Client Alert: Focus on Fiduciary

Three Supreme Court ERISA rulings in 2020 may have dramatic implications for fiduciary liability insureds.

The Employee Retirement Income Security Act of 1974 (ERISA) is often seen as arcane, tedious and slow-moving. In fact, former Chief Justice William Rehnquist so loathed having to review ERISA cases that he commented:

"[t]he thing that stands out about [ERISA cases] is that they're dreary," and the only reason [the US Supreme Court] has granted review to them has been by "duty, not choice." [1]

It therefore would be easy to assume that Fiduciary Liability Insurance renewals will change little year over year, and so require little attention. To make such an assumption, however, would be a mistake. In just the first half of 2020, the Supreme Court has reviewed three ERISA cases and has issued rulings with vastly different implications for plan sponsors and their fiduciaries.

In the Absence of Financial Loss, Participants in a Defined Benefit Plan Do Not Have Standing to Sue Under ERISA

In a decision with potentially sweeping ramifications for defined benefit pension plans, a divided U.S. Supreme Court held that plan participants who have not suffered financial loss do not have standing to bring claims under ERISA.

Plaintiffs James Thole and Sherry Smith are retirees and vested participants in the U.S. Bank defined benefit pension plan pursuant to which they are entitled to receive a specific sum each month for the rest of their lives. At no time did either Thole or Smith fail to receive their full monthly benefit. Nevertheless, they sued U.S. Bank and various plan fiduciaries alleging that the defendants violated ERISA's duties of loyalty and prudence by improperly managed plan assets (including investing in proprietary funds in which U.S. Bank was purportedly paid excessive fees), thus causing significant losses to plan assets that ultimately led to the plan being underfunded. U.S. Bank subsequently made additional contributions to the defined benefit plan to ensure that it comported with ERISA's funding requirements. The district court dismissed the plaintiffs' complaint for lack of standing to sue, and that decision was affirmed by the 8th Circuit.

In *Thole v. U.S. Bank*[2] , the Supreme Court ruled 5-4 in favor of the defendants. Writing for the majority, Justice Kavanaugh noted that a key factor is that the plaintiffs participate in a defined benefit plan with fixed monthly payments that remain constant regardless of the value of the plan, in contrast with a defined contribution plan (such as a 401(k)) in which the benefits to be received are directly related to the plan's financial performance. Justice Kavanaugh further reasoned:

"If Thole and Smith were to lose this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny less. If Thole and Smith were to win this lawsuit, they would still receive the exact same monthly benefits that they are already slated to receive, not a penny more. The plaintiffs therefore have no concrete stake in this lawsuit."

Plaintiffs posited various theories in favor of standing, including their position that if plan participants are not permitted to sue for alleged ERISA breaches, the conduct of plan fiduciaries would be left unchecked. The majority was unpersuaded by these arguments, with Justice Kavanaugh commenting that "fiduciaries who manage defined-benefit plans face a regulatory phalanx" including monitoring and enforcement by

We're here to empower results

If you have any questions about your specific coverage or are interested in obtaining coverage, please contact your Aon broker.

aon.com.

About Aon's Financial Services Group

Aon's Financial Services Group (FSG) is the premier team of executive liability brokerage professionals, with extensive experience in representing buyers of complex insurance products including directors' and officers' liability, employment practices liability, fiduciary liability, fidelity, and professional liability insurance. FSG's global platform assists clients in addressing their executive liability exposures across their worldwide operations. Aon's Financial Services Group manages approximately $2.9 billion in annual premiums, assists with average annual claim settlements of approximately $700 million, and uses its unmatched data to support the diverse business goals of its clients.

[1] *See Vansuch, Matthew G. (2005), "Not Just Old Wine in New Bottles: Kentucky Ass'n of Health Plans, Inc. v. Miller Bottles a New Test for State Regulation of Insurance," Akron Law Review: Vol. 38: Issue 1, Article 8. (internal citation omitted)*

[2] *590 U.S. __ (June 1, 2020)*

Empower Results®

the Department of Labor and the Pension Benefit Guaranty Corporation, as well as by the employer, its shareholders, and other plan fiduciaries.[3]

ERISA's 3-Year Statute of Limitations for Breaches of Fiduciary Duty Requires Actual Not Constructive Knowledge

In a highly anticipated ruling, the U.S. Supreme Court held in *Intel Corp. Investment Policy Comm. v. Sulyma* that ERISA's 3-year statute of limitations for breach of fiduciary duty claims requires actual – not constructive – knowledge.

By way of background, ERISA establishes three separate time periods within which claimants can maintain an action for breach of fiduciary duty against plan fiduciaries – namely:

1. 3 years – triggered from the date when the plaintiff obtains "actual knowledge" of the alleged breach
2. 6 years – effectively, a statute of repose which applies in the absence of "actual knowledge", and which is triggered from the date of the last action constituting the alleged breach (or, in the case of an omission, from the date when the fiduciary could have cured the same)
3. In the event of fraud or concealment – triggered 6 years from the date of discovery of the alleged breach

See 29 U.S.C. § 1113. Christopher Sulyma was employed at Intel Corporation from 2010 to 2012 and participated in two separate retirement plans sponsored by the company. In October 2015 he sued the Intel Investment Policy Committee for breach of fiduciary duty alleging that the Committee overinvested in alternative assets that charged high fees including hedge funds and private equity. Sulyma's suit was filed more than 3 years but less than 6 years after the Committee informed him of its decision to invest in these alternative assets.

The Committee argued that Sulyma's claim was time-barred by ERISA's 3-year statute of limitations, maintaining that Sulyma had actual knowledge of the Committee's investment decisions through his receipt of various disclosures and other materials including: (a) a November 2011 email advising that information regarding plan disclosures was available via a website called NetBenefits; (b) a 2012 summary plan description describing plan investments and referring participants to fund fact sheets; and (c) other plan disclosures made in 2012. Further, the Committee provided evidence at the trial court level that Sulyma visited the NetBenefits site frequently. Sulyma, however, maintained that he did not recall reviewing the disclosures themselves, and that he was 'unaware' while working at Intel that his retirement plan accounts were invested in hedge funds or private equity. Instead, he "recalled reviewing only account statements sent to him by mail, which directed him to the NetBenefits site and noted that his plans were invested in 'short-term/other' assets but did not specify which."

The Supreme Court ruled unanimously in favor of Sulyma, holding that "[t]he question here is whether a plaintiff necessarily has 'actual knowledge' of the information contained in disclosures that he receives but does not read or cannot recall reading. We hold that he does not . . ." In an opinion authored by Justice Alito, the Court noted that while "[i]n everyday speech, 'actual knowledge' might seem redundant . . . the law will sometimes impute knowledge – often called 'constructive' knowledge – to a person who fails to learn something that a reasonably diligent person would have learned." Yet, the use of "actual" as a modifier is critical, and "signals that the plaintiff's knowledge must be more than 'potential, possible, virtual, conceivable, hypothetical, or nominal'" (citation omitted). Therefore, Justice Alito concluded:

"[ERISA] §1113(2) requires more than evidence of disclosure alone. That all relevant information was disclosed to the plaintiff is no doubt relevant in judging whether he gained knowledge of that information . . . To meet §1113(2)'s 'actual knowledge' requirement, however, the plaintiff must in fact have become aware of that information." (emphasis in original)

Fortunately for plan sponsors, Justice Alito also commented that the Supreme Court's opinion does not prevent the establishment of actual knowledge throughout the litigation process such as via deposition testimony or even "through 'inference from circumstantial evidence'" (citation omitted). For example, Justice Alito noted that the following would be relevant: (a) evidence that plan disclosures were made; (b) electronic records showing that the plaintiff viewed those disclosures; and (c) evidence that implies that the plaintiff acted in response

About Aon

Aon plc (NYSE:AON) is a leading global professional services firm providing a broad range of risk, retirement and health solutions. Our 50,000 colleagues in 120 countries empower results for clients by using proprietary data and analytics to deliver insights that reduce volatility and improve performance. Follow Aon on **Twitter** and **LinkedIn**. Stay up to date by visiting the **Aon Newsroom** and hear from our expert advisors in **The One Brief**.

aon.com

[3] *In response, Justice Sotomayor issued a lengthy and strongly worded dissent, stating that plan participants have standing "because a breach of fiduciary duty is a cognizable injury, regardless of whether that breach caused financial harm or increased the risk of nonpayment". For example, Justice Sotomayor noted that ERISA permits claims seeking injunctive relief including the removal of plan fiduciaries, as plaintiffs sought in their underling claim. Thus, in characterizing the majority's decision, Justice Sotomayor commented:*

"Indeed, the Court determines that pensioners may not bring a federal lawsuit to stop or cure retirement-plan mismanagement until their pensions are on the verge of default. This conclusion conflicts with common sense and long standing precedent."

[4] *589 U.S. _ (February 26, 2020)*

Empower Results®

thereto. For this reason, the opinion "also does not preclude defendants from contending that evidence of 'willful blindness' supports a finding of 'actual knowledge'".

Supreme Court Remands Case Questioning a Plan Fiduciary's Duty to Disclose Inside Information Regarding Plan Investments in Company Securities

In a 2014 decision, the Supreme Court held that even where a plan required or strongly encouraged the fiduciaries to offer company stock as an investment option, the plan fiduciaries are not relieved of the duty of prudence by continuing to invest in company stock when it would not be prudent to do so. *Fifth Third Bancorp v. Dudenhoffer.*[5] In that decision, however, the Supreme Court also held that ERISA "does not require a fiduciary to break the law" – e.g., by violating the securities laws through insider trading – and that:

"[t]o state a claim for breach of the duty of prudence . . . on the basis of inside information, a plaintiff must plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[6]

In the years following *Dudenhoffer*, plaintiffs had little success in overcoming the "more likely to harm" hurdle in employer stock drop cases, with the notable exception of *Jander v. IBM* in which the 2nd Circuit ruled that the plaintiffs met the pleading standard.[7] On appeal, the Supreme Court was asked to rule on the degree of specificity with which plaintiffs must plead the "more likely to harm" standard and whether that standard can be met by "generalized allegations that the harm of an inevitable disclosure of an alleged [securities-related] fraud generally increases over time." *Retirement Plans Comm. of IBM v. Jander*, No. 18-1165, (U.S. Jan. 14, 2020). However, two additional issues were raised for the first time during briefing before the Supreme Court – namely, (1) the plan fiduciaries contended that ERISA "imposes no duty on an ESOP fiduciary to act on inside information", and (2) the Securities and Exchange Commission argued that imposing such a duty would conflict with the "complex insider trading and corporate disclosure requirements imposed by the federal securities laws". Therefore, as neither of these issues were addressed by the court below, the Supreme Court vacated that decision and remanded the case to the 2nd Circuit for a determination on the merits.

On remand in June 2020, the 2nd Circuit reinstated its prior decision and returned the case to the trial court, holding that the issues in question were either already considered by the 2nd Circuit, or were not properly raised. The 2nd Circuit's ruling is seen as a victory for the plaintiff-employees. Thus, while the *Jander* case proceeds to discovery and further litigation, additional plaintiffs may feel emboldened to pursue employee stock drop cases.

Thus, in *Thole*, *Sulyma* and *Jander*, the Supreme Court has proven that, while perhaps arcane and tedious, ERISA does evolve over time. More importantly, these decisions have the potential to significantly impact the risks faced by plans' sponsors and fiduciaries, as well as the underwriting of the Fiduciary Liability Insurance which protects them.

---

[5] *573 U.S. 409 (2014)*

[6] *Id., at 428.*

[7] *See Emily Brill, "ERISA Cases To Watch In 2020: All Eyes On the High Court", Law360 (January 1, 2020)*