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5 Recent ERISA Decisions Attorneys Should Know

By **Kellie Mejdrich**

Law360 (December 8, 2023, 1:16 PM EST) -- Appellate courts issued a bevy of important decisions applying federal benefits law in 2023, including a recent Second Circuit ruling in favor of Cornell University that deepened a circuit split and a Tenth Circuit finding that an Oklahoma law regulating pharmacy benefit managers was preempted.

Here, Law360 looks back at five published circuit court decisions in Employee Retirement Income Security Act litigation from the second half of 2023 that benefits lawyers should know.

2nd Circ. Cornell Decision on Prohibited Transactions Widens Circuit Split

A Second Circuit panel's November **decision affirming dismissal** of a certified class action against Cornell University from employees alleging mismanagement of their defined-contribution retirement plan adds to a circuit split on the pleading standard for ERISA prohibited transaction claims that's destined for the U.S. Supreme Court, attorneys say.

The three-judge panel's **52-page opinion**, published Nov. 14, upheld a New York federal judge's decision to toss claims alleging the university allowed a tax-sheltered 403(b) retirement plan to pay excessively high recordkeeping and administrative fees while offering poorly performing investment options. A certified class of some 28,000 participants in Cornell's employee retirement plan appealed to the Second Circuit in January 2020 after the final claim in the case was **settled for $225,000** at the end of 2020. The suit was first brought by a retirement plan participant in August 2016.

The panel specifically affirmed U.S. District Judge P. Kevin Castel's entry of judgment in the case in favor of Cornell from December 2020, which came after the trial court granted summary judgment in September 2019 on all but one of the remaining claims in the suit.

Attorneys quickly zeroed in on the Second Circuit's first-impression ruling on the pleading standard for an ERISA prohibited transaction claim involving Cornell's service providers, Fidelity and the Teachers Insurance and Annuity Association of America and College Retirement Equities Fund, or TIAA-CREF. Ex-workers had alleged that Cornell violated ERISA by causing the plans to engage in prohibited transactions with Fidelity and TIAA-CREF by paying unreasonable fees, but the district court dismissed the claim in 2017.

In affirming that dismissal, the panel found Cornell ex-workers couldn't simply allege the fiduciary caused the plan to overcompensate a service provider to state a claim for a prohibited transaction under ERISA. There had to be unnecessary services or unreasonable compensation involved in allegations "supporting an inference of disloyalty," the panel said.

"The Second Circuit is joining what is now a broad, recognized circuit split on the issue," said Scott Burnett Smith, founder and chair of Bradley Arant Boult Cummings LLP's appellate litigation practice group, with the Ninth and Eighth circuits on one side and the Second, Third, Tenth and Seventh circuits on the other.

Smith, who focuses on ERISA litigation and class actions, said he expects that petitions to the Supreme Court will soon be filed on the issue "now that this split is so widespread," with the Second Circuit's decision standing in direct contrast to a Ninth Circuit ruling from August reviving claims against AT&T in a 401(k) fee suit.

"I do believe that the Second Circuit case puts that under the microscope even more," Smith said of

the AT&T case.

The case is Cunningham et al. v. Cornell University et al., case number 21-88, in the U.S. Court of Appeals for the Second Circuit.

10th Circ. Embraces Benchmarks Post-Northwestern

A Tenth Circuit decision in September **backing dismissal** of 401(k) mismanagement allegations against Barrick Gold of North America Inc. further cemented a pleading standard that's caught on among circuit courts requiring ERISA plaintiffs to include a "meaningful benchmark" by which courts can compare different plans.

A three-judge panel's **48-page opinion** published Sept. 6 made the Tenth Circuit the fifth circuit court to back the meaningful benchmark standard at the pleading stage for excessive fee and investment challenges involving defined-contribution plans, joining the Third, Sixth, Seventh and Eighth circuits.

That's particularly important in the wake of the Supreme Court's 2022 decision reviving mismanagement claims against Northwestern University in a similar defined-contribution plan challenge. While the justices ruled out Northwestern's affirmative defense that the existence of better options in a plan could overrule claims about lower-quality ones, the decision broadly left it to the appellate courts to further flesh out the pleading standards for ERISA excessive fee and investment challenges at the motion to dismiss stage.

Andrew Oringer, partner and general counsel at the Wagner Law Group, said the decision showed "it's just not enough to wave at issues and throw things up against the wall and see what sticks."

"You've got to actually scope out a set of facts that plausibly support a claim that the fiduciary standards have been breached. And what's becoming somewhat more clear, at least in some courts, is that's becoming a significantly high bar," Oringer said.

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.

9th Circ. Panel Backs Off Reprocessing Ruling

A Ninth Circuit panel's substituted published opinion from late August **tweaked a previously published holding** that found reprocessing wasn't a remedy under ERISA, a **key victory** for the plaintiffs bar after an earlier published **decision from January** had begun to gum up health benefit claims litigation nationwide.

The three-judge panel's **37-page substituted opinion** published Aug. 22 still found that patients in ERISA-regulated health benefit plans administered by United Behavioral Health weren't entitled to reprocessing of their claims on a class basis without first proving they were owed benefits. But **following outcry** from President Joe Biden's administration, multiple mental health and substance use disorder treatment advocacy groups, and state attorneys general who filed amicus briefs in support of rehearing, the panel held that while reprocessing wasn't available for plaintiffs in the consolidated class action at hand, it was still possible in other cases.

The panel's decision partially reverses a pair of blockbuster trial court rulings from **2019** and **2020** that would have required UBH to reprocess 67,000 claims for substance use disorder and mental health treatment, but preserved class certification and part of the trial court's judgment on a fiduciary breach claim. But that was a far cry from the complete reversal the panel first articulated in a **March 2022 unpublished memorandum**.

The appeal began with two suits in 2014 that were later consolidated. One case, led by named plaintiff Gary Alexander, brings claims over benefit denials for outpatient treatment, while the other suit, led by David and Natasha Wit, brings claims over benefit denials for residential treatment and hospital stays. With three decisions in the case now on the books, some benefits attorneys have begun to refer to the decisions as Wit I, II and III.

Plaintiff-side Arnall Golden Gregory LLP partner Matt Lavin said changes in the Wit III decision from late August were significant for ERISA health claims litigation, including for plaintiffs he's representing in California federal court who allege UBH violated ERISA when it underpaid claims for out-of-network substance use disorder treatment. That case was stayed pending the issuance of the mandate in Wit, which occurred Sept. 13. Plaintiffs have renewed their motion for class certification after a motion was **denied in April** following the first published Wit opinion in January.

"I think the Ninth Circuit was extremely careful, on its last ruling, to make it clear the Ninth does allow reprocessing as a remedy in an ERISA class action, just not on the facts of Wit. And by doing so, it eliminated the appearance of any kind of circuit split," Lavin said of the Ninth Circuit's decision in Wit III.

Attorneys representing insurers and plan sponsors, including the defendants in the Wit case, have rejected plaintiffs' failure to allege harm from individual claims that were adjudicated in a way that breached plan terms as a cynical way to get around pleading a claim for benefits. Lavin said the class certification arguments in Wit were a "tactical move" that the Ninth Circuit court didn't agree with.

"But that is a very Wit-specific problem," Lavin said. He described how the California action employed a different strategy than in Wit in asserting claims under ERISA related to an allegedly faulty claims process.

"Their harm was caused by the exact same conduct. And everybody was — in the same way — their claims were underpaid, using the exact same inappropriate methodology that applied across the board," Lavin said of differences between the two cases.

The cases are David Wit et al. v. United Behavioral Health, case numbers 20-17363 and 21-15193, and Gary Alexander et al. v. United Behavioral Health, case numbers 20-17364 and 21-15194, in the U.S. Court of Appeals for the Ninth Circuit.

10th Circ. Finds ERISA Preempts Okla. PBM Law

The Tenth Circuit in August found portions of an Oklahoma state statute from 2019 regulating pharmacy benefit managers **didn't apply** to ERISA and Medicare Part D plans in the state, critically after the Supreme Court in 2020 upheld an Arkansas law regulating PBMs as not preempted in Rutledge v. PCMA .

The panel in an **Aug. 15 opinion** reversed an Oklahoma **trial court ruling from April 2022** that found portions of the state's Patient's Right to Pharmacy Choice Act were not federally preempted and remanded the case to the district court for further proceedings.

The Pharmaceutical Care Management Association — a lobbying group representing PBMs, which act as intermediaries between pharmacies, insurance companies and drugmakers — first sued Oklahoma Insurance Commissioner Glen Mulready and the state's insurance department in October 2019. The PCMA sued in Oklahoma federal court one week before the law would have taken effect, but the case was initially stayed while the Rutledge case was pending at the Supreme Court. In that case, the justices upheld an Arkansas law regulating PBMs that set requirements on minimum payments to pharmacies from health plans, finding it wasn't preempted by ERISA. Both PCMA and the Oklahoma defendants moved for summary judgment in September 2021 after the Supreme Court found the Arkansas law wasn't preempted.

The Tenth Circuit's holding was a significant win for the ERISA defense bar and attorneys representing health plans given a **flood of recently enacted state legislation targeting PBMs**. The panel found in August that Oklahoma's policies "do more than increase costs" and instead changed PBM pharmacy network design in a way that directly affected ERISA and Medicare plan administration. Oklahoma state officials petitioned for rehearing in September; a decision is still pending after the PCMA filed an opposition brief in October.

Ryan Temme, principal at Groom Law Group, said the decision was important because it "maintained the status quo and gave meaning to a lot of what the Supreme Court said in Rutledge."

Temme said the Tenth Circuit's decision showed how the statute in Rutledge was distinguishable from

the Oklahoma law. In contrast, the Arkansas law was "really a cost regulation between the PBM and the pharmacy," Temme said, and cost increases the plans experienced weren't "significant enough to force a certain plan design on the plan sponsor."

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.

9th Circ. Revives AT&T 401(k) Fight

The Ninth Circuit's **August revival** of a 401(k) mismanagement suit against AT&T from a certified class of employee retirement plan participants, alleging a costly plan recordkeeper the company failed to monitor constituted a prohibited transaction, set the stage for a clear contrast with the Second Circuit.

A unanimous three-judge panel's **46-page opinion** issued Aug. 4 roundly rejected the argument that ERISA's Section 406, which broadly prohibits transactions between parties in interest, didn't encompass arm's-length transactions, including those between a plan's recordkeeper and a third party that provides investment advice to participants. In other circuits, including the Second, appellate courts have found that the prohibitions are so broad that they could be read to involve nearly every relationship to an ERISA plan if read literally.

But the Ninth Circuit found a lower court erred in concluding that AT&T satisfied the condition of an exemption to Section 406, contained in Section 408, that exempts from ERISA's prohibited transaction provisions reasonable compensation paid to service providers for necessary services to an ERISA plan.

The panel said that the district court had to consider more than the recordkeeping expenses the plan directly paid to Fidelity when weighing prohibited transaction claims from the class, citing ERISA's "unambiguous text."

Michael Hines, a partner in Skadden Arps Slate Meagher & Flom LLP's litigation practice group who focuses on employee benefits, said he believed the AT&T decision was "misguided, because the practical effect of the ruling is that essentially every contract for planning-related services is a prohibited transaction, unless and until a plan sponsor can prove otherwise."

Hines said as appellate courts continue to articulate pleading standards for breach of the fiduciary duty of prudence under ERISA, the Ninth Circuit decision "seemed like a different way to plead that, by dressing it up as a prohibited transaction claim and not having to meet those pleading standards."

Charles Field, partner and chair of the financial services litigation practice at plaintiffs firm Sanford Heisler Sharp LLP, agreed that "there appears to be a split" between circuits on the pleading standards for a prohibited transaction claim. But he disagreed that every service provider transaction would be considered prohibited in the wake of AT&T.

"What this opinion is saying is that these agreements are not necessarily prohibited, unless the compensation that's being paid is unreasonable," Field said.

The case is Robert Bugielski et al. v. AT&T Services Inc. et al., case number 21-56196, in the U.S. Court of Appeals for the Ninth Circuit.

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