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4 Suits Benefits Attys Should Watch As ESG Pressures Persist

By **Kellie Mejdrich**

Law360 (March 17, 2025, 7:29 PM EDT) -- A New York City pension fund recently escaped a proposed class action challenging its decision to divest nearly $4 billion in fossil fuel stocks, but experts say potential liability related to environmental, social and governance investment factors in retirement plan investment decisions is on the rise.

A unanimous five-member panel of New York's First Department on **March 11 affirmed dismissal** of the suit alleging the selloff breached fiduciary duties filed by four New York City workers and Americans for Fair Treatment Inc., a nonprofit that says it educates workers on constitutional rights around union membership. The panel backed Justice Andrea Masley's **July ruling that tossed the suit** for lack of standing, and backed her reasoning that retirees' defined benefit pension plans guaranteed a set monthly payment regardless of how the plan's investments performed.

Attorneys say the case represents something of a lucky break for one employer plan among many others who are facing increased scrutiny over their investment decisions involving employee retirement plan assets, with plenty of other cases to watch involving ESG.

"It's just a canary in the coal mine," said Jeff Witt, employer-side partner at Morris Manning & Martin LLP, of the decision granting the NYC pension fund's motion to dismiss ESG-related retirement claims in what he called a "highly charged" litigation environment.

Witt added that given the lawsuit activity, he's advising his employer clients "if you're a [retirement plan] committee, and you're thinking about how to best use plan assets, try and avoid the litigation altogether" over ESG issues.

Here are four suits involving challenges to employee retirement plan investing and ESG that attorneys say they're watching after New York City escaped a suit from its workers.

ESG Prompts American Airlines 401(k) Suit

Damages briefing is underway in an American Airlines pilot's proposed class action alleging the company's focus on ESG factors in its employee 401(k) plan decisions violated the Employee Retirement Income Security Act, after the **court in January concluded** American violated ERISA's fiduciary duty of loyalty.

U.S. District Judge Reed C. O'Connor on Jan. 10 faulted American's ESG focus via the unchecked actions of its investment manager, BlackRock, and cited a lack of monitoring processes regarding BlackRock's proxy voting activity on the part of American's benefits investment committee. But Judge O'Connor found American didn't violate ERISA's fiduciary duty of prudence, and that the airline was insulated in part from breaching the duty of prudence due to its benefits consultant Aon.

Josh Lichtenstein, an employer-side partner at Ropes & Gray LLP, said in terms of ESG retirement challenges, the proposed class action against American was "the king of these cases." He and other attorneys took note of how the court faulted the employer for breaching duties of loyalty but not prudence.

Judge O'Connor's decision "raises a lot of questions for plans," Lichtenstein said, who added that he's watching for a potential Fifth Circuit appeal in the case once the court makes a ruling on damages.

Witt, with Morris Manning & Martin, said he's also watching how the court rules on damages in the American case because it could spark future proposed class actions against employers targeting their ESG-related investment decisions.

"If the American Airlines suit has an economic win for the plaintiffs, the plaintiff's bar will be more interested in that," Witt said.

The case is Spence v. American Airlines Inc. et al., case number 4:23-cv-00552, in the U.S. District Court for the Northern District of Texas.

States' Fight over DOL's ESG Rule

A group of states' challenge to a Biden-era rule from the U.S. Department of Labor related to how ERISA plan fiduciaries can — but don't have to — consider ESG in retirement investment decisions could be headed back to the Fifth Circuit following a Texas court's decision to end the case in February.

U.S. District Judge Matthew J. Kacsmaryk **granted the DOL summary judgment and closed the case** on Feb. 20. That leaves just a few days for a group of states to appeal dismissal to the Fifth Circuit. An attorney from the state of Arkansas docketed an appearance with the appellate court last week after another attorney withdrew, but no appeal notice has been filed in district court.

Representatives from the attorneys general for the conservative states in the case didn't respond to requests for comment on whether they plan to appeal Judge Kacsmaryk's ruling from February.

Judge Kacsmaryk had **earlier granted the DOL summary judgment** in the case in September 2023. But the Fifth Circuit **vacated that decision in July** citing the Supreme Court's decision to do away with the so-called Chevron doctrine via decisions in Loper Bright Enterprises v. Raimondo and Relentless Inc. v. Department of Commerce .

Attorneys say they're watching for developments in the case and the regulation more broadly because it's not clear yet what a revised policy on ESG investment selection might look like in the second Trump administration, but the policy has whipsawed in previous years.

Andrew Oringer, partner at the Wagner Law Group, took note of how the Fifth Circuit's decision to uphold the Biden ESG rule surprised some attorneys.

"The ESG rule on the Biden side was really trying to return the interpretive advice to where it was before the Trump administration's reg[ulation], and the Biden ESG rule really does a lot less in terms of affirmatively reinterpreting the statute," Oringer said.

The appellate case is State of Utah v. Micone, case number 23-11097, in the U.S. Court of Appeals For the Fifth Circuit. The district case is State of Utah et al. v. Micone et al., case number 4:23-cv-00552, in the U.S. U.S. District Court for the Northern District of Texas.

State Anti-ESG Law Prompts Investor Suit

Another dispute over ESG considerations in employee retirement investing is proceeding in an Oklahoma appeals court, after a state judge enjoined a law restricting state employee retirement funds from investing in financial companies that the state has determined to have boycotted fossil fuel producers.

The state's attorney general has appealed to the Oklahoma Supreme Court after Oklahoma County District Court Judge Shelia D. Stinson blocked enforcement of the law last year. Oklahoma isn't the only state to move toward passing legislation restricting how public employee retirement funds can invest in financial companies a state labels as anti-fossil fuel, with Texas and Arkansas among other states that have taken similar actions.

Former Oklahoma state employee Don Keenan first sued Oklahoma state treasurer Todd Russ in December 2023, alleging the state's law was unconstitutional in violation of his freedom of speech

and created illegal barriers to a court challenge. Judge Stinson approved an initial block on the law in May, which was made permanent later in the year.

The injunction bars Oklahoma Treasury Secretary Todd Russ from implementing the Oklahoma Energy Discrimination Act of 2022. The law, effective as of November 2022, prohibits state retirement systems from investing in enterprises that "without an ordinary business purpose" refuse to invest in companies that manufacture, transport or sell fossil fuel-based energy, and instructs the treasury secretary to keep a list of financial companies that boycott energy firms.

Lichtenstein, at Ropes & Gray, said he thought the Oklahoma case was a "pretty juicy" dispute involving fiduciary duties and investment of state retirement assets.

"It's interesting, because the legislature is considering making changes to the way the law operates, so maybe they have an end-run around, if they get a disfavorable ruling at the state Supreme Court," Lichtenstein said.

The case is Don Keenan v. Todd Russ, in his capacity as the treasurer of the state of Oklahoma, case number CV-2023-3021, in the Supreme Court for the State of Oklahoma.

Fla. Police Fund Sues Target over ESG Goals

Allegations involving ESG in employee retirement investing have also sparked claims of securities fraud, with a Florida police department's pension fund hitting Target in January with a proposed class action alleging the company prompted a customer backlash via its ESG and diversity, equity and inclusion initiatives.

The City of Riviera Beach Police Pension fund **sued Target and its senior executives** on Jan. 31 in the U.S. District Court for the Middle District of Florida, claiming that the company lost billions in stock value due to false and misleading statements about ESG and DEI. The lawsuit alleges that Target CEO Brian Cornell was aware that "woke capitalism" was stirring a backlash since at least May 2023, citing an interview in Fortune magazine.

The suit alleges that the company should have been clearer that its ESG and DEI initiatives had sparked a consumer backlash, in particular its 2023 LGBT-Pride campaign, which the company said at an earnings call in the second quarter of the year had harmed the company's earnings and other financial metrics. That led investors to make misinformed proxy voting decisions, the suit alleges.

"As a result of Target's misleading 2023 Proxy, shareholders voted to reject good-governance proposals that would have increased board accountability and enabled enhanced oversight of ESG/DEI initiatives like the 2023 LGBT-Pride Campaign," the complaint said.

The case is City of Riviera Beach Police Pension Fund v. Target Corp. et al., case number 2:25-cv-00085, in the U.S. District Court for the Middle District of Florida.

--Editing by Amy Rowe and Nick Petruncio.

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