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4 ERISA Arguments To Watch In September

By **Kellie Mejdrich**

Law360 (September 6, 2024, 5:05 PM EDT) -- The Ninth Circuit will weigh two cases involving whether class claims under the Employee Retirement Income Security Act can be forced into solo arbitration, and the Second Circuit will hear Yale University workers' bid to revive their retirement plan mismanagement suit.

Here are four upcoming oral argument sessions that benefits attorneys should have on their radar.

Live Nation Workers Fight 401(k) Suit Arbitration at 9th Circ.

A Ninth Circuit panel will be asked to rule on whether ERISA class actions can be compelled to individual arbitration in an appeal from Live Nation employees that asks the appellate court to rule opposite an appellate panel's holding in 2019.

A three-judge panel will hear arguments Thursday in the suit from Live Nation ex-workers Pamela Avecilla and Sean Bailey, **who want to overturn** a California federal judge's decision from 2023 granting their former **employer's motion to compel**. Avecilla and Bailey first sued on behalf of a proposed class of retirement plan participants and the plan itself in March 2023, alleging Live Nation breached its fiduciary duty under ERISA by saddling workers' 401(k) plan with high fees and poorly performing investments.

Attorneys are closely watching this case for developments because if the appellate panel rules in favor of Live Nation and upholds the California court's August 2023 dismissal in favor of arbitration, the issue might get kicked up to the U.S. Supreme Court. That's because five appellate courts that have ruled on the issue of whether ERISA class actions can be forced into individual arbitration have decided in favor of workers recently: the **Sixth Circuit in August**, the **Second Circuit in May**, the **Third Circuit in June 2023**, the **Tenth Circuit in February 2023** and the **Seventh Circuit in September 2021**.

The Ninth Circuit has never issued a published opinion on the issue but ruled in favor of compelling arbitration in its **partially unpublished 2019 decision** in Dorman v. Charles Schwab Co.

Scott Burnett Smith, founder and chair of Bradley Arant Boult Cummings LLP's appellate litigation practice group, said he's watching for developments in the case.

"It's important for the Ninth Circuit to make it clear which side of the split they're on, but I think this issue is ultimately going to have to be resolved by the Supreme Court," Smith said.

The case is Pamela Avecilla et al. v. Live Nation Entertainment Inc. et al., case number 23-55725, in the U.S. Court of Appeals for the Ninth Circuit.

Same 9th Circ. Panel Weighs Sodexo Arbitration Push

Also on Thursday, the same Ninth Circuit panel hearing the Live Nation case will oversee arguments in food service company Sodexo's push to force individual arbitration of an ERISA class action from workers challenging a healthcare surcharge on nicotine users.

In an indication of the stakes in the employer-side appeal, the U.S. Department of Labor will participate during argument proceedings in support of Sodexo workers. Sodexo appealed after U.S. District Judge David O. Carter in **July 2023 denied** its motion to compel after concluding workers hadn't consented to an arbitration provision added to their health insurance plan documents in 2021 requiring out-of-court dispute resolution of ERISA claims.

The DOL **filed an amicus brief in March** that didn't take a position on whether the claims could be forced into arbitration, but instead argued the arbitration clause was invalid because its waiver of representative actions "abridge[d] substantive remedies conferred by ERISA." In particular, the provision waived rights and remedies under ERISA Section 502(a)(2), which gives individuals the right to bring claims on behalf of a benefit plan, the DOL said.

"In the event that the court finds both that the plan permits severing the representative action waiver and that the arbitration agreement is otherwise enforceable, the court should make clear that claimants may pursue in arbitration the full rights and remedies authorized by section 502(a)(2) (including full plan-wide relief)," the DOL said in its brief.

The case is Robert Platt v. Sodexo SA et al., case number 23-55737, in the U.S. Court of Appeals for the NInth Circuit.

Yale Workers Ask 2nd Circ. for New Trial

The Second Circuit will consider Yale University employees' bid for a new trial in a suit alleging mismanagement of a defined-contribution 403(b) retirement plan, taking up the hotly debated question of which party must prove loss causation to prevail on ERISA claims of retirement plan mismanagement.

A three-judge panel is set to hear arguments in the case Sept. 25. Yale beat the case in **June 2023 following a trial**, with a jury concluding that while the Yale retirement plan participant plaintiffs proved Yale breached some of its duties, those breaches did not result in any damages to the class.

The question before the Second Circuit panel is already subject to a considerable circuit split that the **Eleventh Circuit deepened in August**, when it backed Home Depot's win over a 401(k) mismanagement suit. The Eleventh Circuit **held that the burden doesn't shift** to an employer to disprove loss causation if plaintiffs have already demonstrated there was an ERISA fiduciary breach and that the plan suffered a loss. The DOL also filed an **amicus brief in the case in December 2023** in support of Yale employee retirement plan participants.

The Eleventh Circuit pointed out in its Home Depot ruling that the Second Circuit has ruled both ways on this issue in previous decisions. Some attorneys representing employers see an uphill battle for workers to revive their case after losing at trial because they couldn't prove fiduciary breaches caused their retirement plan losses.

"It's exceedingly difficult to overturn a jury verdict," said Smith, at Bradley. Smith added that he's watching to see how the court responds to Yale's argument in briefing that if the circuit court allows a redo, the plan participants **aren't entitled to a jury trial** on their claims.

Andrew Oringer, partner and general counsel at the Wagner Law Group, said he's watching the Yale appeal and said the burden of proof issue on loss causation, while procedural, can be "absolutely critical" in ERISA cases.

"Sometimes in failing to really focus on the process, you miss the way in which the case is really going to evolve. And this is a case that really shows that the procedural rules surrounding proof could well be determinative of who wins the case," Oringer said.

The case is Vellali v. Yale University, case number 23-1082, in the U.S. Court of Appeals for the Second Circuit.

11th Circ. Takes Up Bakery's Union Pension Withdrawal Fight

Benefits attorneys who represent multiemployer union pension plans and the employers who participate in them are paying attention to argument proceedings in the Eleventh Circuit in a wholesale bakery's appeal in a dispute over a $6.3 million withdrawal liability bill.

A three-judge panel is set to hear arguments in the case Sept 26. Perfection Bakeries Inc. disputes an arbitrator's decision upholding the Retail Wholesale and Department Store International Union and Industry Pension Fund's calculation regarding how a 2016 partial withdrawal by the bakery affected a liability assessment for a complete withdrawal in 2018.

U.S. District Judge Annemarie Carney Axon in June 2023 upheld the arbitrator's decision to confirm the $6.3 million complete withdrawal liability bill, **rejecting the Indiana wholesale bakery's argument** that payment from the previous partial withdrawal should have reduced the bill by more than $1.4 million. According to the union fund's brief filed in February, the total aggregate assessment of liability for both the partial and complete withdrawals that an arbitrator upheld in 2022 was $194,976 for 80 quarters, adding up to nearly $15.6 million. But the dispute subject to the appeal pertains to the lower $6.3 million figure related to the complete withdrawal cost.

The outcome in the case is important because it involves a critical question about how an employer's previous payment for a partial withdrawal from a multiemployer fund affects the price of further withdrawals down the line.

Sarah Bryan Fask, shareholder at Littler Mendelson PC who advises employers in these disputes, said she's watching the case because the decision will be "incredibly significant" for counsel who advise multiemployer pension plans and participating employers.

She pointed out that the Ninth Circuit's **ruling in a 2018 pension dispute** involving Quad/Graphics Inc. embraced a union fund's reading of how prior withdrawal liability is credited that Perfection Bakeries is now arguing against in the Eleventh Circuit.

After that decision, some multiemployer plans began to change the way they credited prior withdrawals to follow the calculation method that was upheld in the Ninth Circuit, Fask said, whereas previously funds used the method set forth in a 1982 opinion letter from the Pension Benefit Guaranty Corp. and the text of the statute.

"If the Eleventh Circuit follows Quad/Graphics in Perfection Bakeries, it will become increasingly difficult for employers to argue that that decision is wrong, leaving employers exposed to significantly increased withdrawal liability assessments for subsequent withdrawals," Fask said.

"But, if the Eleventh Circuit splits with the Ninth Circuit in a well-reasoned decision, it will tip the playing field on this issue back towards withdrawing employers," Fask said.

The case is Perfection Bakeries Inc. v. Retail Wholesale & Dept Store International Union, case number 23-12533, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Bruce Goldman and Nick Petruncio.
