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The Biggest ERISA Decisions Of 2019

By **Emily Brill**

Law360 (December 20, 2019, 1:00 PM EST) -- In a relatively slow year for benefits rulings, multimillion-dollar settlements were the star of the show, with Dignity Health agreeing to pay $100 million to quash allegations it misused an ERISA exemption and the University of California wrapping up a nearly decadelong class action for $84.5 million.

MetLife, JPMorgan, SSM Health and ABB Inc. all inked high-dollar settlements in Employee Retirement Income Security Act suits this year, reaching deals that ranged from $55 million to $80 million.

Elite universities continued striking deals to end ERISA class actions that accused them of mishandling retirement plan fees and investments, with the Massachusetts Institute of Technology offering the biggest payout in one of these cases so far by settling for $18 million.

Cases involving marquee questions in the benefits and executive compensation space also settled this year, leaving those queries unanswered. A case against Netflix challenging the legality of an allegedly rigged executive bonus program wrapped in September for an undisclosed sum. Also in September, a high-profile case involving The New York Times that could have affected how actuaries calculate employers' debt upon leaving union pension plans settled after going to the Second Circuit.

A report issued this year by the corporate watchdog group Good Jobs First illustrated the prevalence of settlements in the ERISA class action space, indicating that large employers have spent $6.2 billion since 2001 to end these suits.

The report, which tracked both settlements and awards, listed the largest ERISA deals of the past 18 years as Daimler AG paying $480 million in 2014 to settle allegations of improperly cutting retiree health benefits, and the Bank of New York Mellon Corp. finalizing a $335 million deal in 2015 to end claims it overcharged a group of pension funds in foreign exchange transactions.

Attorneys described 2019 as a year in which much significant litigation advanced, but little ended in a court ruling — though settlements abounded.

"There were more settlements than rulings in 2019, as is typically the case," said Nancy Ross, the co-chair of Mayer Brown LLP's ERISA litigation practice. "And the notable district court rulings have advanced to appeal, such as the university 403(b) rulings, so those remain ongoing."

Amid the slew of settlements this year, two court rulings stood out. Here, Law360 breaks down the Ninth Circuit ruling allowing benefit plan managers to force fiduciary-breach suits into solo arbitration and the Tenth Circuit holding that insurers who determine workers' profits from 401(k) investments aren't fiduciaries.

Ninth Circuit Allows Plans to Compel Arbitration

Attorneys agreed that 2019's most significant court decision came down from the Ninth Circuit, when a three-judge panel ruled in August that Charles Schwab Corp. could write a provision into its 401(k) plan blocking ERISA fiduciary-breach class actions.

The ruling gave a legal stamp of approval to language in Charles Schwab's 401(k) plan requiring employees to resolve all their complaints against the plan through individual arbitration.

"The decision is in favor of plans who have been trying to prevent these massive class actions," said Rick Pearl, a partner at McDermott Will & Emery.

The decision struck down decades-old case law — the Ninth Circuit's 1984 opinion in Amaro v. Continental Can Co., which held that ERISA fiduciary-breach suits must be heard in court — while raising new questions about whether ERISA arbitration provisions can exclude class claims.

"I think Dorman v. Schwab was very important, first of all, because it overruled previous case law in the Ninth Circuit on allowing arbitration in ERISA claims," Drinker Biddle & Reath LLP partner James Jorden said. "Longer-term, one of the key issues here is how is the determination with respect to individual versus plan arbitration is going to be worked out."

"Right now, you have this question of: Can companies adopt arbitration provisions for their employees as part of the plan itself that excludes class claims?" Jorden said.

Schwab's workers said ERISA guarantees employees the right to sue for planwide relief, and that right can't be signed away through an arbitration provision.

"I think it's intellectually inconsistent to say the plan can both choose to arbitrate its case and choose to limit its damages to only one participant's recovery when the statute clearly allows the plan to recover all of its losses," said Mark Boyko of Bailey & Glasser LLP.

Boyko said he wouldn't be surprised if corporations begin using arbitration provisions in their 401(k) plans to limit fiduciary-breach class actions. Whether that's a good idea for companies, though, remains to be seen, attorneys said.

"There are profound implications for plan sponsors if they choose to have arbitration and the arbitration clauses are upheld," said Jerry Schlichter, the founding partner of Schlichter Bogard & Denton LLP. "One can look at the mass tort space and look how lawyers who advertise for mass torts often have thousands of cases that they bring. Do employers want ERISA lawyers to become mass tort lawyers, and have an arbitrator decide those with no appeal?"

Schwab's workers petitioned the Ninth Circuit to rehear their case, but the court refused in November. Attorneys say issues surrounding 401(k) plans' arbitration provisions will likely wind up at the U.S.

Supreme Court, but they're not sure whether the vehicle will be the Schwab case or something else. The case has not yet been petitioned to the high court.

Tenth Circuit Grants Win to Money Manager

In March, the Tenth Circuit handed a victory to Great-West Life & Annuity Insurance Co. in a ruling establishing that money managers don't act as fiduciaries to 401(k) plans by setting the rate by which workers profit from certain investment options.

Though the Supreme Court denied review of the case in November, the ruling's impact reverberated across the benefits world. Money managers breathed a sigh of relief, with industry representatives saying a contrary ruling would have threatened the viability of investment products like stable-value funds.

"There are consequences of becoming a fiduciary, including having to act in the best interest of plan participants and beneficiaries. What's in the best interest of the participants is the highest interest rate possible. That's not in the best interest of the ... shareholders," said Jan Jacobson, senior counsel of retirement policy for the American Benefits Council. "Effectively, the insurers would no longer be able to offer these products."

The class of investors who sued Great-West — a group of roughly 270,000 people, who invested in Great-West's Key Guaranteed Portfolio Fund across 13,000 different 401(k) plans — said the company exercised enough control over the plan to act as a fiduciary.

For one thing, Great-West created obstacles for 401(k) plans ending their relationship with the company, the investors said. Great-West also set the interest rate by which workers profited from the KGPF, setting its own profits in the process, they said.

U.S. District Judge William J. Martinez tossed the case in December 2017, finding that Great-West didn't act as a fiduciary to the plans when setting the rates, because investors weren't bound by the insurer's decisions: They could "vote with their feet" and leave the KGPF, he said. The Tenth Circuit upheld his decision and would not rehear the case.

The case was important because "it raised the issue of who or what is a fiduciary," said Charles Field, co-chair of the financial services litigation group at Sanford Heisler Sharp LLP.

"What do you have to do to become a fiduciary to a plan, or to be identified as a fiduciary subject to ERISA standards?" Field said.

It's hardly a sure bet that the Tenth Circuit will have the final word on this issue, attorneys say, considering that the Eighth Circuit is on track to weigh in on the matter in a similar case involving stable-value funds: Rozo v. Principal.

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