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

ERISA Trio Gives Justices A Chance To Curb Benefits Suits

By **Emily Brill**

Law360 (October 4, 2019, 6:38 PM EDT) -- With three ERISA cases on its docket this year, the U.S. Supreme Court has a chance to significantly restrict workers and retirees' ability to pursue class actions under the federal benefits statute.

If the conservative-majority court sides with companies, workers could see their deadline to challenge plan management decisions cut in half in some cases, and their ability to sue at all revoked entirely in others.

The high court's decision to accept review of three Employee Retirement Income Security Act decisions is a significant break from its yearslong pattern of refusing to accept more than one of these cases per term. Some attorneys see this as a sign that the court has something to say about how it wants ERISA class actions to proceed.

"It's reasonable to look at these cases through the lens of the broader movement by the court to impose limits on class-action litigation," said Brian Netter, co-chair of the ERISA litigation practice at Mayer Brown LLP.

Here, experts discuss what's at stake for workers and employers this term.

Banning Stock-Drop Suits in Jander v. IBM

The high court's last significant ERISA ruling arrived five years ago in Fifth Third Bancorp v. Dudenhoeffer, which made it much harder to challenge plan fiduciaries' failure to act on knowledge that the proprietary stock stored in a retirement plan is about to lose value.

As it happens, the first big ERISA ruling the Supreme Court accepted for review since Dudenhoeffer concerns the court's findings in that case.

Most stock-drop cases bit the dust after 2014 because workers couldn't jump the hurdle Dudenhoeffer erected for these suits: convincing a judge that fiduciaries' failure to act was nearly guaranteed to do more harm than good.

Typically, plaintiffs attorneys say, fiduciaries can successfully argue that taking action before a stock drop would carry too many risks, including the risk of violating federal securities laws.

IBM's retirement committee used this argument to win its stock-drop suit in New York federal court in 2017. But in 2018, the Second Circuit reversed U.S. District Judge William H. Pauley III's ruling, holding that a prudent fiduciary wouldn't have thought it proper to take no action when learning IBM's microchip division was losing $700 million per year, knowing that IBM's retirement plan was filled with company stock.

Now IBM is challenging that decision before the high court. Attorneys say the ruling could provide more clarity on what level of misconduct needs to occur to push a stock-drop suit past the finish line.

"If the Second Circuit's upheld, the plaintiffs bar is going to get a new roadmap for how to plead successful cases, and we haven't seen that in the post-Dudenhoeffer era," said Michael Khalil, the vice chair of Miller & Chevalier Chtd.'s employee benefits department.

If the Supreme Court gives workers that roadmap, Netter fears the ruling "could return the field of ERISA litigation to the way it was before Dudenhoeffer," when stock-drop suits were common.

Halving Statute of Limitations in Intel v. Sulyma

The second ERISA case the Supreme Court picked up for review was Intel v. Sulyma, which concerns the statute of limitations for filing fiduciary-breach suits.

The case pits the Ninth Circuit against the Sixth Circuit over what constitutes "actual knowledge" of fiduciary misconduct. How this term is defined will affect whether workers get three years or six years to sue.

Workers typically have six years to sue over a fiduciary breach. But if employers can convince a judge the worker gained "actual knowledge" of the breach on a specific date, then a three-year statute of limitations applies, starting on that date.

In the Intel case, the Ninth Circuit ruled that in order for workers to have "actual knowledge" of a potential ERISA violation, they must have read documents or had conversations that clued them in to the existence of wrongdoing.

Employers can't give workers "actual knowledge" of ERISA violations by simply placing financial documents online, as Intel argued they could, the Ninth Circuit ruled.

Plaintiffs attorneys widely consider Intel's argument a radical position, saying the Ninth Circuit made the right call and the high court should uphold its ruling.

"To say that someone has actual knowledge just because they were sent disclosures is an extreme position," said Dara Smith, a senior attorney at the AARP Foundation.

Smith said a ruling for Intel would deal a huge blow to workers, because it would be much easier for employers to invoke the shorter statute of limitations and thus much harder for workers to sue.

"Cutting the time in half for bringing a claim really limits people's ability to get to court," Smith said.

Employers' attorneys, on the other hand, said workers are responsible for reading the disclosures their employers send them, and they should sue over issues promptly.

"A reasonable system would be, if plan participants have an issue with something in the disclosures, they should raise it when they get the disclosures," Netter said.

Limiting Pension Lawsuits in Thole v. US Bank

The final case the Supreme Court accepted for review could resolve a circuit split that has pitted the Eighth Circuit against the Second, Third and Sixth circuits.

The US Bank workers' petition asks the court to decide whether employees can sue over pension plan mismanagement when their plan is fully funded.

The Eighth Circuit ruled for US Bank in the case, holding that a proposed class of workers lost their ability to sue under ERISA when US Bank fully funded its pension plan, which had become underfunded due to what workers call a series of bad management decisions.

The workers urged the high court to overturn the Eighth Circuit's ruling and bring the law of the land in harmony with decisions made by the Second, Third and Sixth circuits, which ruled that a violation of workers' ERISA rights was enough to justify a lawsuit, whether the plan is fully funded or not.

In September, the U.S. solicitor general said ERISA allows pensioners to sue regardless of their plan's funding status. The government specified it was staying neutral in the case, but the argument supports the workers' side.

Management-side attorneys oppose this view, saying workers should have to point to actual financial harm to be able to sue.

"Thole, if decided for the participants, would make it easier for plaintiffs lawyers to file lawsuits, because they wouldn't need to worry about finding clients who have real injuries," Netter said.

Workers' advocates, on the other hand, say this isn't a reasonable lens to apply.

"If the court were to adopt the defendants' view that Article III standing hinges on personal financial losses, many individuals who are the intended beneficiaries of a wide variety of federal statutes might potentially lose their congressionally granted ability to sue," said Elizabeth Hopkins, a partner at Kantor & Kantor LLP.

--Editing by Brian Baresch and Kelly Duncan.