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Latest ERISA Standard Ruling Could Lead To More Dismissals

By **Kellie Mejdrich**

Law360 (September 15, 2023, 8:12 PM EDT) -- A recent Tenth Circuit decision upholding Barrick Gold of North America Inc.'s defeat of a proposed class action alleging it saddled retirees with excessive 401(k) plan fees and subpar investments added to a growing body of circuit precedent applying a defense-friendly standard to dismissal bids in retirement plan mismanagement cases.

The three-judge panel's **48-page opinion** Sept. 6 joined the Third, Sixth, Seventh and Eighth circuits in embracing a pleading standard that requires Employee Retirement Income Security Act plaintiffs to offer up a "meaningful benchmark" by which a court can compare an allegedly mismanaged plan to a better one.

Myron Rumeld, partner and co-chair of Proskauer Rose LLP's ERISA litigation group, said in an interview the Tenth Circuit's decision was "good news" for the defense bar.

"It certainly is consistent with what I've been advocating for a long time. It's also consistent with the notion that evaluation of the claim has to be contextual, as the Supreme Court said, but I don't think it's just a question of recognizing [a] meaningful benchmark as being the comparator," Rumeld said. "It's the courts' willingness on a motion to dismiss, to really roll up its sleeves to determine whether the benchmark is meaningful."

5 Circuits Now Back Benchmarks

The Sept. 6 panel ruling traced the logic of its sister circuits, explaining how the meaningful benchmark standard was first articulated by an Eighth Circuit panel in a 2018 ruling that **shut down** an ERISA fee class action against Wells Fargo & Co.

The Tenth Circuit panel said the benchmarks that Barrick workers had offered didn't provide a sound enough basis for comparison to stave off dismissal, including comparisons between a set of mutual funds the plan offered to a set of collective investment trusts with identical investments but lower fees. The panel said with no details about the goals or strategies of the two types of investments, "so as to establish their comparability," it was unclear whether the investments had different purposes.

The Tenth Circuit panel also pointed out that in the wake of the U.S. Supreme Court's January 2022 decision in Hughes v. Northwestern University et al., another Eighth Circuit panel **further elaborated** on how to apply the meaningful benchmark standard in its October 2022 decision, Matousek v. MidAmerican Energy Co. The Tenth Circuit panel also highlighted the Eighth Circuit panel's reasoning that without a meaningful benchmark, workers couldn't infer the decision-making process was flawed in managing an energy company's employee retirement plan.

Attorneys say that's particularly important because while the Northwestern decision **knocked out one defense** against ERISA class actions alleging excessive fees — that the existence of better options in a plan could overrule claims about lower-quality ones — justices largely left it up to the appellate courts to determine how that "context-specific" inquiry worked.

"The meaningful benchmark really is becoming the test," said Emily Costin, an employment-side partner at Alston & Bird LLP.

"The Supreme Court said there needs to be a context-specific inquiry, but they didn't elaborate on

what that is, and now the circuit courts are really expanding upon that. And it seems to be that the universal test is that there needs to be a meaningful benchmark, coming out of the Wells Fargo case in the Eighth Circuit," Costin said.

Documents Outside Complaint in Play

In addition to articulating its support for the meaningful benchmark standard, attorneys highlighted how the appellate panel explicitly permitted Barrick to use documents referenced in, but in addition to the complaint, to successfully dispute higher fee allegations on the facts.

Specifically, the Tenth Circuit panel allowed Barrick to use documents to show the plan lowered costs by sharing in fee revenue from offering higher-cost investments in its 401(k) investment slate, a practice commonly referred to as revenue sharing.

That's in contrast to other courts that have recently rejected those kinds of factual arguments as either insufficient or inappropriate at the motion to dismiss stage. For example, a Ninth Circuit panel cited factual disputes over the reasons for allegedly higher fees when **reviving claims** that a Salesforce.com Inc. employee 401(k) plan was mismanaged in April 2022.

And on Wednesday, a Virginia federal court **denied a motion to dismiss** sought by an insurance company, Genworth Financial Inc., after finding that several documents the company provided in support of its motion that were referenced in the workers' complaint couldn't be considered at the dismissal stage. The judge in that case had also found meaningful benchmarks used in the workers' complaint and concluded allegations were "well-pled."

Daniel Aronowitz of Euclid Fiduciary, a fiduciary liability insurance underwriting company for employee benefit plans, said of the Tenth Circuit decision: "The key factor in this case was that the district court allowed extrinsic evidence that was not in the complaint to show the revenue-sharing discount."

"Courts that allow the true evidence of plan fees are more likely to dismiss complaints," Aronowitz said, contrasting the decision with revivals in the Ninth Circuit, including the Salesforce case.

Costin, at Alston & Bird, said she didn't think the Ninth Circuit's revival in Salesforce was representative of a divergence in the pleading standard. Costin pointed out how the Salesforce decision was unpublished, "very short" at five pages, and didn't address the Supreme Court's 2022 decision that had come down months earlier.

What's Next

Attorneys are closely watching to see if more circuits adopt the meaningful benchmark standard, with a Ninth Circuit panel set to hear arguments in October in a **dismissal appeal** involving an Intel 401(k) plan where the term has come up repeatedly in briefing.

If the standard were to be adopted nationwide, that could certainly raise the bar for pleadings in ERISA class actions and lead to more dismissals at a time when large companies continue to be targeted with new class actions every week.

Andrew Oringer, partner at the Wagner Law Group, said the Tenth Circuit panel's decision could be something of a "tipping point." He said in the early aftermath of the Supreme Court's Northwestern decision, "some pointed to the discussion there about the facts-and-circumstances nature of the prudence inquiry as something that might allow plaintiffs to get past the pleading stage." But rulings like the Tenth Circuit panel's decision show that "conclusory allegations of imprudence won't cut it," he said.

"Plaintiffs lawyers may need to start really considering whether cases with weak facts are really worth bringing, just on the off chance that the courts will let the case get past the pleadings stage," Oringer said.

--Editing by Bruce Goldman and Nick Petruncio.