State Of Class Certification: Defense In ERISA Cases

By **Richard Nowak and Nancy Ross** (April 13, 2020)

As recent data reveals record levels of class certification grants from federal courts, this Expert Analysis series examines the latest offense and defense strategies in Employee Retirement Income Security Act, workplace bias, and wage and hour class suits.

Richard Nowak

Nancy Ross

Almost a decade has passed since the U.S. Supreme Court issued its landmark decision clarifying the requirements for class certification in Wal-Mart Stores Inc. v. Dukes.[1] While it was expected that the rate of class certification would decrease in the wake of Dukes, in recent years courts have been certifying class actions at an increasing rate.

In fact, according to a recent report from Seyfarth Shaw LLP, last year Employee Retirement Income Security Act class actions were certified at the highest rate since the report was first published 16 years ago.

In 2019, ERISA plaintiffs obtained class certification almost two-thirds (65%) of the time. While in some circumstances class certification can actually benefit plan sponsors and fiduciaries defending these cases, by and large they tend to incentivize plaintiffs attorneys to bring these lawsuits, even though a class may not be necessary under ERISA's civil enforcement structure.

In addition to courts having become more receptive to ERISA class actions, the increasing rate of certification is also due to the steady stream of lawsuits challenging the administration of large 401(k) and 403(b) retirement plans. For example, in recent months, Trader Joe's Co., Salesforce.com Inc., Prudential Financial Inc., AutoZone Inc., John Hancock Life Insurance Co., Cintas Corp., Cerner Corp., and Teva Pharmaceutical Industries Ltd. were some of the companies targeted in ERISA lawsuits alleging classwide fiduciary breaches with respect to their retirement plans.

Moreover, the U.S. Supreme Court granted certiorari in three ERISA cases during the 2019-2020 term — all putative class actions: Thole v. U.S. Bank NA, Intel Corp. Investment Policy Committee v. Sulyma, and Retirement Plans Committee of IBM v. Jander.

Given the proliferation of lawsuits challenging the administration of benefit plans, courts have increasingly determined that class certification is appropriate because the challenged fiduciary behavior and resulting harm, if proven, affects the plan as a whole. However, because ERISA plans and lawsuits come in many forms, class certification is not a foregone conclusion.

For that reason, parties on both sides of the aisle in ERISA lawsuits need to carefully evaluate the propriety of class treatment.

Class Certification Requirements

For even seasoned practitioners, it can be easy to overlook the applicable requirements for class certification. Because ERISA is a federal statute, class certification is governed by

Federal Rule of Civil Procedure 23. Rule 23 provides that a party seeking to certify a class must satisfy both (1) the four requirements of Rule 23(a) and (2) at least one of the requirements of Rule 23(b). In addition, the proposed class definition must also be appropriate.

The Federal Rule 23(a) requirements include:

- Numerosity: The class is so numerous that joinder is impracticable.
- Commonality: There are questions of law or fact common to the class.
- Typicality: The claims or defenses of the class representatives are typical of the claims or defenses of the class.
- Adequacy: The class representative will fairly and adequately protect the interests of the class.

If the party moving for certification satisfies these requirements, that party must also satisfy at least one of the following Rule 23(b) requirements:

- Inconsistent adjudications: The prosecution of separate actions would create a risk of inconsistent or dispositive adjudications.
- Injunctive relief: The party is seeking declaratory or injunctive relief that would properly apply to the entire class.
- Predominance and superiority: Questions of law or fact common to the class predominate and a class action is superior to other adjudication methods.

The substantial jurisprudence interpreting each requirement of Rule 23(a) and 23(b) is beyond the scope of this article. Needless to say, however, the law of class certification materially varies from jurisdiction to jurisdiction.

While some courts address class certification in a rote manner, perfunctorily applying the Rule 23 requirements, others more deeply examine the appropriateness of class certification.

The Growing Trend: Class Certification Granted

In recent years, ERISA plaintiffs have obtained class certification in lawsuits against a number of household names, including JPMorgan Chase & Co., Oracle Corp. and Massachusetts Institute of Technology, to name a few. And, if the start of 2020 is any indication, this trend is likely to continue.

Since February, courts have certified classes in disputes involving Microchip Technology Inc., Raydon Corp., Transamerica Corp. and Northrop Grumman Corp. relating to the companies' severance, employee stock ownership, 401(k) and pension benefit plans.[2] In February, in Schuman v. Microchip Technology Inc.,[3] the U.S. District Court for the Northern District of California certified a class of more 200 former employees who alleged that they were improperly denied severance following Microchip Technology's acquisition of their former employer.

While the defendants argued that class treatment was inappropriate because liability would ultimately turn on the enforceability of the releases signed by each individual class member, the court emphasized that the defendant's argument was "based on the faulty premise that Plaintiffs have no evidence that Defendants made any common communications to induce class members into signing these releases."

The court also rejected the argument that the named plaintiffs' claims were not typical because they were uniquely entitled to additional senior-level severance payments. The court stressed that the plaintiffs' own entitlement to additional severance had no bearing on certification because their claims in the lawsuit related to the severance plan that they shared with the other class members.

Conversely, in 2019 in Carlson v. Northrop Grumman and Northrop Grumman Severance Plan,[4] the U.S. District Court for the Northern District of Illinois certified a class in an ERISA severance benefits lawsuit only with respect to the plaintiffs' claim for benefits under ERISA Section 502 (a)(1)(B).

The court denied class certification with respect to the plaintiffs' interference claim under ERISA Section 510 and their fiduciary breach claims. The court found that the named plaintiffs failed to show that their claims were typical of the class because the claims were dependent on alleged individualized representations and on the named plaintiffs' unique circumstances.

Looking at defined contribution retirement plans in particular, ERISA plaintiffs have largely succeeded in obtaining class certification because their central claims allege fiduciary breaches relating to fees and the overall administration of the plan. As such, courts have found that the implicated ERISA fiduciary duties are owed to all participants.

For example, in March 2020 in Karg v. Transamerica Corp., the U.S. District Court for the Northern District of Iowa emphasized that "fundamental questions involving defendants' alleged fiduciary breaches [with respect to the company's 401(k) plan] are common to proposed class members" and that "the fiduciary underpinnings of the ERISA claim protect the participants and beneficiaries collectively."[5] For this reason, even defendants who contest class certification may not mount a successful challenge under Rule 23(b)(1).[6]

ERISA plaintiffs have historically had more difficulty obtaining class certification in cases involving multiple plans. For example, in 2019 in Brown v. Nationwide Life Insurance Co., the U.S. District Court for the Southern District of Ohio refused to certify a plaintiff class of more than 7,000 401(k) plans and a defendant class of more than 7,000 plan sponsors in a lawsuit against plan sponsor Andrus Wagstaff PC and its record-keeper, Nationwide.[7]

The plaintiff alleged that Nationwide charged excessive administrative and record-keeping fees and concealed the amount of those fees by providing confusing and misleading fee disclosures. In denying class certification, the court held that the named plaintiff could only assert claims against Nationwide and her own plan's sponsor (Andrus Wagstaff) and that each putative class member would have to separately bring claims against Nationwide and their own plan's sponsors.

The court also noted that Nationwide separately negotiated its services agreements with each plan sponsor and did not provide identical services to those plans. Thus, the court

found that the putative plaintiff class lacked standing to sue Andrus Wagstaff and all similarly situated plan sponsors.

Similarly, in In re: Aetna UCR Litigation in 2018,[8] the U.S. District Court for the District of New Jersey denied class certification in a case challenging Aetna Inc.'s calculation of reimbursements for out-of-network medical providers because there were significant variations in the operative plan provisions that were applicable to different class members. The court also noted that commonality was lacking because the "plethora of diverse contractual standards ... [would drive] the Court into highly individualized inquiries."

However, in 2019, the U.S. District Court for the Western District of Texas in Chavez v. Plan Benefit Services Inc.[9] certified a class where the named plaintiffs were seeking to represent participants in other plans. The plaintiffs filed suit against their plans' service providers, alleging that the service providers breached their fiduciary duties by overcharging for record-keeping, administrative and other services to a large number of different plans.

While the defendants argued the plaintiffs could not adequately represent participants in other plans, the court disagreed, finding that the plaintiffs' plan affiliation was not dispositive because their excessive fee claim applied to the entire class. The court also noted that the defendants failed to identify any defense that would apply only to certain plans or class members and render class certification inappropriate.

The above decisions and statistical data reflect that courts are continuing to find ERISA cases suitable for class certification because plan fiduciaries are required to act in the best interests of all participants, and ERISA plaintiffs have been targeting planwide fiduciary conduct that that will improve their chances of certifying a class.

Hope for Defendants: Class Certification Denied

ERISA defendants have achieved more success defeating class certification when a plaintiff is unable to establish the commonality and predominance requirements of Rule 23(a)(2) and Rule 23(b)(3). This has most often arisen in cases involving multiple plans or allegations based on the defendants' alleged representations about the plaintiff's benefits or the meaning of specific plan provisions.

For example, in Fitzwater v. Consol Energy Inc. in 2019,[10] the U.S. District Court for the Southern District of West Virginia denied the plaintiffs' request to certify a class of participants in a health welfare plan based on their claim that plan representatives promised them lifetime health benefits. The plaintiffs argued that class treatment was appropriate because the defendants had allegedly promised a single, unified benefit plan that included medical, prescription drug, dental, vision and life insurance coverage.

In denying class certification, the court first explained that the written plan documents did not provide for lifetime benefits, and that the defendants' alleged representations could not override the plan's terms. The court went on to note that, even if the alleged representations could establish an entitlement to benefits, there were too many individualized questions for class certification to be appropriate.

Among other things, the plaintiffs would have to prove what the defendants represented to each class member and when they made those representations, given that some of the alleged statements dated back to the 1980s. The court further noted that the plaintiffs would have to prove which participants actually relied on the alleged misrepresentations.

While Consol Energy involved representations regarding health benefits, the same analysis holds true in other ERISA cases alleging individualized misrepresentations.[11] On the flip side, courts have found class certification appropriate when the alleged misrepresentations were widely distributed in writing to plan participants.[12]

Recently, some ERISA defendants have been successful opposing class certification on standing grounds. In addition to Brown v. Nationwide Life Insurance, in 2018 the U.S. District Court for the District of Colorado in Troudt v. Oracle Corp. partially denied the plaintiffs' motion for class certification with respect to one of the alleged imprudent plan investments (Pacific Investment Management fund) because the named plaintiffs had not invested in that fund.

While the plaintiffs argued that a more broadly defined class was appropriate because the alleged injury was to the plan itself, the court emphasized that it "is not enough to say that the named plaintiffs want relief for the plan as a whole, if the class is defined so broadly that some members will actually be harmed by that relief." The court also placed certain restrictions on the time period that class members had to have participated in two of the challenged investment funds to be part of the subclasses for those funds.

Opposing or Consenting to Class Certification

The propriety of class certification ultimately comes down to the facts and circumstances of each case. However, given that certain types of ERISA claims are more conducive to class certification than others, ERISA defendants should give careful consideration to whether, and to what extent, they should contest class certification.

For most defendants, the default reaction is to oppose class certification. This is because, in cases involving thousands of participants, the denial of class certification can alter the plaintiffs' interest in the lawsuit given the potential limit on recovery, or result in the dismissal of the lawsuit altogether.

Perhaps spurred by the overall success in defending these cases on the merits, combined with the continuing rate of class certification, some ERISA defendants have recently started to consent to class certification and shift their focus to the merits and summary judgment. Class certification provides the advantage of the elimination of piecemeal lawsuits, and a larger net in the case of a favorable outcome for defendants.

Earlier this year, the parties in Herndon v. Huntington Ingalls Industries Inc.[13] stipulated to class treatment in one of the growing number of ERISA lawsuits challenging the use of older mortality tables in calculating pension benefits using nonstandard payout methods. In their stipulation, the parties agreed that class certification was appropriate under Rule 23(b)(1) because requiring the class members to litigate individually might lead to conflicting judgments. While Huntington Ingalls expressly noted that it disagreed with the merits of the lawsuit, it supported resolution of the plaintiffs' claim through a single lawsuit.

Similarly, in 2019, the parties in Velazquez v. Massachusetts Financial Services Company[14] stipulated to certification of a class of more than 2,000 participants and beneficiaries in a lawsuit alleging that the defendants mismanaged the company's retirement plans by offering higher-cost and lower-performing proprietary investment products instead of lower-cost, better-performing unaffiliated funds.

The parties stipulated to class certification under Rule 23(b)(1) because separate actions might lead to conflicting judgments. The parties also specifically identified eight recent

ERISA cases where other courts had certified a class under similar circumstances.

In deciding whether to oppose or consent to class certification, ERISA defendants should consider the merits of their substantive defenses and their likelihood of prevailing on the merits. While defendants are appropriately concerned about incentivizing plaintiffs attorneys with class treatment, and the risk of potential class liability, prevailing on the merits against a certified class will cut off future individual lawsuits involving the same allegations.

In addition, agreeing to class status may not only save the time and resources required to oppose a motion for class certification, it can often be used as leverage to narrow the scope of the claims, and reduce future costs by clarifying certain areas of agreement between the parties that would otherwise be litigated. However, these considerations require careful analysis as to whether individual circumstances take precedent.

Moving forward, ERISA defendants may also want to consider the U.S. Supreme Court's February 2020 decision in Intel Corp. Investment Policy Committee v. Sulyma[15] in evaluating whether to oppose class certification. Although Intel is a plaintiff-friendly decision in that it makes it more difficult for defendants to show the named plaintiff had actual knowledge sufficient to trigger ERISA's three-year statute of limitations, Justice Samuel Alito's opinion emphasized that actual knowledge could be proven through an "inference of circumstantial evidence" or a showing of the plaintiff's willful blindness.

Because ERISA plaintiffs routinely plead claims seeking to take advantage of ERISA's default six-year limitations period for fiduciary breaches, defendants may be able to argue that individualized inquiries into whether each class member had actual knowledge sufficient to trigger the shorter three-year limitations period renders class treatment inappropriate.

What About Arbitration?

Another way for ERISA defendants to potentially avoid class certification is through the inclusion of an arbitration provision in their plan documents. While courts historically have not been receptive to ERISA defendants seeking to compel individual arbitration of fiduciary breach claims, in 2019 the U.S. Court of Appeals for the Ninth Circuit held in Dorman v. Charles Schwab Corp.[16] that Schwab could enforce the arbitration provision in its 401(k) plan and compel the individual arbitration of the plaintiff's fiduciary breach claims.

The court held that, even though the plaintiff's fiduciary breach claims actually belonged to the plan, the claims were still arbitrable because the plan had "expressly agreed in the Plan document that all ERISA claims should be arbitrated." This is what distinguished Dorman from the Ninth Circuit's 2018 rejection of the defendants' motion to compel arbitration in Munro v. University of Southern California.[17] Unlike in Dorman, the arbitration provision at issue in Munro was in the named plaintiffs' employment agreements.

In the wake of Dorman, plan sponsors are likely to evaluate whether to amend their plans to add arbitration provisions. While individual arbitration potentially eliminates the risk of classwide liability, plan sponsors should carefully consider the implications of choosing individual arbitration over a putative class proceeding.

For one, large corporations — which have been the primary target of recent ERISA class actions — have plans with tens of thousands of participants. If those plan sponsors successfully compel individual arbitration, companies may find themselves defending

against hundreds, or possibly thousands, of individual claims, potentially resulting in inconsistent outcomes making plan administration difficult, and paying millions of dollars in arbitration filing fees associated with those claims.

The arbitration avenue in ERISA claims is further complicated by the statutory structure that potentially allows one participant to seek recovery for fiduciary breaches on behalf of the entire plan. These issues remain to be sorted out.

In reality, the likelihood that thousands of plan participants would file individual arbitration demands asserting ERISA fiduciary breach claims is low. However, both Uber Technologies Inc. and DoorDash Inc. have experienced this first-hand in labor and employment disputes.

In February 2020, the U.S. District Court for the Northern District of California in Abernathy v. DoorDash[18] ordered DoorDash to arbitrate over 5,000 individual disputes with workers who alleged they were misclassified as independent contractors.

The filing fees alone are estimated to exceed $9 million. Similarly, before Uber went public last year, it reported in its prospectus that more than 60,000 of its drivers had filed arbitration demands over being classified as independent contractors. While these examples are unlikely to be repeated in the ERISA context, the prospect of a plan fiduciary having to defend itself against even a dozen individual fiduciary breach claims would likely be unappealing given the nature of such claims and the uncertainty if there were conflicting arbitral decisions.

Future Outlook

There is the oft quoted saying that "when one door closes, another opens." This saying is particularly apt to the current state of ERISA class certification.

While typical defenses to class certification have been less successful in ERISA cases in recent years, the Supreme Court in Intel may have provided ERISA defendants with potential avenue for defeating some class claims using ERISA's statute of limitations. In addition, the Ninth Circuit may have opened the door to the individual arbitration of fiduciary breach claims. While it remains to be seen whether, and to what extent, either will have an impact on ERISA class actions moving forward, we expect both issues to play a prominent role in ERISA litigation in the coming year.

Richard Nowak is a partner at Mayer Brown LLP.

Nancy Ross is a partner and co-chair of the ERISA litigation practice at the firm.

[1] 564 U.S. 338 (2011).

[2] Schuman v. Microchip Technology, Inc., 2020 WL 887944 (N.D. Cal. Feb. 24, 2020); Woznicki v. Raydon Corp., 2020 WL 1270223 (M.D. Fla. Mar. 16, 2020); Karg v. Transamerica Corp., Case No. 1:18-cv-00134-CJW-KEM, ECF No. 65 (N.D. Iowa Mar. 25,

2020); Baleja v. Northrop Grumman Space & Missions Systems Corp. Salaried Pension Plan, et al., Case No. 5:17-cv-00235-JGB-SP (C.D. Cal. Mar. 26, 2020).

[3] 2020 WL 887944 (N.D. Cal. Feb. 24, 2020).

[4] 333 F.R.D. 415 (N.D. Ill. 2019).

[5] Case No. 1:18-cv-00134-CJW-KEM, ECF No. 65, at pp. 5, 7 (N.D. Iowa Mar. 25, 2020).

[6] See, e.g., Troudt v. Oracle Corp., 325 F.R.D. 373 (D. Colo. 2018) (noting that "Defendants do not even address this aspect of plaintiffs' request for class certification").

[7] 2019 WL 4543538 (S.D. Ohio Sept. 19, 2019).

[8] 2018 WL 10419839 (D.N.J. June 30, 2018).

[9] 2019 WL 4254627 (W.D. Tex. Aug. 30, 2019).

[10] 2019 WL 5191245 (S.D. W. Va. Oct. 15, 2019).

[11] See e.g., Tootle v. ARINC, Inc., 222 F.R.D. 88 (D. Md. 2004).

[12] See, e.g., Cunningham v. Wawa, Inc., 387 F. Supp. 3d 529 (E.D. Pa. 2019) (finding that detrimental reliance could be presumed on a class-wide basis because the defendants' alleged misrepresentations were in the plan's summary plan descriptions and other plan communications); Moyle v. Liberty Mutual Retirement Benefit Plan, 823 F.3d 948 (9th Cir. 2016) (certifying class because the alleged misrepresentations were made on a uniform and class-wide basis).

[13] Case No. 4:19-cv-00052-HCM-DEM (E.D. Va.) (ECF No. 48) (Jan. 17, 2020).

[14] Case No. 1:17-cv-11249 (D. Mass.) (ECF No. 76) (Jan. 25, 2019).

[15] 2020 WL 908881 (S. Ct. Feb. 26, 2020).

[16] 780 F. App'x 510 (9th Cir. 2019); 934 F.3d 1107 (9th Cir. 2019).

[17] 896 F.3d 1088 (9th Cir. 2018).

[18] 2020 WL 619785 (N.D. Cal. Feb. 10, 2020).