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5 Argument Sessions Benefits Attys Should Watch For In July

By **Kellie Mejdrich**

Law360 (July 3, 2024, 7:02 PM EDT) -- Republican state attorneys general will try to convince the Fifth Circuit to knock down a U.S. Department of Labor rule covering how retirement plan managers can consider environmental and social factors when picking investments, while Kellogg workers will challenge a class action waiver at the Sixth Circuit.

Here are five argument sessions coming up this month that benefits attorneys should keep an eye on.

DOL's ESG Rule at 5th Circ.

The Fifth Circuit will consider whether the U.S. Department of Labor properly interpreted the Employee Retirement Income Security Act in an **appeal from Republican attorneys general** seeking to invalidate the agency's **rule from 2022** that allows retirement advisers to consider so-called environmental, social and governance factors when choosing investments.

A three-judge panel has set oral arguments for Tuesday in the appeal seeking to reverse a summary judgment win that U.S. District Judge Matthew J. Kacsmaryk granted the agency in September in the Administrative Procedure Act suit. Judge Kacsmaryk **upheld the rule** after finding it passed the test established by the U.S. Supreme Court in the landmark Chevron USA Inc. v. Natural Resources Defense Council Inc. case.

But that precedent was just overturned in Loper Bright Enterprises v. Raimondo, raising questions about how the Fifth Circuit panel might rule on appeal. Parties have already begun fighting over the issue in supplemental briefing, with the attorneys general filing a notice Friday that cited Loper Bright.

The DOL swiped back against the citation in a brief Monday that said as justices just recently instructed in that case, past interpretations of law can inform courts about the validity of an agency's current interpretations.

"Plaintiffs offer the court no reason to disagree with the long-settled view of the agency charged with interpreting ERISA," the DOL said in its Monday-filed brief. The DOL also defended its rule in a brief with the Fifth Circuit **filed in March.**

Mark Boyko, a plaintiff-side partner at Bailey & Glasser LLP, said the decision is coming up for appeal at the same time that "fiduciaries, many of whom are getting pressure from employees to offer ESG funds, or compliments on their inclusion of ESG funds, just want clear guidance one way or the other."

"If that guidance is that [the] fiduciary must act solely in the economic interest of participants full stop, and ignore ESG characteristics, so be it. Many advisers have already been giving that guidance — to include ESG funds in the search but to ignore the fact they are ESG funds when comparing them to peers for selection," Boyko said.

The case is State of Utah v. Su, case number 23-11097, in the U.S. Court of Appeals for the Fifth Circuit.

Union Workers Seek 9th Circ. Pension Suit Revival

Union carpenters will ask the Ninth Circuit to revive a suit alleging that trustees in charge of their retirement savings breached their ERISA fiduciary duty by investing in highly speculative index funds managed by Allianz Global Investors US LLC, a company that federal agencies later charged with fraud.

A three-judge panel is set to hear oral arguments Tuesday in the **appeal from union carpenters** suing the Carpenters of Western Washington Board of Trustees individually and on behalf of two union carpenter retirement plans. Allianz isn't named as a defendant in the suit.

The workers allege that the Carpenters of Western Washington Board of Trustees breached their duty under ERISA when they chose the Allianz index funds as retirement investments, which lost retirees more than $250 million. Workers seek to overturn a decision **dismissing the case** from May 2023.

The U.S. Department of Justice and U.S. Securities and Exchange Commission ultimately charged Allianz with defrauding investors out of billions of dollars, with Allianz pleading guilty to federal charges and settling for a **massive $6 billion sum in 2022.** And after the crash, the union sued Allianz and secured a $110 million settlement. But the carpenters argue this recovery represented less than 45% of the plans' losses.

On appeal, the carpenter's union argues that workers don't have a case because workers' retirement plans recovered all their losses and had even experienced capital gains.

Andrew Oringer, partner and general counsel at the Wagner Law Group, said a key question on appeal is "whether the fiduciaries were conflicted or had their eyes off the ball."

"A fundamental ERISA principle is that fiduciaries engaging in proper process shouldn't be second-guessed for bad investment performance. Many experts guessed wrong during the pandemic," Oringer said.

The case is Johnson et al. v. Carpenters of Western Washington Board of Trustees et al., case number 23-35370, in the U.S. Court of Appeals for the Ninth Circuit.

California's Antitrust PBM Fight at 9th Circ.

The Ninth Circuit will decide whether the state of California can pursue antitrust action in state court against Express Scripts and CVS Caremark, two pharmacy benefit managers that act as intermediaries between drugmakers, insurers and pharmacists that the state accuses of conspiring to hike insulin prices.

A three-judge panel set oral arguments for July 11 in the PBM-led appeals that ask the Ninth Circuit to overturn a district court ruling from last summer remanding the lawsuit, which also targets drug manufacturers Eli Lilly & Co., Novo Nordisk Inc. and Sanofi-Aventis US LLC. Both **Express Scripts** and CVS Health Corp.'s PBM, CaremarkPCS Health LLC, have separately appealed the same order from **June 2023 granting** the state's motion to remand.

The state **first sued in January 2023**, alleging that PBMs and drugmakers violated California's Unfair Competition Law and conspired to

raise insulin prices. In support of its argument, the state said while PBMs argue the net price for insulin has gone down, the list price continues to increase while people in other countries pay significantly less for the same, cheap-to-manufacture drug.

The state in its complaint had expressly disavowed the inclusion of federal insurance plans such as the military health plan TRICARE and asserted that its antitrust action didn't raise any other federal issues. But Express Scripts and CVS argue on appeal that the state couldn't avoid express preemption provisions in federal benefits laws with respect to federal employees, servicemembers and veterans.

Ben Conley, an employer-side partner in Seyfarth Shaw LLP's employee benefits practice group, said he's watching the appeal because "when a PBM develops its pricing list, it doesn't do it based on segments of the population and does so globally, and that would also implicate ERISA plans."

He said the case also comes up on appeal during "a period of intense focus and scrutiny on PBMs, from every angle."

The Express Scripts case is the People of the State of California v. Express Scripts Inc. et al., case number 23-55599, in the U.S. Court of Appeals for the Ninth Circuit. The CVS case is People of the State of California v. CaremarkPCS Health LLC et al., case number 23-55597, in the U.S. Court of Appeals for the Ninth Circuit.

Arbitration Heats Up at 6th Circ.

Employer-side benefits attorneys are closely watching to see if Kellogg Co. can convince the Sixth Circuit to enforce its arbitration provision in ERISA plan documents that contains a class action waiver, by adding language to the provision permitting an arbitrator to award planwide relief.

A three-judge panel has set arguments for July 18 in the **appeal from Kellogg 401(k) participants**, who seek to overturn a Michigan federal judge's decision to toss the case in **favor of arbitration in April 2023**. The appellate court is taking up the issue of ERISA arbitration roughly two years after another three-judge panel **rejected Cintas Corp.'s effort to force arbitration** of an ERISA class action in April 2022.

In that case, the appellate court found the suit could proceed in federal court because an individual arbitration provision in workers' separate employment agreements couldn't bar claims made on behalf of the entire plan. But the Kellogg arbitration provision is in plan documents, not with individual employees, and contains an express provision allowing planwide relief.

Tia Martarella, of counsel at Jackson Lewis PC and an employer-side attorney, said she's closely watching the case because "every circuit that has weighed in on this so far has basically said you can do arbitration, but this particular arbitration clause, in this particular plan that we're ruling on doesn't work."

Martarella pointed out that other appellate courts have cited what's called the effective vindication doctrine, which gives judges deference under the Federal Arbitration Act not to enforce arbitration agreements that eliminate statutory remedies.

"Basically what Kellogg is saying is this is different," Martarella said, pointing out the clause permitting "any ERISA recovery."

"So what they're saying is ERISA doesn't require class action or a representative suit, all ERISA requires is that you can recover on behalf of the plan," Martarella said.

So far, the employer-side argument that ERISA class actions can be forced into individual arbitration has faced widespread rejection in the appellate courts. Four circuit courts faced with an arbitration provision purporting to waive an ERISA class action — the **Second**, **Third**,

Seventh and **Tenth** circuits — **have all decided to keep the suits in federal court** in recent years.

Plaintiff-side partner Boyko, at Bailey Glasser, said he's watching the outcome of the Kellogg retirees' appeal.

"This case presents a novel twist because here the defendants are arguing that the arbitration clause does allow for planwide relief, it only requires that a single participant bring the claim, and that it be brought in arbitration," Boyko said. "That distinction may make the difference, although as a policy matter it's hard to see how it is better for fiduciary breach claims to be brought in individual private arbitrations instead of giving all plan participants the protections of Rule 23."

Boyko added that a victory for Kellogg might not give employers what they want on this arbitration issue.

"Having so clearly conceded the availability of planwide remedies in any and all individual arbitrations, a defense victory here would be Pyrrhic at best, setting up a rare lose-lose for plan fiduciaries and plan participants moving forward," Boyko said.

The case is Bradley Fleming v. Kellogg Co. et al., case number 23-1966, in the U.S. Court of Appeals for the Sixth Circuit.

AT&T Fights for Toss of De-Risking Suit

A hearing has been scheduled for July 30 in Massachusetts federal court on AT&T's motion to dismiss a novel type of ERISA class action challenging an employer's decision to convert pension benefits into annuity insurance contracts.

Chief U.S. District Judge F. Dennis Saylor IV will oversee a video hearing in the ERISA class action that three AT&T retirees first brought March 15.

The proposed class of retirees led by former AT&T worker Catherine Schloss alleges that the telecommunications company's choice of an annuity provider called Athene for the so-called pension de-risking transaction breached ERISA because it wasn't the safest available. The suit also names as a defendant AT&T's investment adviser State Street Global Advisors Trust Co.

AT&T retirees first brought a proposed class action over the de-risking transaction in another Massachusetts federal court on March 11, which was filed by Lanel Piercy. Those retirees have moved to consolidate their suit with Schloss' action.

The challenge is one of several suits from **retirees challenging their employers' choice of the same annuity provider**, with similar proposed class actions pending against Lockheed Martin Corp. and Alcoa Corp.

AT&T retirees argue in both complaints that by choosing Athene, which has ties to private equity, employers put retirees' future savings at additional risk by stripping their benefits of federal protection and placing them at the mercy of the state-regulated insurance market. The retirees also assert that the various state insurance guaranty associations backing insurance companies in case of insolvency are an inferior backstop compared to the Pension Benefit Guaranty Corp.

AT&T in its motions to dismiss both proposed class actions argues that its decision wasn't a risky one, that fears about Athene aren't backed with evidence, and that the deal was designed to guarantee income for retirees that would be more stable than a pension plan.

Boyko, at Bailey Glasser, said he's watching the case.

"Any random person on the street would see that 'de-risking' hurts plan participants, although we've certainly seen other fact patterns (Thole, for example) where that kind of thinking doesn't win the day," he said.

Boyko refers to the U.S. Supreme Court's decision in Thole v. U.S. Bank , where justices held retirement plan participants lacked standing to sue over mismanagement because they couldn't show a personal financial loss.

Employer-side partner Oringer, at Wagner, said he's also watching the forfeiture case.

"As de-risking efforts continue, these cases may continue to proliferate. A threshold question is, What acts are fiduciary and what acts are not? Then, any fiduciary acts would be analyzed for conflicts, prudence and loyalty," Oringer said.

The cases are Piercy et al. v. AT&T Inc. et al., case number 1:24-cv-10608, and Schloss et al. v. AT&T Inc. et al., case number 1:24-cv-10656, in the U.S. District Court for the District of Massachusetts.

--Editing by Bruce Goldman.
