LAW360

Portfolio Media. Inc. | 111 West 19th Street, 5th floor | New York, NY 10011 | www.law360.com
Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

9th Circ. ERISA Fee Ruling May Spur High Court Intervention

By **Kellie Mejdrich**

Law360 (August 9, 2023, 9:37 PM EDT) -- The Ninth Circuit's recent decision reviving ex-workers' claims that AT&T needed to more thoroughly investigate and disclose compensation earned by a retirement plan record-keeper sets up a circuit split on the reach of federal benefits law that could eventually reach the U.S. Supreme Court, attorneys say.

In a break with the Third and Seventh circuits, a three-judge panel of the appellate court on Aug. 4 held that ERISA Section 406 — which broadly prohibits transactions between a benefit plan and parties in interest — **would apply** to the type of contract that AT&T's had with its plan record-keeper, Fidelity.

As a result, the panel partially reversed AT&T's **summary judgment win** from 2021 on ex-workers' claims that AT&T engaged in a prohibited transaction through its contract with Fidelity, failed to monitor the retirement plan record-keeper's compensation, and improperly reported it. The panel remanded the certified class action to a California district court to consider these issues under the proper legal framework.

Employer-side benefits attorneys told Law360 they expect a Supreme Court petition and warned that the compensation service providers earn from ERISA retirement plans might need separate legal treatment in different circuits if the decision is upheld.

"I believe it's cert worthy," said Gerald Maatman Jr., chair of Duane Morris LLP's workplace class action group, who highlighted how the Ninth Circuit's wide reach means the decision "impacts a lot of plans."

"The issue is when does [the Supreme Court] do it, and is the circuit split ripe enough that it should do so?" Maatman said, who represents defendants in ERISA class actions.

'Smackdown' on Section 406

Plaintiff-side benefits attorneys cheered the appellate panel's decision as potentially kneecapping an effort by the defense bar to cut off a wide range of service contracts from the reach of ERISA's prohibited transaction rules in litigation, with promising results in the Third and Seventh circuits.

In finding AT&T's amendment to a record-keeping contract with Fidelity constituted a prohibited transaction between the plan and a party in interest subject to Section 406, the Ninth Circuit panel said it disagreed with the Third Circuit's **2019 decision** in Sweda v. University of Pennsylvania as well as the Seventh Circuit's **2022 decision** in Albert v. Oshkosh Corp. The panel noted how the amendment to Fidelity's contract had incorporated additional services from new vendors that allowed Fidelity to reap millions in additional compensation, which the class alleges wasn't properly disclosed or considered by the plan in violation of ERISA.

When considering similar contractual relationships between service providers and an ERISA plan, the Third Circuit panel in Sweda called the interpretation that Section 406 applied, while possible, "absurd." The Seventh Circuit said in Albert, meanwhile, that it was "nonsensical," even while conceding that "under a literal reading" of the statute, transactions between plans and their service providers would be considered prohibited under Section 406.

But the appellate panel balked at the other circuits' characterizations, pointing to the DOL's own regulations as well as the statutory text.

"We are hard-pressed to find the best reading of the statutory text, as corroborated by the agency tasked with administering the relevant regulations, "nonsensical,'" the Ninth Circuit said.

Plaintiff-side attorneys highlighted that section of the opinion as an important departure from other circuits.

"It really put the smackdown in a pretty comprehensive way," said Michelle Yau, chair of the benefits practice group at plaintiff-side firm Cohen Milstein Sellers & Toll PLLC.

Yau pointed to how the appellate court in its discussion of the holding on Section 406 "looked carefully" at the DOL's extensive regulations on 408(b)(2), which exempts certain transactions between plans and service providers that would otherwise be prohibited.

John Stokes, partner at plaintiff-side firm Stris & Maher LLP, said the Ninth Circuit's decision comes as "there has been an effort by the defense bar to basically try to narrow what Congress made a very, very broad rule in Section 406."

"They had had at least some success in the prior cases that have reached the courts of appeals. And so this is a really important decision by the Ninth Circuit, because it really painstakingly goes through all the reasons why that's not the right way of thinking about it," Stokes said.

What's Next

A wave of supplemental briefing has already kicked off in other ERISA class actions in the district courts since the appellate court's decision Friday, even as a Supreme Court petition is likely already under construction.

Some employer-side attorneys were emphatic that high court intervention was needed to clarify an important question of what Congress intended when it constructed Section 406.

"There is a diverging of the circuits now on a very important issue," said Daniel Aronowitz, managing principal and owner of Euclid Fiduciary, a fiduciary liability insurance underwriting company for employee benefit plans.

"The Supreme Court has to step in and decide whether arm's-length agreements on essential service contracts can be considered a prohibited transaction," Aronowitz said.

Their reactions suggested a wave of new disclosures about plan fees could be coming from the Ninth Circuit if the decision stands. That could also trigger more plans to make sure they meet the requirements of an exemption to prohibited transaction provisions under Section 408.

But other employer-side attorneys were more skeptical that many plans weren't already ensuring that their service contracts, which might be subject to ERISA's rules barring prohibited transactions between a plan and a party in interest, met the conditions for an exemption.

"It seems to me that there is an overreaction in some quarters to the AT&T decision," said Andrew Oringer, partner with The Wagner Law Group.

"Because in my experience, practitioners tend to take the conservative and protective position that services contracts are generally subject to the provisions of Section 406(a) of ERISA," Oringer said.

"Therefore, it seems to me, practitioners ordinarily already look for applicable exemptions when reviewing services contracts."

--Editing by Bruce Goldman and Nick Petruncio.