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3rd Circ. Makes Defending ERISA Cases Tougher For Schools

By **Emily Brill**

Law360 (May 3, 2019, 10:17 PM EDT) -- The Third Circuit's ruling in a proposed Employee Retirement Income Security Act class action against the University of Pennsylvania set important precedent in two areas and will likely make it easier for workers to get these cases past motions to dismiss.

The first appellate ruling to emerge from a wave of roughly two dozen university retirement plan cases, the opinion held that workers can accuse universities of mismanaging their savings without inside knowledge into plan oversight practices, and universities can't skirt these suits by pointing to the breadth of their plan's investment lineup. Schools also must ensure the plan's investments are good, the court ruled.

"I think on balance, it was a fair opinion," said Todd Schneider, a founding partner of the plaintiffs firm Schneider Wallace Cottrell Konecky Wotkyns LLP. "At the end of the day, it's going to be good for retirees, and that's all we're trying to do."

Here, Law360 explains the two precedent-setting, worker-friendly holdings in Thursday's Third Circuit decision in Sweda v. University of Pennsylvania, which revived two ERISA fiduciary-breach claims against the school.

Workers Don't Need Insider Info to Sue

The split Third Circuit panel overturned U.S. District Judge Gene Pratter's holding that the workers needed more information about Penn's investment decision-making process in order to sue for breach of fiduciary duty.

The workers presented the facts they had access to, and those facts suggested that a fiduciary breach had occurred, the panel wrote. That's all the workers need to do at the motion-to-dismiss stage, the opinion said.

"While Sweda may not have directly alleged how Penn mismanaged the plan, she provided substantial circumstantial evidence from which the district court could 'reasonably infer' that a breach had occurred," the panel majority wrote in its opinion.

The Third Circuit noted that the workers compared the investment performance and fees of Penn's plan to those of comparable plans, showing that their plan didn't measure up. As one example, the workers

said Penn's plan paid $4.5 million to $5.5 million in record-keeping fees when comparable plans were paying $700,000 to $750,000.

Allegations like those aren't "merely unadorned, the-defendant-unlawfully-harmed-me accusations," the majority wrote — rather, "they are numerous and specific factual allegations that Penn did not perform its fiduciary duties with the level of care, skill, prudence, and diligence to which plan participants are statutorily entitled under [ERISA]."

As long as workers' complaints include specific factual allegations, then, they don't need to have information about a fiduciary decision-making process that likely took place behind closed doors, the panel said.

Plaintiffs attorneys praised the holding, saying it "recognizes the reality of the position the plaintiffs are in at the time they file a case," as Bailey Glasser LLP attorney Mark Boyko put it.

"The opinion recognizes the complete impossibility of having to allege the intricacies of a fiduciary process that they're not a party to," said Jerome J. Schlichter, the lead attorney for the workers who sued the university.

Conversely, defense attorney Nancy Ross, who co-chairs Mayer Brown LLP's ERISA litigation practice group, said the ruling will make it too easy for workers to get their fiduciary-breach claims past motions to dismiss.

"It is not difficult to get past that low bar, particularly in the face of a 70-plus page complaint invoking a kitchen sink approach, as here," Ross told Law360 in an email.

Stacked Plan Lineups Aren't Enough

The Third Circuit panel also reversed Judge Pratter's finding that Penn proved it adequately stewarded workers' savings by showing its plan offered many investment options.

Judge Pratter took the wrong approach, the majority wrote. Offering a variety of investment choices doesn't make a plan manager a good fiduciary unless those investment options are prudent, the opinion said.

"What the Penn court is saying is it's not enough to simply populate a plan with a variety of options," Schlichter said. "It wouldn't be prudent to have a Bernie Madoff fund in your plan just because you have a variety of other options."

Judge Pratter relied on a 2011 Third Circuit decision called Renfro v. Unisys Corp. to reach his decision, saying the case considered "the range of investment options" a plan offered to be a "highly relevant" factor in determining whether a fiduciary acted appropriately.

But the Renfro decision was based on a Seventh Circuit ruling called Hecker v. Deere Co. that was later walked back, Boyko said.

"Renfro relied on Hecker, and then the Seventh Circuit actually reconsidered the Hecker decision and said, 'If you have a bad fund, the fact that you have other good funds can't save you,'" Boyko said. "But Renfro was already out there as the Third Circuit's companion to the Seventh Circuit's Hecker case."

In the Penn case, the Third Circuit panel wrote that courts shouldn't interpret Renfro to mean that all fiduciary-breach cases against plans with stacked investment lineups should end.

Just because Renfro considers a plan's range of investment options to be a "highly relevant" factor in determining fiduciary performance doesn't mean it should be the only factor, the majority said.

"[In Renfro,] we explained that a fiduciary breach claim must be examined against the backdrop of the mix and range of available investment options. We did not hold, however, that a meaningful mix and range of investment options insulates plan fiduciaries from liability for breach of fiduciary duty," the opinion said.

Schlichter said this holding will be useful to other university cases, because it should prevent courts from tossing fiduciary-breach claims simply because a plan offers many investment options.

"If all a fiduciary needs to do is put a variety of funds in a plan, there would never be a fiduciary breach," Schlichter said. "The fiduciary would simply pick some funds and be done with it."

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

--Editing by Breda Lund and Kelly Duncan.

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