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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 January Argument Sessions Benefits Attys Should Watch

By **Kellie Mejdrich**

Law360 (January 3, 2024, 8:48 PM EST) -- The Fifth Circuit will hear arguments this month over whether the Affordable Care Act's anti-discrimination mandate covers sexual orientation and gender identity, and Goldman Sachs workers will seek to revive a class action over proprietary retirement investments.

Here's a look at those two cases, and three others benefits attorneys should be keeping an eye on in January.

HHS Trans Health Policy At 5th Circ.

A Fifth Circuit panel has set oral arguments for Jan. 8 in the federal government's appeal in an Administrative Procedure Act lawsuit over the Biden administration's interpretation that nondiscrimination in healthcare protections under the Affordable Care Act bar discrimination based on sexual orientation and gender identity.

The U.S. Department of Health and Human Services **seeks to undo** a Texas court ruling from **November 2022 that invalidated** the agency's interpretation of the ACA's Section 1557 after finding a landmark 2020 U.S. Supreme Court decision about Title VII discrimination wasn't applicable to the healthcare law.

Doctors opposed to providing gender-affirming care sued after HHS announced in May 2021 that it would interpret and enforce Section 1557 of the ACA in line with the U.S. Supreme Court's 2020 decision in Bostock v. Clayton County. They alleged the interpretation from HHS violated the Administrative Procedure Act.

After certifying a class of all healthcare providers subject to Section 1557 in October 2022, U.S. District Judge Matthew J. Kacsmaryk said in his November 2022 order granting summary judgment and setting aside the HHS policy nationwide that Supreme Court justices were explicit that the Bostock decision didn't apply beyond Title VII of the Civil Rights Act. Judge Kacsmaryk found HHS violated the Administrative Procedure Act in interpreting Bostock to extend to Section 1557 or Title IX, which the ACA uses to outline who is protected from discrimination in healthcare, including plans regulated by the Employee Retirement Income Security Act.

HHS **argued in a reply brief filed in June with the appellate court** that the lower court erred in determining the doctors, who haven't faced any enforcement action over the policy, had adequate Article III standing to sue.

The appeal comes up for argument at the same time benefits attorneys have been hoping for additional guidance on how to apply nondiscrimination in healthcare policy to ERISA plans and the legality of potential exclusions — but have gotten little help from federal agencies **as lawsuits proliferate**.

Tia Martarella, of counsel at Jackson Lewis PC, said she's tracking the appeal and expects the Fifth Circuit to uphold Judge Kacsmaryk's ruling: "I would be surprised if they took the position that Bostock applies to Title IX," she said, referring to the Fifth Circuit.

She pointed out that the appellate court already invalidated another Section 1557 policy in **2022,**

when a three-judge panel upheld a permanent block on the federal government from requiring several religious medical providers to perform abortions or gender-confirmation surgeries or cover those procedures for their employees.

"What's probably going to happen is it's going to get vacated," Martarella said of HHS policy on Section 1557 of the ACA as applied to gender identity and sexual orientation.

"Then, it's going to get a cert to the Supreme Court, then we're going to figure out what happens from there," Martarella added.

The case is Neese v. Becerra, case number 23-10078, in the U.S. Court of Appeals for the Fifth Circuit.

Workers Seek 2nd Circ. Revival Of Goldman 401(k) Suit

A Second Circuit panel has set arguments for Jan. 8 in an appeal from a class of more than 29,000 Goldman Sachs employee 401(k) plan participants seeking to undo their September 2022 summary judgment loss on claims alleging retirees lost millions because Goldman offered under-performing proprietary investment funds.

Attorneys say they're closely watching the case as similar suits are pending nationwide against large employers that allege an employer's offering of in-house funds breached ERISA's fiduciary duties of loyalty and prudence, and constituted transactions that were prohibited under federal benefits law.

The class of participants in a $7.5 billion employee 401(k) retirement plan argue on appeal that U.S. District Judge Edgardo Ramos was wrong to grant Goldman summary judgment on claims that the bank gave preferential treatment to its own company-managed investment funds. The company eventually removed the funds as plan offerings after they underperformed, and the class alleged that should have happened sooner. Goldman argued in **a brief filed in April that** the lower court properly found the undisputed facts showed it managed the plan in compliance with ERISA.

Daniel Aronowitz, managing principal and owner of Euclid Fiduciary, said he's closely watching the case because the ERISA plaintiffs' bar "likes to sue on proprietary investment cases."

"This is important because the court actually granted summary judgment on the alleged underperformance and breach of fiduciary duty in allowing three to five proprietary investments — in a fund that had 30 or 35 investments," Aronowitz said.

Aronowitz said another factor making the case interesting is that the plaintiff-side expert was Marcia Wagner of the Wagner Law Group, a major law firm that often represents employers.

"It's very interesting. She's a very good witness, she took the position that the Investment Committee had a rudderless process because they didn't have an investment policy statement," Aronowitz said. "But the court overlooked that … from my perspective, this committee did everything right and had a deliberative process and the court got to the right decision."

Former Goldman employee Leonid Falberg **first sued in October 2019**. A trial court **granted him class certification** in February 2022, and the Second Circuit **rejected Goldman Sachs' bid to decertify** the class in June 2022.

The case is Leonid Falberg v. The Goldman Sachs Group Inc. et al., case number 22-2689, in the U.S. Court of Appeals for the Second Circuit.

1st Circ. To Weigh Teamsters' Pension Liability Win

A First Circuit panel has set arguments for Jan. 8 in Americold Logistics LLC's challenge to a $1.5 million Teamsters pension fund bill, in a dispute over a settlement agreement involving withdrawal liability that the company negotiated through written agreements with the unions when it left a legacy retirement plan in 2017.

The New England Teamsters Pension Fund, which is joined as a defendant in the suit by Teamsters

Local 25 and Teamsters Local 42, **asked the appellate court in September to affirm** a Massachusetts federal court's January 2023 ruling that found the Multiemployer Pension Plan Amendments Act mandated arbitration for the dispute. Americold hit the Teamsters units with the suit in June 2022, alleging it had agreed to pay about $13.7 million to the fund over 30 years after switching from the fund's "legacy plan" to its "alternative plan," but it didn't consent to the activation of an additional $1.5 million charge.

Americold switched to an alternative Teamsters plan in 2017 and signed withdrawal and reentry agreements with Local 25 and Local 42. The company **argues on appeal** that the withdrawal and reentry agreements are a set that can be enforced in court and are not subject to the MPPAA's mandatory arbitration provision.

Specifically, Americold argues the MPPAA's mandatory arbitration provision doesn't apply to a $1.5 million bill the Teamsters sent Americold in 2020 for what the logistics company called "snapback liability" created by contract, not federal pension laws. Americold said in a reply brief with the appellate court filed in October that the snapback liability — which was established pursuant to the 2017 agreement outlining its exit from the legacy plan and reentry into a new employer pool — was distinguishable from withdrawal liability subject to the MPPAA.

"This case stems from a breach of contract in 2020 when the fund invoiced Americold for snapback liability after the closure of its Boston operations, despite the fact that there had not been a complete withdrawal — as defined in the 2017 agreements — because Americold continued to operate in Gloucester," Americold said in its brief.

Faegre Drinker Biddle & Reath LLP partner Greg Ossi said he's closely watching the case to see how the Second Circuit rules on how withdrawal liability rules under the MPPAA apply to a "private settlement agreement."

A major question on appeal, Ossi said, is whether the settlement agreement between the union and the company related to the withdrawal is subject to mandatory arbitration under the MPPAA or whether Americold can dispute the bill by bringing a breach of contract claim in court.

Ossi said he expects the First Circuit to reverse the lower court because "it is very clearly not an issue of MPPAA withdrawal liability, but rather pursuant to a settlement agreement."

The case is Americold Logistics LLC v. N.E. Teamsters Pension Fund et al., case number 23-1189, in the U.S. Court of Appeals for the First Circuit.

2nd Circ. Takes Up United Surgery Claim Fight

A Second Circuit panel has set arguments for Jan. 11 in an appeal from medical practice groups challenging how UnitedHealth Group Inc. reimburses claims for surgeries that doctors perform in their offices, after a New York federal court granted the insurer judgment on all claims in the case in September 2022.

The case challenging claims administration practices at out-of-network doctors' offices for in-office surgeries arrives at the appellate court for debate at the same time disputes over out-of-network billing are heating up. That includes via arbitration subject to the No Surprises Act, though that's not an issue debated in the New York practices' appeal, which alleges United's out-of-network billing procedures violated ERISA and the plain meaning of employee participants' health plans.

An individual medical practice called Columbia East Side Surgery PC, as well as two doctor groups — the Society of New York Office Based Surgery Facilities and the Medical Society of the State of New York, first sued in July 2016.

The medical practice groups and an individual surgery practice alleged that United violated ERISA by failing to pay the same facility fees it provided for hospital surgeries, on claims for in-office procedures. On appeal, doctors argue United's denials, on grounds that the surgeries weren't licensed in the state, were based on an automatic policy that didn't account for explicit changes in a 2007 New York state law authorizing office-based surgeries and setting standards for office facilities where the procedures can be performed.

Following a five-day bench trial, U.S. District Judge J. Paul Oetken entered final judgment in favor of United and its affiliated companies on Sept. 14.

The doctors in an appellant's brief filed in February argued the appellate court should reverse Judge Oetken's decision because the court went too far beyond the administrative record when considering the reasonableness of United's denials, and because the denials defied the plain meaning of the ERISA plans.

"As an OBS is not a hospital and is permitted under New York law to provide surgical services on an outpatient basis, any average plan participant would plainly understand this plan language to mean that an OBS is a facility," the doctors said.

The case is The Medical Society of the State of New York v. UnitedHealth Group Inc., case number 22-2702, in the U.S. Court of Appeals for the Second Circuit.

6th Circ. Weighs ESOP Liability Insurance Dispute

A Sixth Circuit panel has set arguments for Jan. 25 in a dispute over liability insurance coverage tied to a financial firm performing employee stock ownership plan valuations, in an appeal that asks the appellate court to determine when an ERISA exclusion applies to defense costs stemming from ESOP services.

Great American Fidelity Insurance Co. hopes to knock out a district court's ruling that a policy exclusion for ERISA cases didn't apply to all the disputed costs, which were spent defending Stout Risius Ross Inc. against claims alleging mismanagement of an employee stock ownership plan that spawned proceedings in Delaware bankruptcy court and Wisconsin federal court. A Delaware judge eventually transferred portions of the Delaware action to Wisconsin.

Great American argues on appeal it's owed more for defending Stout Risius under the terms of the company's miscellaneous professional liability insurance policy because it contains a clear exclusion for claims that are "based on or arose out of actual or alleged violations of ERISA or securities laws."

The lawsuits stem from work Stout Risius performed for trustees of the Appvion Retirement Savings and Employee Stock Ownership Plan to conduct an independent fair market valuation of a stock held by the plan. A proposed class of ESOP participants accused the firm of inflating share prices, causing Appvion and its ESOP to "consistently overpay" for the stock, which eventually led Appvion into bankruptcy.

The suit settled and was dismissed by the time U.S. District Judge Laurie J. Michelson **permitted Great American to be reimbursed $60,000 in November 2022,** which was only part of what the insurer was seeking reimbursement for defending Stout Risius in the ESOP suit alleging mismanagement. In her ruling that found the insurer was owed only partial reimbursement, Judge Michelson said the policy exclusion for ERISA cases didn't apply to defending non-ERISA allegations, including state-law tort and bankruptcy claims in the suit. In court filings previous to Judge Michelson's November 2022 ruling, Great American said it spent more than $624,000 on the firm's defense.

Andrew Oringer, partner and general counsel at Wagner, said the case offers clear, practical advice for benefits attorneys and employers: "If you are dealing with an ERISA plan, you need to make sure that your policy does not contain an ERISA exclusion."

"It is a known issue in the market that policies often, by default, contain ERISA exclusions, and it is extremely common for insureds dealing with ERISA plans to get what is colloquially known as an ERISA rider," Oringer said. "So, whether or not the defendants prevail here, to me, the lesson is that if you're dealing with an ERISA plan, make sure that you don't have an ERISA exclusion in your insurance policy."

Aronowitz said he's also watching the case because of its implications for the cost of fiduciary liability insurance. He said he wasn't surprised Great American was appealing the district court's ruling: "that's a fundamental tenet of most professional services contracts," Aronowitz said of an ERISA

policy exclusion.

"Because if you want ERISA covered, you need to buy it separate, and it's going to be more expensive. Especially if you're in the business of evaluating ESOPs, which the plaintiff bar loves to sue on, and so does the DOL," Aronowitz said. "There are just too many lawsuits on ESOP transactions."

The case is Great American Fidelity Insurance Company v. Stout Risius Ross Inc. et al., case number 23-1167, in the U.S. Court of Appeals for the Sixth Circuit.

--Editing by Amy Rowe.
