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ERISA Litigation: Recent Developments

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ERISA Litigation: Recent Developments

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Agenda

- *Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S. Ct. 768 (Feb. 26, 2020)
- *Thole v. United States Bank, N.A.*, 2020 U.S. LEXIS 3030 (S. Ct. June 1, 2020)
- *Jander v. Retirement Plans Committee of IBM*, 140 S. Ct. 592 (Jan. 14, 2020), remanded to the Second Circuit
- ESOP Case Filings to Watch and Recent Decision in *Foster v. Adams and Associates*
- Case No. 18-cv-02723-JSC.(N.D. Cal. July 6, 2020).
- Recent Discovery Orders Against the U.S. Department of Labor
- EBSA Enforcement Trends and Recent Executive Orders and Potential Limits on EBSA Enforcement; ERISA Industry Committee Recommendations regarding the Pandemic

Intel Corp. Investment Policy Comm. v. Sulyma

Decided: February 26, 2020

Issue: What is "actual knowledge" under ERISA's 3-year statute of limitations (ERISA section 413(a)(2)(A), 29 U.S.C. § 1113)

- Plaintiff alleged Intel imprudently invested plan assets
- Documents and website available about plan's asset allocation and investment strategy; the Plaintiff stated he did not read this information
- District court dismissed as time-barred
- Ninth Circuit reversed, holding Plaintiff had no "actual knowledge"

Intel Corp. Investment Policy Comm. v. Sulyma

The Ninth Circuit held that the phrase “actual knowledge” means that “the plaintiff is actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff.” The Court noted that the plain and unambiguous meaning of actual knowledge means knowledge “existing in fact or reality,” as distinguished from constructive or imputed knowledge.

The Supreme Court affirmed, holding that a plaintiff does not necessarily have actual knowledge of the information contained in disclosures that he receives but does not read or cannot recall reading. To satisfy the actual knowledge requirement, the plaintiff must “in fact have become aware of that information.”

Intel Corp. Investment Policy Comm. v. Sulyma

The Court concludes its opinion by clarifying that nothing in the opinion precludes any of the "usual ways" of proving actual knowledge including "inference from circumstantial evidence." The Supreme Court instructed that, for purposes of ruling on a motion for summary judgment, a court should not adopt a plaintiff's version of the facts if the record "blatantly" contradicts the plaintiff's denial of knowledge.

Finally, the Supreme Court emphasizes that its opinion does not preclude defendants from arguing that evidence of "willful blindness" supports a finding of actual knowledge.

Thole v. U.S. Bank, N.A.

Decided: June 1, 2020

Issue: Whether the plaintiff in a defined benefit pension plan had sufficient standing to sue under ERISA when financial loss or imminent loss cannot be demonstrated

- Plaintiffs alleged U.S. Bank, N.A. breached its ERISA fiduciary duty and engaged in prohibited transactions because 40% of the plan's assets invested in equities were invested in U.S. Bank's parent company's own mutual funds

Thole v. U.S. Bank, N.A.

District Court granted Defendant's motions to dismiss, holding the case was moot and no injury existed. The Eight Circuit affirmed the District Court and the Supreme Court affirmed, stating:

"Courts sometimes make standing law more complicated than it needs to be. There is no ERISA exception to Article III. And under ordinary Article III standing analysis, the plaintiffs lack Article III standing for a simple, common sense reason: They have received all of their vested pension benefits so far, and they are legally entitled to receive the same monthly payments for the rest of their lives. Winning or losing this suit would not change the plaintiffs' monthly pension benefits. The plaintiffs have no concrete stake in this dispute and therefore lack Article III standing."

Thole v. U.S. Bank, N.A.

The Supreme Court rejected the claims that participants in a defined benefit plan are similarly situated to the participants in a defined contribution plan because the defined benefit feature ensured that the participants would receive their entire benefit under the plan

The Court acknowledged the authority that participants in a define-benefit plan have standing to sue if the mismanagement of the plan was so egregious that it substantially increased the risk that the plan and the employer would fail and be unable to pay the participants' future pension benefits, but found that such facts were not alleged in this case. Notably, in this case, the allegations that the improper investment resulted in $750M of losses were viewed in the context that the plan was funded (during the litigation) by an additional $300M in employer contributions

Jander v. Retirement Plans Committee of IBM

IBM’s announcement of the sale of its microelectronics division caused the stock price to fall 7%

Plaintiffs alleged fiduciaries could have made an earlier announcement that would have mitigated losses to stock fund

District Court dismissed on the grounds that plaintiffs failed to allege that a prudent fiduciary in the fiduciary's position would not have viewed the earlier disclosure as more likely to harm the stock fund than help it

Second Circuit reversed

Jander v. Retirement Plans Committee of IBM

The Supreme Court remanded noting that petitioners argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information. The government's briefs argued that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would conflict at least with objectives of the complex insider trading and corporate disclosure requirements imposed by the federal securities laws. The remand stated:

"The Second Circuit did not address these arguments, and, for that reason, neither shall we."

The case remains pending in the Second Circuit.

ESOP Case Filings to Watch

***Ferrell Companies, Inc. v. GreatBanc Trust Co., et al.*, 2:20-cv-02229 (D. Kan., Filed May 4, 2020)**

The complaint, arising out of a failed acquisition, alleges (i) that trustee GreatBanc Trust Company attempted to thwart its removal by replacing the Board of Directors of an ESOP sponsor that was attempting to terminate GreatBanc and (ii) that financial advisor Houlihan Lokey intentionally interfered with GreatBanc's fiduciary contract and breached its own confidentiality agreement.

ESOP Case Filings to Watch

***Gamino v. KPC Healthcare Holdings, Inc., et al.*, Case 5:20-cv-01126 (C.D. Cal., Filed June 1, 2020)**

The complaint alleges fiduciary violations of the prudence obligations and prohibited transaction based on the acquisition of employer securities for greater than adequate consideration. The complaint further seeks the $110 per day penalty under ERISA section 104 for failure to disclose the ESOP valuation report as a plan document.

ESOP Case Filings to Watch

***Szalanski v. Arnold, et al.*, 3:19-cv-940 (W.D. Wis., Filed Nov. 15, 2019)**

The complaint frames allegations that are typically framed as shareholders' derivative allegations – Board of Directors conflicts and self-interest with employment rights and stock appreciation rights – to assert an ERISA fiduciary violation against ESOP Trustee GreatBanc Trust Company which approved an asset sale in its shareholder capacity. The allegations raise the issue regarding how an ESOP Company Board of Directors should monitor its ESOP's independent trustee.

ESOP Case Filings to Watch

***Lee v. Argent Trust Company*, 5:19-cv-00156, 2019 U.S. Dist. LEXIS 132066 (W.D.N.C. Aug. 7, 2019). Appeal Pending in the Fourth Circuit (Case No. 19-2485)**

The Western District of North Carolina held that a post-transaction drop in ESOP value from $198 per share of company stock to $65 per share did not indicate an ERISA fiduciary violation and suggested the analogy of a home *purchased* pursuant to a mortgage was applicable to a leveraged ESOP purchase. The District Court rejected a motion for reconsideration in late November in light of the Fourth Circuit decision in Brundle v. Wilmington Trust, N.A. and an appeal to the Fourth Circuit is currently pending. Briefs have been filed by a number of amicus parties in support of the district court decision, including by the American Society of Appraisers.

ESOP Recent Decision

Foster v. Adams and Associates, Inc., Case No. 18-cv-02723-JSC.

N.D. Cal.) July 6, 2020.

Held: breach of the duty to monitor a fiduciary requires a predicate breach by the fiduciary. **The Northern District of California joins the Second Circuit in finding that a monitoring claim is a derivative claim. *Rinehart v. Lehman Bros. Holdings Inc.*, 817 F.3d 56, 68 (2d Cir. 2016) ("Plaintiffs cannot maintain a claim for breach of the duty to monitor ... absent an underlying breach of the duties imposed under ERISA by the Plan Committee Defendants.") (internal quotation marks and citation omitted).**

In Adams, this required an analysis of the actions of the deceased trustee in order for the allegations of monitoring violations to be considered. While there was sufficient factual questions on the withholding of information in the monitoring rule the Court also found that "no reasonable trier of fact could find the Director Defendants were acting as fiduciaries for purposes of the ESOP transaction; instead, their liability on this claim must be evaluated as non-fiduciaries."

Recent Discovery Orders Against the DOL

***Scalia, Secretary of Labor v. Heritage, et al.*, 1:18-cv-155 (D. Haw.)**

- Discovery in private plaintiff ERISA cases and those brought by the U.S. Department of Labor ("DOL") are similar. Plaintiff does not typically have personal knowledge of the alleged ERISA violation(s).
- DOL ERISA actions, however, arise out of investigations by the DOL's Employee Benefits Security Administration ("EBSA"). EBSA gathers considerable factual information, such as plan-related documents, transactional documents, e-mails, and conducts numerous interviews of investigation targets, that are discoverable in litigation.
- While certain of the DOL's investigatory materials are privileged under a number of governmental privileges, such as investigatory files, deliberative process, and informant privileges, the underlying facts are discoverable.

Recent Discovery Orders Against the DOL

***Scalia, Secretary of Labor v. Heritage, et al.*, 1:18-cv-155 (D. Haw.)**

- Governmental privileges must be supported by a detailed declaration from senior agency staff explaining how the withheld material fits into the decision-making or investigative process. Cal. Native Plant Soc'y, 251 F.R.D. 408 (N.D. Cal. 2008).
- The DOL is obligated to produce facts relevant to the claims and defenses in a lawsuit. Governmental privilege does not protect "facts and evidence" from disclosure. F.T.C. v. Warner Communications Inc., 742 F.2d 1156, 1161 (9th Cir. 1984). Only factual material that "is so interwoven with the deliberative material that it is not severable" may be encompassed by the privilege. U.S. v. Fernandez, 231 F.3d 1240, 1247 (9th Cir. 2000).
- Even if properly asserted, qualified privileges can be overcome if defendant's need for the materials and the interest in accurate fact-finding outweighs the government's interest in non-disclosure. F.T.C. v. Warner Commc'ns Inc., 742 F.2d 1156, 1161 (9th Cir. 1984); N. Pacifica, LLC v. City of Pacifica, 274 F. Supp. 2d 1118, 1122 (N.D. Cal. 2003).

Recent Discovery Orders Against the DOL

***In Scalia, Secretary of Labor v. Heritage, et al.*, 1:18-cv-155 (D. Haw.) [Dkt. 237, July 21, 2020]:**

- The Court awarded $63,509.25 in fees and $1,801.20 in costs against the Secretary of Labor in favor of two defendants following a 14-month discovery dispute over the Secretary of Labor's failure to produce documents and provide sufficient privilege logs and declarations supporting the assertion of governmental privileges.
- Despite the Secretary of Labor's continued failings in discovery and being compelled to produce thousands of pages of documents previously withheld, the Court failed to find a waiver of governmental privileges and held that an award of attorneys' fees and costs was appropriate and proper.
- With respect to the Secretary of Labor's continued assertions of privilege in certain redactions, the Court determined that defendant's need for the materials and the interest in accurate fact-finding did not outweigh the government's interest in non-disclosure.

EBSA Enforcement Trends

2019 EBSA Enforcement Program Results (DOL Fact Sheet)

- The DOL has been actively promoting its enforcement results and announced that in its most recent fiscal year ended September 30, 2019, EBSA recovered in excess of $2.5 billion in direct payment to plans, participants and beneficiaries. https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/fact-sheets/ebsa-monetary-results.pdf
- It appears that $510M of these recoveries are from informal complaint resolutions (such as participants asking when is my check going to arrive, how do I update my address, etc.) outside of enforcement contexts. Of the remaining $2 billion, the DOL does not break down the recoveries between litigation and investigations.

EBSA Enforcement Trends

2019 EBSA Enforcement Program Results (DOL Fact Sheet)

- EBSA closed 1,146 civil investigations with 770 of those cases (67%) resulting in monetary results for plans or other corrective action.

- EBSA referred 89 cases for litigation.

EBSA Enforcement Trends

Executive Orders 13891 and 13892, Issued in October 2019, direct:

- Federal Agencies to stop reliance on guidance that goes beyond a statute or notice and comment regulations (which have the force of law, if consistent with the governing statute).

- Federal agencies must establish a single, searchable toolbar that links to all of the already issued guidance. Additionally, the website must note that the guidance does not have the force and effect of law, unless as authorized by law or incorporated into a contract.

EBSA Enforcement Trends

DOL Website Guidance

In response to the Executive Orders, and in accordance with Office of Management and Budget directives, the DOL has announced on its website that it "is undertaking a detailed and comprehensive review of guidance documents issued by Department agencies to determine whether such guidance aligns with the law and Administration policy and otherwise serves an appropriate and useful purpose. Guidance which is outdated, superseded, invalid, unhelpful, confusing, redundant, outside the Department's appropriate role, or contrary to law or policy is being rescinded or modified."

EBSA Enforcement Trends

Recent Executive Orders and Potential Limits on EBSA Enforcement

There has been speculation that these Executive orders may limit future case filings on topics such as the adequate consideration standard for purchases of ESOP shares of company and cause the DOL to consider returning to their proposed regulations on adequate consideration issued 31 years ago in 1988 to issue final regulations. EBSA has listed 205 documents in the DOL guidance website as “non-binding Guidance Documents” pursuant to the directive in Executive Order 13891. The 1988 proposed regulations issued by the Department of Labor and never finalized have not been identified to date by EBSA as “non-binding Guidance Documents”.

What About the Pandemic?

July 17, 2020 ERISA Industry Committee Letter to Congressional Leadership sets forth a wish list of legislative proposals on ERISA litigation matters , including requests that Congress act to address the following:

Prevent abusive "stock drop" lawsuits, if the plaintiff cannot prove that the volatility of the investment was due to a cause other than COVID-19;

Prevent abusive "imprudent investment" lawsuits, if the plaintiff cannot prove that the volatility of the investment was due to a cause other than COVID-19; and

Prevent abusive ERISA disclosure lawsuits, by requiring plaintiffs to demonstrate actual harm in a case based on failure to provide an ERISA-required disclosure or respond to a document request in a timely manner.

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David has helped hundreds of corporations form ESOPs and create effective employee ownership through other equity incentives during the past 35 years. David defends ERISA fiduciary actions in federal courts throughout the U.S. in a wide range of controversies covering ERISA fiduciary responsibilities, ESOP valuation disputes, disclosure obligations, investment issues, and tax matters. He has extensive experience in negotiating ESOP, ERISA, and other issues with government regulatoryagencies and in representing ERISA fiduciaries in litigation. and is actively involved in defending regulatory and enforcement actions by the IRS and the U.S. Department of Labor. Recognized nationally for his experience and expertise in the ESOP and executive compensation field, David is a past chair (1993-1995 and 2005-2007) of the legislative and regulatory advisory committee of The ESOP Association.