Portfolio Media. Inc. | 111 West 19th Street, 5th Floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Eye On ERISA: A Chat With Mayer Brown's Practice Chairs

By **Emily Brill**

Nancy Ross

Brian Netter

Law360 (March 1, 2019, 9:15 PM EST) -- Nancy Ross and Brian Netter, the co-chairs of Mayer Brown LLP's ERISA litigation practice, view writing friend-of-the-court briefs as key to their work, hoping to influence the direction of benefits law and stanch the flow of lawsuits they say has intensified in recent decades.

Most recently, Mayer Brown attorneys authored an amicus brief in Brotherston v. Putnam Investments, a U.S. Supreme Court case that could determine which party bears the burden of proof in fiduciary-breach suits.

The practice recently notched wins in three Employee Retirement Income Security Act class actions that targeted universities' retirement plan management practices, convincing workers at the University of Rochester and Long Island University to drop their suits and persuading a federal judge to toss all claims against Georgetown University.

This interview has been edited for length and clarity.

Nancy, you've been practicing benefits law for 30 years. Can you talk to me about the state of ERISA law right now?

Ross: One of the greatest ironies of ERISA is it was enacted to be this uniform system of regulation. It is just the opposite. We have seen that the outcomes of ERISA class actions are very often dependent on not just the courts in which they're litigated, but the particular judges they're litigated in front of.

Until courts start taking a more unified approach and actually enforcing the dictates the Supreme Court handed down in Twombly and Iqbal as to the threshold standard for staying in the court, they're going to encourage more and more of these lawsuits.

What do you think about the suits lodged against retirement plan managers?

Ross: It's a money game, in my view. Unfortunately, the cases that have merit get buried by the hundreds of cases that have no merit and are an attempt by the plaintiffs bar to see if they can find a hook to go into court, stay in court and elicit a settlement.

I'm not saying that corporate America has been a poster child for prudent administration of all its benefit programs, but what some courts recognize and more courts need to recognize is, like most things in corporate America, there are going to be trip-ups, and there's going to be negligence, but not all negligence or trip-ups are actionable.

Brian, what do you think about how the practice area has changed since you started doing this work in 2009?

Netter: There's been an evolution away from union-generated cases and stock-drop cases toward cases that I guess you can describe as more in the weeds of the financial attributes of a 401(k) plan. That evolution prompts the development of new areas of law and new substantive skill sets for the lawyers. I think that's an evolution we're experiencing and will continue experiencing as the practice area continues to mature.

Speaking of skill sets for lawyers, what do you two look for when hiring an ERISA litigator?

Ross: I look for three things: brains, brains and brains. I want somebody who understands the nuances of the law. ERISA is a trap for the unwary. You really need somebody who is familiar with not only the statute, but the civil enforcement provisions.

Equally important is judgment. We want somebody who can tell the difference between what is really an area that we should focus our resources on and what is an area that is not worth the fight.

Netter: It's hard to underscore how important it is [for incoming attorneys] to understand why ERISA matters for our clients. The other critical skill is the ability to translate ERISA's technical concepts into a language that generalists can understand.

What are some ERISA issues you're watching in the appellate courts right now?

Netter: Most courts require plaintiffs to prove that procedural problems [that occur during retirement plan management] actually caused a loss to plan participants, but some courts have shifted that burden to the defendants. The Supreme Court has twice toyed with resolving the issue but hasn't yet taken a case.

There's now a case in front of the court called Brotherston v. Putnam Investments that will be teed up for the justices to review. We filed a brief on behalf of the American Council of Life Insurers in that case. There are some big legal questions that are percolating, and we like to participate in those cases as amici.

Tell me about some other cases you've participated in through amicus briefs.

Ross: Another area of amicus briefs that we did was to support employers who were being attacked for their decision to provide a stable value fund on their investment platform. The cases were all over the map. If you provided one, you got attacked for doing so, and if you didn't provide one, you got attacked for doing so.

We didn't brief the issue of the prudence of stable value funds as much as the issue of how fiduciaries go about deciding whether or not to provide a stable value fund.

Those were two cases in the First Circuit: Ellis v. Fidelity and Barchock v. CVS Health. The companies won both those cases.

Why do you consider filing amici an important initiative for your practice?

Ross: That's how we get the ear of the courts and how we represent the industry at large. We work hard to keep the equilibrium that Congress intended when it enacted ERISA. If that's disturbed, it's another threat to employers being able to dedicate their energy and effort to running benefit programs as opposed to spending time in court defending themselves.

We hold very tightly onto the steering wheel of ERISA, and we try very hard to keep it from, frankly, going into a ditch.

--Editing by Jill Coffey.