits have all disagreed with the Eighth Circuit, ruling that a violation of workers' ERISA rights is enough to justify a claim.

The high court has not yet made a decision about whether to accept the U.S. Bank workers' petition for a writ of certiorari. It did, however, ask the U.S. solicitor general to weigh in this fall.

Although she noted that "no one has a crystal ball," Ross said several factors weigh in favor of the court accepting review of the case.

"Standing is a sexy issue. It's such a foundational issue that our Constitution is premised on that it gets the court's attention," Ross said. "[And] we have an employer-friendly court. An employer-friendly court might want to limit the challenges made to these defined-benefit plans."

The case is *James J. Thole et al. v. U.S. Bank NA et al.*, case number 17-1712, in the U.S. Supreme Court.

### **Munro v. USC**

Like the U.S. Bank case, *Munro v. USC* concerns the circumstances under which a worker can sue for breach of fiduciary duty. The case also resembles U.S. Bank in that its subject matter tends to command the Supreme Court's attention.

*Munro v. USC* is about arbitration; it seeks to determine when workers can be compelled to arbitrate ERISA fiduciary-breach cases.

Can a general arbitration agreement stop a worker from filing a fiduciary-breach claim, which is brought on behalf of a plan? The Ninth Circuit said no, prompting the University of Southern California to petition for Supreme Court review.

Attorneys are confident the issue of fiduciary-breach claim arbitration will get to the Supreme Court, but they aren't sure whether *Munro v. USC* will be the vehicle. Nonetheless, they recommend keeping an eye on the case and two other disputes that consider arbitrability: *Dorman v. Schwab* and *Brown v. Wilmington Trust*.

"What [*Munro v. USC*] probably has going for it is the Supreme Court has, in recent years, liked to take up a lot of arbitration cases," said Barton, the chair of Block & Leviton LLP's employee benefits group.

"They seem to like arbitration quite a lot."

The case is University of Southern California et al. v. Allen L. Munro et al., case number 18-703, in the U.S. Supreme Court.

### **Brotherston v. Putnam Investments**

The Supreme Court will soon mull a third petition that could have a significant impact on benefits litigation: Putnam Investments' forthcoming request for review in the case of Brotherston v. Putnam Investments.

This dispute concerns a topic Faucher called "destined for the Supreme Court": burden of proof in fiduciary-breach rows. If the high court took up the case, it would resolve a significant circuit split that pits five courts against four while answering a question of great importance in benefits cases: Who must prove that a fiduciary breach caused a loss?

"In every case in which neither party is able to convince the trier of fact of its position, the party against whom the burden of proof runs will lose, so it is an enormously significant issue," Oringer said. "Especially given the fact that in any number of ERISA [fiduciary-breach] cases, you will have exactly that situation."

Faucher said he expects the high court to accept review of the case, which revolves around the same issue that plagued Pioneer Centres Holding v. Alerus Financial, a case the high court was considering taking up until a settlement was reached in September.

He also expects the high court to rule in Putnam Investments' favor, overturning the First Circuit's October decision in the case.

"If I had to read the tea leaves, if the Supreme Court is fairly conservative, one would guess that the court would be more likely to conclude that the plaintiffs have to prove both ends of it, both that a breach occurred and that the breach caused a loss," Faucher said.

Putnam Investments announced its intent to seek Supreme Court review in late October.

The case is John Brotherston et al. v. Putnam Investments LLC et al., case number 17-1711, in the U.S. Court of Appeals for the First Circuit.

--Editing by Jill Coffey and Breda Lund.