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3 May Argument Sessions Benefits Attorneys Should Watch

By **Kellie Mejdrich**

Law360 (April 28, 2023, 8:26 PM EDT) -- In May, federal appeals courts are set to hear pivotal Employee Retirement Income Security Act disputes while California's highest court will consider whether a person can sue their spouse's employer over a COVID-19 infection.

Here are three appellate argument sessions set for May that benefits attorneys will be keeping an eye on.

California Weighs Employers' 'Take-Home' COVID Liability

California's highest appeals court has set remote oral arguments for May 9 after the **Ninth Circuit certified** two questions for the state court regarding whether companies can be held liable for not doing enough to stop COVID-19 from spreading to their workers' households.

Attorneys say the case, which asks the appeals court to answer whether California's derivative injury doctrine bars claims against a spouse's employer and whether employers owe a duty to households of its employees to prevent the spread of COVID-19, could have significant implications for employers in the state and beyond.

Corby and Robert Kuciemba have **urged the appeals court** to find liability in their suit alleging Corby became severely ill after contracting COVID-19 that Robert contracted at work because Victory Woodworks did not follow proper transmission mitigation protocols. A federal judge found that the state's derivative injury doctrine blocked their claims — a doctrine which dictates that no employer is legally obligated to compensate anyone who suffered a loss derivative of an employee's on-the-job injury.

John P. Kamin, equity partner at Bradford & Barthel, said the Kuciemba case presents the California Supreme Court with tough questions in the wake of a 2021 state appellate court ruling early on in the pandemic in See's Candies Inc. v. Superior Court of California for the County of Los Angeles . The California appellate court found that in that case, See's Candies could be sued over the COVID-19 death of a worker's spouse.

"Here, the Ninth Circuit has asked the state's high court for a more definitive ruling on derivative injury litigation," Kamin said.

Kamin said that "considering how difficult it is to determine where someone got Covid-19 from, it seems unfair to place an immense financial burden on employers and insurers at this time. It would be a travesty to bankrupt thousands of employers with an avalanche of questionable litigation, especially in lieu of the plethora of nonindustrial exposures that all of us face on a daily basis."

The case is Corby Kuciemba et al. v. Victory Woodworks Inc., case number 21-15963, in the Supreme Court of the State of California.

Oklahoma to Defend PBM Laws at 10th Circ.

A Tenth Circuit panel set arguments for May 16 in an industry group's appeal seeking to invalidate an Oklahoma law regulating pharmacy benefit managers — which intermediate between drugmakers, insurers and pharmacists — on federal preemption grounds.

The Pharmaceutical Care Management Association has argued on appeal that a lower court erred in finding that Oklahoma's Patient's Right to Pharmacy Choice Act, which the Legislature passed and the governor signed into law in 2019, was not fully preempted by federal benefits laws or Medicare Part D.

Attorneys are closely watching this case to see how more circuit courts respond to the U.S. Supreme Court's 2020 decision in Rutledge v. PCMA, which reversed an Eighth Circuit panel and found an Arkansas state law placing restrictions on PBMs wasn't preempted by ERISA. The Eighth Circuit later considered a North Dakota PBM law in PCMA v. Wehbi and found North Dakota's laws, while partially preempted by Medicare, didn't meet ERISA's criteria for preemption.

Andrew Oringer, partner and general counsel at The Wagner Law Group, said that ERISA's preemption provision is among the broader preemptive rules in federal law with a very significant exemption for state insurance laws.

"It does apply with extensive breadth, but that doesn't mean that every single statute that affects benefit plans is preempted. It just triggers the analysis, and it's an uphill battle to save it from preemption. But it's by no means impossible," Oringer said, giving as a recent example how the Supreme Court **declined to take up** a preemption challenge of a Seattle health care law in November.

The U.S. Department of Labor will participate at argument and asked the court in an **April amicus brief** in support of neither party to partially affirm and partially reverse the district court's judgment. The DOL said that the law, which places restrictions on PBMs including network design requirements, was partially preempted by ERISA and Medicare Part D but wasn't preempted when it applied to third-party administrators and PBMs.

The state of Oklahoma and PCMA **both rebuked** the DOL for its views in April response briefs, with Oklahoma officials questioning why the DOL appeared to have reversed its views on certain preemption arguments that were supported by the Supreme Court in Rutledge.

The case is Pharmaceutical Care Management Association v. Mulready et al., case number 22-6074, in the U.S. Court of Appeals for the Tenth Circuit.

10th Circ. to Consider 401(k) Fee Suit Dismissal Appeal

A Tenth Circuit panel set oral argument for May 17 in an appeal from ex-workers for a gold and copper mining company seeking to reverse dismissal of their suit alleging Barrick Gold filled an employee 401(k) plan with underperforming, high-cost investment options.

The proposed class argued on appeal that U.S. District Judge Tena Campbell's order from April 2022 didn't sufficiently take into account the change to pleading standards at the motion to dismiss stage in ERISA cases involving excessive fees following the U.S. Supreme Court's decision in January 2022 in Hughes v. Northwestern.

The case has drawn **amicus participation** from several major industry groups including the U.S. Chamber of Commerce.

Proskauer Rose LLP Partner Myron Rumeld and associate Tulio Chirinos, who discussed the Barrick Gold appeal with Law360 over email, said they hope to see the Tenth Circuit address meaningful benchmarks and share class claims during the class period with its decision.

"We hope the Tenth Circuit will approve the district court's decision to consider at the motion to dismiss stage documents that showed that, due to revenue sharing arrangements, the use of higher share classes resulted in a net cost to the plan that was lower than if it had used lower share classes," Rumeld and Chirinos said.

Other circuit courts have been "almost unanimous," Rumeld and Chirinos said, in allowing share class claims to survive dismissal, "rather than confronting at the outset such obvious explanations for the use of higher share classes."

Charles Field, partner and chair of the financial services litigation practice at plaintiffs firm Sanford Heisler Sharp LLP, said he was also looking out for how the panel weighs in on benchmarks and share class claims.

Field noted how a fees chart used in the case that compiles median fund expense ratios published by the Investment Company Institute has already been rejected as not a meaningful enough benchmark in other courts, including the Ninth Circuit. Workers want the circuit court to find the document is a useful measurement for benchmarking.

"If the circuit comes down on this, and they say 'Yes, an ICI study is not a good benchmark,' then that should put that to rest," Field said.

He said plaintiffs might have a better chance with their share class allegations, pointing to how share class claims ultimately survived the Seventh Circuit in March **on remand** in Hughes v. Northwestern.

The case is Matney et al. v. Barrick Gold of North America et al., case number 22-4045, in the U.S. Court of Appeals for the Tenth Circuit.

--Editing by Bruce Goldman.
