

Cornell Case May Be Bellwether For ERISA Transaction Claims

By **Kellie Mejdrich**

Law360 (January 21, 2025, 6:59 PM EST) -- The U.S. Supreme Court will hear arguments Wednesday from Cornell University and workers looking to reinstate a class action alleging their retirement plan paid excessive fees, in a case that could change the strategy for Employee Retirement Income Security Act plaintiffs in the future.

The workers, who saw the high court **grant their bid** for review Oct. 4, are taking aim at a Second Circuit panel's **November 2023 decision** upholding an end to their case. The panel split with other circuits by ruling that it was the workers' burden at the motion-to-dismiss stage to prove that the employer did not meet the conditions of its asserted exemption to ERISA's limits on impermissible plan transactions. The appellate panel also affirmed summary judgment on other claims, but only the workers' prohibited transaction claims are subject to the Supreme Court petition.

The Cornell workers have argued that payments their plan made to its service providers, the Teachers Insurance and Annuity Association of America and Fidelity Investments Inc., constituted prohibited transactions because the fees charged for investment management and recordkeeping were too high.

Not all ERISA challenges to retirement plan fees involve allegations that a contract with service providers like TIAA or Fidelity was prohibited, though attorneys say that if the Supreme Court were to reject the Second Circuit's reading, it's likely more cases probably would.

"It's a very important case in the ERISA context," said Elizabeth Hopkins, senior partner at Kantor & Kantor LLP and a plaintiffs-side ERISA attorney, referring to the Cornell suit. Not only does the case have ramifications for Cornell and its plan participants, but it could be a barometer of "where the court is going on pleading burdens in general," she said.

How We Got Here

The initial complaint in the Cornell case, lodged in August 2016, didn't include a prohibited transaction claim — it alleged two fiduciary breach claims and a failure-to-monitor claim. But a December 2016 amended complaint added prohibited transaction claims, which got tossed by a lower court in 2017 and are at the center of the battle at the nation's highest court.

When asked why prohibited transaction claims are making their way into more of these types of suits, Hopkins said that it's probably due to the pleading standards for fiduciary breach claims becoming more strict.

"I think as it got harder to plead fiduciary breach in the context of fee cases, I think then people started thinking, 'Well, you know, should we have to plead this? This is a prohibited transaction,'" Hopkins said.

Cornell workers are asking the court to determine the relationship between two portions of ERISA: Section 406, which sets out which transactions are prohibited under the statute, and Section 408, which lists out exemptions to those prohibitions.

The Cornell workers are arguing that to state a prohibited transaction claim under Section 406, workers only need to show a transaction between a plan and a party in interest to the plan, as the

statute describes. An exemption to those provisions should be Cornell's to plead as an affirmative defense, the workers argue.

But Cornell argues that other appellate courts have rejected such a literal reading of the law and points out that Section 406 explicitly references exemptions in Section 408, making them fair game at the pleading stage. If workers want to argue a transaction was prohibited, they must show that the exemption allowing for service provider contracts wasn't met, Cornell asserts.

The Cornell workers said in their petition filed in March that only three other circuits — the Third, Seventh and Tenth — have adopted such an expansive reading of ERISA to require additional elements beyond showing a transaction between a plan and a party in interest to a plan to plead a claim under Section 406. They also point out that the Eighth and Ninth circuits merely require showing a transaction between the plan and the party in interest.

What's at Stake

Some management-side attorneys have warned that prohibited transaction claims against employers involving benefit plan service providers could balloon if the Supreme Court does not affirm the Second Circuit.

But others are more skeptical that any given decision in the case will dramatically impact ERISA litigation and predict that the court's ruling will likely be narrowly focused.

"I think that there's a real misunderstanding of this issue out there," said Andrew Oringer, partner and general counsel at The Wagner Law Group and a longtime ERISA practitioner.

"The reality is ... many ERISA practitioners over the years have — out of either an excess of caution or as a result of an analytical conclusion — have counseled that an exemption should be there, essentially, in the case of every services relationship," Oringer said.

He also pushed back against reactions to the case warning that if the justices were to rule that every service relationship can be subject to prohibited transaction claims, "then that's going to make life incredibly difficult for the market."

"That's not necessarily true to the extent that you're talking to people in the market who have already figured that they needed an exemption," Oringer said.

Even while some attorneys are predicting a more narrow ruling on ERISA from the high court, others are keeping watch for a broader decision.

"I'm much more concerned about the longer-term impact," said Jeffrey Lewis, a plaintiffs-side attorney and partner at Keller Rohrback LLP. He said he sees prohibited transaction claims much more regularly in litigation involving employee stock ownership plans.

"If the plaintiff is required to plead in any significant detail why a transaction does not come under any exemption, I think it just puts people in this impossible situation, because you can't get the necessary information before a motion to dismiss in a lot of cases," Lewis said.

--Editing by Abbie Sarfo and Nick Petruncio.