ERISA litigation trends from 2010

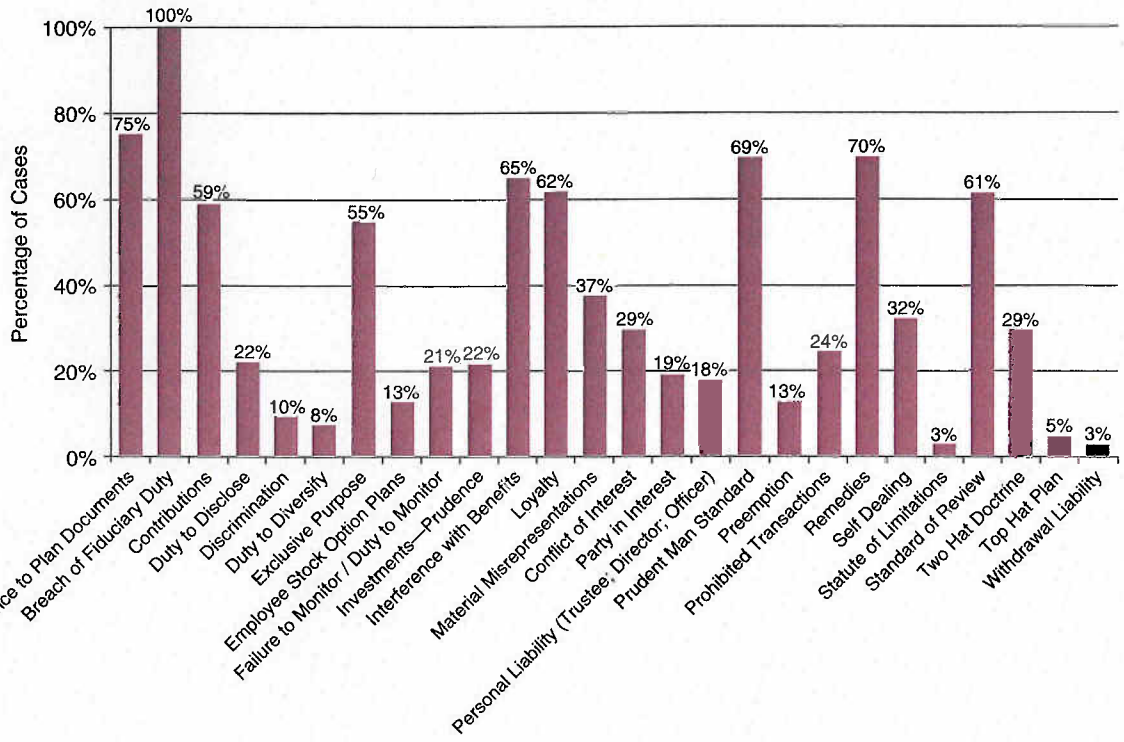
By Marcia S. Wagner, Esq.

The year 2010 was quite active in the field of ERISA litigation. The evolving trends fall along the following four lines:

1. Renewed Emphasis on Deference to Plan Administrator. In the long run, the most important case of the last year will probably be the Supreme Court's ruling in Conkright v. Fommert, 2010 WL 1558979 (U.S. 2010), that a plan administrator is entitled to judicial deference even if the administrator has previously made a mistake in the same case. *Conkright* should deter lower courts from excessive involvement in plan administration and from overriding reasonable decisions of plan administrators. It appears that the decision is applicable to a broad array of benefits claims, including those where the administrator is attempting to fashion a remedy when there has been a breach of legal requirements, such as the anticutback rules involved in *Conkright*.

The plaintiffs in *Conkright* were employees who had previously terminated employment, received lump sum distributions from the plan, and were subsequently rehired. These employees alleged that an adjustment to their current pension benefits to avoid duplication was incorrectly calculated and that the adjustment methodology used by the employer violated anticutback rules. The district court had deferred to the plan administrator as to the methodology for calculating this benefit offset and granted summary judgment for the defendant. However, the Second Circuit Court of Appeals ruled in favor of the plaintiffs and reversed. On remand, the district court substituted its own "straightforward" methodology for another proposed by the plan administrator, and on a second appeal to the Second Circuit, the appellate court approved the lower court's choice of remedy. In reversing the Second Circuit and reinstating the plan administrator's offset methodology, the Supreme Court said that the case was about whether a single honest mistake in plan interpretation strips the plan administrator of deference with regard to subsequent related interpretations

Figure 1. Number of Cases by Type Code Classification



Source: Pension Governance, Inc. and the Michel-Shaked Group.

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and held that it does not. The Court reasoned that such deference protects and promotes "efficiency, predictability, and uniformity."

Conkright appears to be an attempt to reduce the role of the courts in plan administration. At the same time, the authority of plan administrators is both strengthened and broadened. District courts will be expected to remand benefit claims to the plan administrator, possibly even in those cases involving the determination of the remedy for a fiduciary breach.

2. Settlements in Fee Litigation. In August, General Dynamics joined *Caterpillar* and *Hartford Financial* in settling the 401(k) fee claims lodged against it. It is to be noted, however, that the *General Dynamics* case included unique claims that focused on the role of a plan investment manager run by former General Dynamics officials. Therefore, some may question whether it represents the continuation of a trend toward settlement of fee cases.

3. Influence of Hecker v. Deere. The Seventh Circuit Court of Appeals' decision resulting in dismissal of the plaintiffs' claims in the *Deere* case remains a powerful influence. The Seventh Circuit's analysis that relies on the efficacy of market forces and the significance of offering a wide array of investment options appears in several recent cases, including Renfro v. Unisys and F.W. Webb Company v. State Street Bank and Trust Company.

4. Elimination of Retail Class Mutual Funds As Investment Options. Most of the 401(k) fee cases include a claim alleging that excessive investment fees resulted from offering retail class mutual funds as a plan investment option. The *Caterpillar* settlement, which received final court approval last August, included a provision that *Caterpillar* would not use such funds as core investment options for two years. In addition, Tibble v. Edison, decided in July on the merits after a bench trial, held the defendants in that case liable for including such funds in the plan's investment line-up without sufficient justification. It may be time to conclude that, where it is possible, replacing retail class funds with less expensive investment options has become a best practice. ❖

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