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By Austin R. Ramsey

Deep Dive
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Second Circuit Opinion

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- Narrow interpretation could trigger 'deluge' of new lawsuits

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The fate of an emerging strategy plaintiff's firms use to advance employer-sponsored benefit plan mismanagement cases is at stake as the US Supreme Court tackles a multifaceted debate over a decades-old conflict-of-interest law.

Cornell University workers recently won their bid for high-court review of a US Court of Appeals for the Second Circuit decision affirming the dismissal of claims that their 403(b) plan engaged in prohibited transactions with service providers. At issue is a single, vague clause in the 1974 Employee Retirement Income Security Act that defines with whom plans are prohibited from transacting.

ERISA lists any "person providing services to such plan" as prohibited, but that can't be read too literally, the appeals court said in its 2023 ruling. Courts must account for myriad exemptions lawmakers and federal regulators have written into the record to allow plans to contract for routine goods and services, the panel said.

The Supreme Court's decision to weigh in on the case highlights a trio of legal analyses that arose from circuit courts considering prohibited transaction claims and the vast differences featured in "letter" versus "spirit" of the law rulings. The stakes are high for employers eager to fend off a wave of litigation brought by workers accusing plans of charging excessive fees for third-party services.

Justices on the country's highest bench will have to wade through a multitude of distinct interpretations that range from allowing mismanagement cases to proceed simply because the plans at issue have contracted with another business to specific requirements on plaintiffs to list the employers' alleged misdeeds.

"That's not only a circuit split; that's a circuit crash," said Andrew L. Oringer, partner and general counsel at The Wagner Law Group PC in New York. "You've got not only two different ways of looking at something, but three different ways of looking at something, so it sounds like the Supreme Court realized, 'I guess we need to step in and find what the real answer is.'"

'Deluge of Lawsuits'

A narrow reading of the "person providing services" clause in ERISA led the Eighth and Ninth circuits to conclude almost any third-party contractor agreements are prohibited. Like the Second Circuit's ruling last year, the Eighth Circuit's 2009 decision in *Braden v. Wal-Mart Stores, Inc.* gave rise to an understanding among some that applying a prohibited transaction claim to virtually any participant-borne ERISA claim would all but guarantee survival in the motion-to-dismiss phase, Oringer said.

If the Supreme Court adopts that view, "you could potentially see a deluge of lawsuits," said Anne Tyler Hall, managing partner at Hall Benefits Law LLC in Atlanta. "And I think it would apply not only to retirement plans but to group health plans, too."

The Consolidated Appropriations Act of 2022 applied the same third-party service provider fees disclosure requirements to health-care plans that the US Labor Department has held retirement plans to for more than a decade. As a result, the plaintiff's bar has begun to target health plans in the same way it has 401(k)s and 403(b)s since 2012, Hall said.

The second, smaller camp of benefits advisers and plaintiff's attorneys subscribe to the Tenth Circuit's view in *Ramos v. Banner Health* where the court determined that, although a first-time third-party service contract may not constitute a prohibited transaction, subsequent dealings with the same person or company may.

The Third and Seventh circuits have issued recent rulings rejecting prohibited transaction claims that weren't accompanied by some indication of a conflict of interest or ill intent. The Second Circuit now under review by the Supreme Court similarly found that exemptions in the law for "reasonable and necessary transactions" must first be considered.

'Surprised Before'

Industry groups representing retirement plan sponsors told the Supreme Court earlier this year that litigation over fees has reached a "fever pitch" with nearly 300 cases filed between 2020 and 2023. The top 10 ERISA settlements during that time period totaled more than $1.6 billion, Hall said.

"I think the Supreme Court knows that," she said. "But we've been surprised before."

In 2022, the high court issued a ruling in *Hughes v. Northwestern University* that some benefits advisers have interpreted as lowering the pleading standard for fiduciary imprudence associated with the management of defined-contribution plans. The ruling left the industry "picking our jaws up off of the ground," Hall added.

It's noteworthy that the Supreme court chose the Second Circuit *Cornell* suit to address prohibited transactions, because the arrangement of facts in the case is likely to give the justices another crack at determining an acceptable pleading standard in ERISA cases, said Joanne Roskey, a member at Miller & Chevalier Chartered and former top health investigator at the DOL's Employee Benefits Security Administration.

The conservative-bent high court is stacked with textualists, prone to give words written by Congress a literal interpretation. In this case, a business-friendly approach to the law would require the court to determine what the spirit of two distinct sections of ERISA mean when combined.

"It will be interesting whether this court, which is so focused on textual interpretations of federal statutes, will follow that interpretative path or if they're going to take the narrower view and read into intent," Roskey said.

The case is Cunningham v. Cornell Univ. , U.S., No. 23-1007 .

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