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4 Appellate Arguments Benefits Attys Should Watch In Nov.

By **Kellie Mejdrich**

Law360 (November 1, 2024, 5:28 PM EDT) -- The Second Circuit will weigh battles over retirement plan fees and union benefit contributions, teachers will ask the Ninth Circuit to revive their suit over interest they say is owed on their retirement accounts, and the Eleventh Circuit will mull a constitutional challenge to a Florida gender-affirming care ban.

Here are four upcoming arguments that benefits lawyers should have on their radar.

Montefiore Plan Participants Want 2nd Circ. to Resuscitate Suit

Ex-workers for Montefiore Medical Center will ask the Second Circuit to revive their proposed class action alleging mismanagement of a $3.2 billion defined-contribution employee retirement plan, arguing a federal judge should have allowed workers to amend their complaint instead of ending the suit in April.

A three-judge panel scheduled oral arguments for Nov. 15 in the appeal from the proposed class action from participants in a 403(b) plan for employees of New York City teaching hospital Montefiore alleging violations of the Employee Retirement Income Security Act.

Former Montefiore Medical Center employees Sheila Boyette and Tiffany Jiminez first sued in June 2022, alleging that Montefiore should have offered better-performing investments and negotiated lower recordkeeping fees.

U.S. District Judge John G. Koeltl's decision to close the case in April came after he had **initially tossed the suit** in November 2023. In his 2023 order, Judge Koeltl cited a lack of adequate comparisons for the court to judge allegations of excessive fees and said participants couldn't sue over fund offerings they challenged as nonperforming in which they did not invest.

Daniel Aronowitz, managing principal and owner of Euclid Fiduciary who sells fiduciary liability insurance, said he's interested in the appeal because it tees up a question about "the pleading standard for excessive fee cases."

"It is an old issue, but the case shows that the plausibility standard remains unresolved and inconsistently applied across the country," Aronowitz said, pointing to arguments from the hospital workers in briefing citing recent decisions in the Third, Seventh and Fifth circuits reviving similar retirement plan mismanagement claims.

Andrew Oringer, partner and general counsel at the Wagner Law Group, said he's also watching the case because "the more cases that get dismissed at an early stage, the greater the disincentive for plaintiffs to bring additional cases."

Montefiore Medical Center, based in the Bronx, is associated with the Albert Einstein College of Medicine and has over 5,400 doctors and nurses across its hospitals and clinics, according to its website.

The case is Boyette v. Montefiore Medical Center, case number 24-1279, in the U.S. Court of Appeals for the Second Circuit.

Benefit Funds Defend CBA Suit Win at 2nd Circ.

A different Second Circuit panel later in November will consider another ERISA dispute involving union fringe benefit contributions in an appeal from two concrete companies that involves questions of interpretation of ERISA as well as the Labor Management Relations Act.

A three-judge panel has scheduled oral arguments for Nov. 21 in the appeal from Manny P. Con Industries Inc. and Manny P. Concrete Co. Inc. seeking to reverse a summary judgment win in favor of several Cement and Concrete Workers District Council benefit funds, which a New York federal court granted in June 2023.

The concrete companies argued in an appellate brief filed in February that the union's claims for additional contributions subject to the CBA were based on a "grossly inflated and erroneous audit" and had included individuals who performed work subject to other union CBAs.

Meanwhile, the union funds urged the appellate court to affirm their early win in a brief filed in May. The funds said the concrete companies lost on summary judgment because they had "not submitted any evidence to rebut plaintiffs' audit other than their naked assertion that the CBA, by its terms, does not cover the type of work at issue here."

Greg Ossi, an employer-side partner at Norton Rose Fulbright, said he's watching the case.

"The imbalance in the law regarding contribution audits in favor of multiemployer funds creates many potential pitfalls for employers, such as disputes over what is covered work under the collective bargaining agreement," Ossi said.

The case is Cement and Concrete Workers District Council Welfa v. Manny P. Concrete Co. Inc., case number 23-1030, in the U.S. Court of Appeals for the Second Circuit.

Teachers to Seek 9th Circ. Revival of Pension Interest Suit

Teachers accusing a Washington state workers' pension agency of skimping on interest earned by thousands of retirement savers will ask a Ninth Circuit panel to revive their certified class action, arguing a district judge erred in concluding that the group of 20,000 teachers waited too long to sue.

A three-judge panel scheduled oral arguments for Nov. 22 in the appeal from the class of teachers seeking to **reverse dismissal** of the case from May 2023.

Dismissal of the suit came after a Washington federal judge **in 2019 certified** a class of over 20,000 teachers alleging the director of the Washington State Department of Retirement Systems, Tracy Guerin, violated their constitutional rights by withholding daily interest earned on their retirement accounts. The case doesn't bring claims under ERISA because the federal benefits law does not apply to state-run employee retirement plans.

The proposed class of state teacher retirement plan participants first sued in 2015, alleging the state had violated the Fifth and 14th amendments to the U.S. Constitution after it failed to transfer all the interest earned on their contributions when switching teachers from one retirement plan to another in the late 1990s and early 2000s.

The case is back at the Ninth Circuit for a second time: a different panel **earlier reversed dismissal** of the case in 2018 reviving allegations that state retirement systems directors violated constitutional private property rights, after finding a lower court erred in dismissing a constitutional takings claim as prudentially unripe.

Oringer, at Wagner, took note of the constitutional takings claim advanced by the teachers in the dispute.

"It remains to be seen whether or not the theory has legs, but it does show that there's always room for thinking outside the box," Oringer said.

The case is Mickey Fowler et al. v. Tracy Guerin, case number 23-35414, in the U.S. Court of Appeals

for the Ninth Circuit.

Florida Asks 11th Circ. to Uphold Trans Health Medicaid Ban

An Eleventh Circuit panel will be asked to decide whether the equal protection clause of the 14th Amendment guarantees access to gender-affirming care in a Florida state Medicaid program, in one of several disputes pending on appeal involving discrimination challenges to state laws restricting transgender individuals' healthcare access.

A three-judge panel has scheduled oral arguments for Nov. 22 in the appeal from the Florida Agency for Health Care Administration and other state officials. The group **seeks to overturn** a Florida federal judge's ruling from June 2023 that **had initially blocked** the law banning Medicaid payments for gender-affirming treatments. Senior U.S. District Judge Robert L. Hinkle found the state's law violated nondiscrimination protections in the Medicaid Act, the equal protection clause and the Affordable Care Act.

Following the state's appeal, Judge Hinkle **declined to enforce** his order in January, citing the Eleventh Circuit's **decision to lift a preliminary injunction** that blocked an Alabama state law restricting gender-affirming care for minors in August 2023.

The appellate court is set to consider the case after **ordering supplemental briefing** last week focused on whether the U.S. Supreme Court's invidious discrimination analysis, or discrimination motivated by hostility, applied to issues in the case. That analysis was established under Supreme Court rulings in Washington v. Davis in 1976 and in Personnel Administrator of Massachusetts v. Feeney in 1979.

Parties must submit supplemental briefs by Wednesday to address whether the invidious discrimination analysis described in those two rulings applies only to suspect and quasi-suspect classes, such as to sex and race, or whether it applies more broadly.

Benefits attorneys have been **keeping a close eye** on litigation regarding the extent to which the Constitution and various federal nondiscrimination laws protect access to gender-affirming healthcare that recently passed state laws have restricted. That's because changes in law could affect administration of healthcare plans in states that have such restrictions.

The appellate court is considering the issue of constitutional protections for transgender people's healthcare at the same time the U.S. Supreme Court has agreed to take up a case involving allegations of transgender healthcare discrimination.

Justices in **June granted** the federal government's petition for review of a Sixth Circuit decision that upheld a Tennessee law banning gender-affirming treatment for transgender minors as not in violation of the 14th Amendment's equal protection clause.

Xavier Baker, a principal at Groom Law Group who advises health insurers and employee benefit plan sponsors, said he was "a bit surprised that the 11th Circuit set this for oral argument on Nov. 22 given the pendency of Skrmetti that will be argued less than two weeks later." Baker refers to the Supreme Court case involving Tennessee, United States v. Skrmetti et al.

"It seems like whatever [the court] does in Skrmetti will be dispositive of the equal protection arguments in [the 11th Circuit appeal]," Baker said.

Baker added that the Florida appeal was interesting "given how much legwork the state put in to reviewing and challenging WPATH and Endocrine Society guidance to develop its own criteria." Baker refers to standards on gender-affirming care from the World Professional Association for Transgender Health, a nonprofit medical organization that develops guidelines on gender-dysphoria treatment.

"That may provide a framework plan sponsors could adopt for similar coverage limitations — particularly if the court finds that it does not constitute unlawful discrimination on the basis of sex under Section 1557," Baker said, referring to the ACA's nondiscrimination-in-healthcare provision.

The case is August Dekker et al. v. Secretary, Florida Agency for Health Care Administration et al.,

case number 23-12155, in the U.S. Court of Appeals for the Eleventh Circuit.

--Editing by Bruce Goldman and Leah Bennett.