

5 Argument Sessions Benefits Attys Should Watch In March

By **Kellie Mejdrich**

Law360 (February 28, 2025, 8:32 PM EST) -- The Ninth Circuit will mull Express Scripts and OptumRx's bid to force a public nuisance suit brought by the state of California into federal court, and the Second Circuit will hear from pensioners who say that IBM's use of outdated mortality tables shrank their benefits payouts.

Here are five appellate arguments happening in March that should be on benefits lawyers' radar.

9th Circ. Weighs Removing Calif.'s Nuisance Fight with PBMs

Pharmacy benefit managers Express Scripts Inc. and OptumRx Inc. will ask the Ninth Circuit to transfer to federal court the state of California's lawsuit alleging their dispensing practices contributed to the opioid epidemic and created a public nuisance, a suit that is currently proceeding in Los Angeles County Superior Court.

The federal appeals court will hear arguments March 4 in the appeal from Express Scripts and OptumRx, which are pharmacy benefit managers for Cigna and UnitedHealth. The PBMs, which act as intermediaries between drugmakers, pharmacies and insurers, want the Ninth Circuit to reverse a federal judge's February 2024 decision kicking the case to state court.

U.S. District Judge Sherilyn Peace Garnett had rejected the PBMs' arguments that a question of federal jurisdiction regarding the Controlled Substances Act supported removal to federal court. Judge Garnett also rejected the PBMs' argument that state court wasn't the appropriate venue because federal employees' health benefit plans were involved with PBM-related claims in the case.

In its brief with the Ninth Circuit, California is urging the appellate court to affirm Judge Garnett's decision. The state points out that it had a disclaimer in its complaint that it was only targeting conduct by the PBMs in the nonfederal market. The PBMs, meanwhile, argue on appeal that a federal court should handle the case because the state challenges business conduct the companies undertake for all clients, including federal ones.

The nuisance action from California reaches the Ninth Circuit as a **number of states** have moved to pass legislation in the absence of action to regulate PBMs by the federal government.

However, a recent executive order from the Trump administration — which focused on **healthcare companies' pricing transparency** and mentioned PBMs — suggests federal action could be regaining momentum.

Employer-side attorney Anne Tyler Hall, a managing partner at Hall Benefits Law who helps negotiate PBM contracts, said the case caught her attention because it reflected how "everyone seems to be fed up with the PBM paradigm."

"I think there's a real groundswell of fatigue and disdain, and I think we're going to see something happen at the federal level," Hall said.

The case is *People of the State of California v. Express Scripts Inc. et al.*, case number 24-1972, in the U.S. Court of Appeals for the Ninth Circuit.

9th Circ. Tackles 'Jersey Boys' Withdrawal Liability Fight

The Ninth Circuit will weigh whether a now-shuttered Las Vegas production of the jukebox musical "Jersey Boys" can escape withdrawal liability to a union plan for theater production workers, in a dual-sided appeal from the union and the production company over approximately \$1 million in pension fund contributions.

"Jersey Boys," which was first performed in California and then ran on Broadway before touring, dramatizes the career of the 1960s rock and roll group the Four Seasons and singer Frankie Valli. The union dispute targets JB Viva Vegas LP, the production company for the Vegas production that ran from 2008 until 2016, with alleged violations of the Employee Retirement Income Security Act.

A three-judge panel is set to hear arguments March 5 from the production company and the International Alliance of Theatrical Stage Employees' trust, which both sought Ninth Circuit review after a Nevada federal judge entered final judgment in the case in favor of the union in 2024. The trust's full name is the Nevada Resort Association–International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the United States and Canada Local 720 Pension Trust.

The production company argues on appeal that the Nevada federal judge shouldn't have vacated an arbitrator's conclusion that the company could skip paying about \$900,000 in withdrawal fees to a stagehands' pension plan after the show's run ended.

An arbitrator had ruled earlier in the dispute that the IATSE Local 720 trust is a plan serving the entertainment industry, triggering a carveout that cleared producer JB Viva Vegas from having to pay withdrawal liability when a project ends. But the district court **vacated that initial arbitration award** in 2020.

The arbitrator issued a subsequent decision that spurred the present appeal, determining that the entertainment industry exemption didn't apply to the "Jersey Boys" production and that the company owed withdrawal liability. The Nevada court affirmed that decision in its 2024 final judgment in favor of the union fund.

Throughout the "Jersey Boys" run in Las Vegas, JB had a collective bargaining agreement with IATSE Local 720 that required the company to pay wages and fringe benefit contributions. As a result, the suit involves questions of ERISA and the Multiemployer Pension Plan Amendments Act.

Andrew Oringer, partner and general counsel at The Wagner Law Group and a longtime ERISA practitioner, said the case "shows how important it can be to understand all applicable pension considerations when dealing with a union — one doesn't want to get tossed around like a ... rag doll."

Oringer said that liability to a union pension fund depends on multiple factors, including the extent to which the plan is underfunded, whether employers that previously withdrew were able to pay their liability and how significant an employer's participation is compared to others paying into the plan.

"These factors could result in liabilities that don't necessarily make intuitive sense when looking solely at the characteristics of the employer," Oringer said.

The case is Nevada Resort Association-International Alliance of Theatrical Stage Employees and Moving Picture Machine Operators of the US and Canada Local 720 Pension Trust v. JB Viva Vegas LP, case numbers 24-3047 and 24-2791, in the U.S. Court of Appeals for the Ninth Circuit.

Grocery Co. Workers Want 2nd Circ. 401(k) Suit Revival

Participants in a 401(k) plan for employees of Northeast Grocery Inc. will ask the Second Circuit to revive a proposed class action alleging their plan was saddled with excessive recordkeeping fees and retained poorly performing investments.

Arguments are set for March 10 in the appeal from participants in the grocery conglomerate's employee 401(k) plan. Northeast Grocery is the parent company for grocery stores Market 32, Price Chopper and Tops.

The proposed class of 401(k) participants seek to revive claims that the excessive recordkeeping and investment fees caused ERISA prohibited transactions and breached fiduciary duties under ERISA, allegations that a New York federal court **tossed in August**. In addition to alleging fiduciary breach claims against Northeast Grocery, the 401(k) plan participants claim that excessive fees were charged to the plan because of revenue-sharing activity the committee engaged in that resulted in subpar fund offerings, which constituted self-dealing that caused the plan to engage in prohibited transactions.

The proposed class of grocery company retirement plan participants said in their appellant's brief filed in October that the court shouldn't have dismissed their prohibited transaction claims alleging Northeast Grocery's retirement plan committee "intentionally chose to populate the plan with investments that primarily served the committee's interests, and, consequently, received a benefit adverse to participants."

The case comes up for consideration as the pleading standard for a prohibited transaction claim is under consideration by the U.S. Supreme Court in a retirement mismanagement case from Cornell University employees. The justices heard **arguments in that case** in January.

The case is Collins v. Northeast Grocery Inc., case number 24-2339 in the U.S. Court of Appeals for the Second Circuit.

J&J Wants 3rd Circ. to Disband Talcum Powder Class

Johnson & Johnson will ask a Third Circuit panel to knock out a New Jersey federal court's **class certification order** from December 2023 in an investor action alleging the company artificially inflated its stock price by failing to disclose cancer risks associated with its talcum powder products.

A three-judge panel has set arguments for March 11 in the **appeal from J&J** and other company defendants named in the securities class action led by the San Diego County Employees Retirement Association. The main argument on appeal from J&J is that the company can prove a lack of price impact from disclosures about the talc. The company argues it can also show that corrective disclosures it made didn't include any new information that revealed any alleged misstatement was false.

U.S. District Judge Zahid N. Quraishi's December 2023 order certified a class including all individuals who purchased or acquired J&J securities from Feb. 22, 2013, to Dec. 13, 2018.

On appeal, J&J argues that certification constituted a misreading of class action and securities law because there was no disclosure causing a stock drop that investors could point to that actually supported certification of a class.

Erin Weber, a partner in Winston & Strawn LLP's employee benefits and executive compensation practice group, said the case on appeal follows a "trend of having the pension plans as named lead plaintiffs in these cases."

"I think that it really underscores how important these cases are to pension plans that invest in these companies, because pension plans are such significant shareholders," Weber said. "So the standards of disclosure, whether the shareholders have been misled, it's so important to plans, and accordingly, to plan participants and plan sponsors."

The case is San Diego County Employees Retirement Association et al. v. Johnson & Johnson et al., case number 24-1409, in the U.S. Court of Appeals for the Third Circuit.

IBM Retirees Ask 2nd Circ. Revive Pension Fight

Pensioners at IBM will ask the Second Circuit to revive their proposed class action alleging that the company violated ERISA's actuarial equivalence requirement and breached fiduciary duties when it used outdated mortality tables in conversions that lowered their overall annuity payouts.

Arguments are set for March 20 in the suit, which drew the support of the U.S. Department of Labor

on appeal. In its amicus brief, the DOL argues that a lower court's ruling throwing out claims in the case as time-barred directly contradicted the Supreme Court's 2020 ruling in **Intel Corp. Investment Policy Committee v. Sulyma** . The IBM retirees appealed after a New York federal judge **tossed the case in April 2024.**

In **a brief filed in August** in support of the IBM retirees, the DOL argued that because the retirees didn't have actual knowledge about the mortality data within the three-year limitations period that typically applies under ERISA, their claims should be considered within the statute's alternative six-year limitations period. The DOL also rejected arguments that some claims were untimely under a two-year statute of limitations contained in the retirement plan document, which was tied to when a retirement plan participant "knew or should have known" of certain facts, according to the DOL's brief.

Weber, with Winston & Strawn, said the appeal underscored a frequent occurrence with benefits cases on appeal where "the substantive issue at the root of the case becomes secondary to the implications of the procedural holdings."

"Even though the mortality table issues certainly are important, ... in my opinion they're not as impactful as the question of whether participants must have actual knowledge, versus the 'known or should [have] known' standard, to start a statute of limitations running," Weber said. "And whether disclosure equals constructive knowledge."

Weber said that the DOL's amicus brief in support of workers, along with an amicus brief in support of IBM jointly filed by industry trade groups the American Benefits Council, the ERISA Industry Committee and the U.S. Chamber of Commerce, "puts even more of a spotlight on this case."

The case is Knight et al. v. International Business Machines Corp. et al., case number 24-1281, in the U.S. Court of Appeals for the Second Circuit.

--Editing by Abbie Sarfo and Nick Petruncio.