



A report to clients and friends of the Firm

Edited by Stacey C.S. Cerrone and Russell L. Hirschhorn

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in this issue

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Editor's Overview

This month we take a look at the plaintiffs' past successes in fee litigations, and the influx of such lawsuits seeking to impose heightened fiduciary standards for 401(k) plans. Regardless of the outcomes in these cases, they illustrate the ever-heightening scrutiny being applied to plan fiduciaries. The low interest rate environment after the Great Recession has put substantial pressure on money market and stable value funds, which are delivering low returns in this environment. And, low returns and poor market performance has led to a search for alternative investments, which also can increase risk and hindsight-based second-guessing. As discussed in the article below, plan fiduciaries can engage in preventive measures that should help them defend against these newly minted claims.

As always, please be sure to review the Rulings, Filings and Settlements of Interest where we provide an update on litigation involving the DOL's new fiduciary rule, review decisions and guidance on ERISA float, forum selection clauses, fiduciary status of consultants, marketplace subsidy notices, and executive compensation tax deductions.

ERISA Fee Litigation Continues to Expand with New Claims Seeking to Impose Heightened Fiduciary Standards for 401(k) Plans*

By Robert Rachal & Tulio D. Chirinos**

Introduction

Buoyed by their recent success in fee litigation cases against plan fiduciaries,¹ plaintiffs' counsel are bringing more lawsuits seeking to impose heightened fiduciary standards for 401(k) plans. In an unprecedented surge, plaintiffs filed at least a dozen fee litigation

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¹ See Robert Rachal, Lindsey Chopin & Robert Sheppard, View from Proskauer: 401(k) Fee Litigation – Practices to Mitigate Fiduciary Risk, BNA Pers. & Ben Daily (Jan. 7, 2015).

lawsuits between December 2015 and February 2016. These suits include challenges against: (i) 401(k) plans that offer Vanguard and Stable Value Funds (SVFs), which are typically regarded as low cost, conservative funds;² (ii) non-traditional investments offered in 401(k) plans, such as through target date funds, that did not perform well in hindsight; (iii) insurers offering what they believe are ERISA-exempt guaranteed benefit contracts;³ and (iv) investments in target date funds.⁴

The U.S. Department of Labor's new fiduciary rule, could conceivably lead to even more fee litigations.⁵ By expanding the scope of individuals and entities subject to ERISA's fiduciary requirements, the rule could likewise expand the potential targets for such lawsuits.

While these developments cause concern, they also can identify areas of potential exposure, and provide insights on best practices to mitigate the risk of what appear to be ever heightening fiduciary standards.

Overview of Fee Litigation Cases

As 401(k) plans supplemented the traditional defined benefit (pension) plan as the primary vehicle for funding employee retirement, beginning in 2006 plaintiffs' counsel commenced a wave of ERISA fiduciary lawsuits challenging the fees and expenses associated with 401(k) plans.⁶ Initially, these fee litigation lawsuits challenged "revenue sharing" arrangements with plan service providers and claimed that the selection of various types of investment options, such as retail mutual funds and actively managed funds, charged plan participants excessive fees.⁷

² See Complaints, *Bell v. Anthem Inc.*, No. 1:15-cv-02062 (S.D. Ind. Dec. 29, 2015), ECF No. 1, amended March 16, 2016, ECF No. 23; *White v. Chevron Corp.*, No. 4:16-cv-00793 (N.D. Cal. Feb. 17, 2016), ECF No. 1; *Bristol v. Mass. Mut. Life Ins. Co.*, No. 3:16-cv-00139 (D. Conn. Jan. 29, 2016), ECF No. 1; *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444 (N.D. Ga. Dec. 22, 2015), ECF No. 1, amended Apr. 15, 2016, ECF No. 37; *Barchock v. CVS Health Corp.*, No. 1:16-cv-00061 (D. R.I. Feb. 11, 2016), ECF No. 1; *Ellis v. Fidelity Mgmt. Trust Co.*, No. 1:15-cv-14128 (D. Mass. Dec. 11, 2015), ECF No. 1; *Jacobs v. Verizon Commc'n Inc.*, No. 1:16-cv-01082 (S.D.N.Y. Feb. 11, 2016), ECF No. 1; *Moreno v. Deutsche Bank Americas Holding Corp.*, No. 1:15-cv-09936 (S.D.N.Y. Dec. 21, 2015), ECF No. 1, amended Mar. 30, 2016, ECF No. 27; *Rosen v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01839 (D. Conn. Dec. 18, 2015), ECF No. 1, amended Apr. 6, 2016, ECF No. 35; *Wittman v. New York Life Ins. Co.*, No. 1:15-cv-09596 (S.D.N.Y. Dec. 8, 2015), ECF No. 1; *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01785 (D. Conn. Dec. 3, 2015), ECF No. 1.

³ See *Teets v. Great-West Life & Annuity Ins. Co.*, No. 1:14-cv-02330, at *22-23 (D. Colo. June 22, 2016) (granting class certification of a class of more than 270,000 retirement plan investors challenging the ERISA-exempt status of a guaranteed benefit contract).

⁴ See, e.g., Complaint, *Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698-NC, at 11, 120-134 (N.D. Cal. June 30, 2016), ECF No. 1.

⁵ See 29 C.F.R. § 2510.3-21 (2016); For a further discussion and analysis of the new fiduciary rule, see also Proskauer Client Alert, U.S. Department of Labor Finalizes Fiduciary Definition and Conflict of Interest Rule, (April 19, 2016), available at <http://www.proskauer.com/publications/client-alert/us-department-of-labor-finalizes-fiduciary-definition-and-conflict-of-interest-rule/>.

⁶ See Howard Shapiro, Robert Rachal, & Tulio Chirinos, *Fees and Expenses Litigation in Defined Contribution Plans*, in BNA ERISA LITIGATION 1033, 1034 (5th Ed. 2014).

⁷ *Id.* at 1034-35.

Defendants prevailed in many of those cases;⁸ however, several recent rulings resulted in substantial settlements and judgments. For example, three notable and long running fee litigation cases settled in 2015 for over \$220 million, including the payment of over \$80 million in attorney's fees.⁹ Plaintiffs achieved these results despite losing on many of their claims. But fee litigation operates like hydraulic pressure, probing for any weak parts in plan management, even when the plan is overall well-managed. These recent developments have emboldened plaintiffs to push the envelope in fee litigation cases, including bringing claims against 401(k) plans that offer very low cost funds and against investment vehicles and providers previously considered exempt from ERISA, like insurers offering investment policies with guaranteed rates of return.

New Complaints Seeking to Impose Heighted Fiduciary Standards

In a significant new development, this past year plaintiffs' counsel have begun bringing claims against 401(k) plans that offer as investment options Vanguard and Stable Value Funds. These claims are surprising, since plaintiffs' counsel have previously argued that fiduciaries should use Vanguard funds in 401(k) plans because they often have relatively lower index-based fees as compared to other investment options.¹⁰ Similarly, plaintiffs and courts alike have noted that SVFs offer stability over money market funds, based on their holdings of longer-duration instruments, and that through various "wrap contracts" with banks or insurance companies they "guarantee the fund's principal and shield it from interest-rate volatility."¹¹

Vanguard Claims

Plaintiffs have brought two fee litigation cases against Anthem and Chevron based, in part, on their inclusion of Vanguard funds that plaintiffs claim charged excessive fees in relation to other share classes that were allegedly available.

- > In *Bell v. Anthem Inc.*, plaintiffs alleged that Anthem's 401(k) plan, with assets worth over \$5 billion,¹² failed to use its considerable bargaining power to demand lower

⁸ For a more complete analysis of the claims, issues and cases arising in fee litigation, see *supra* Shapiro et. al., *supra* note 7.

⁹ See *Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-1552, slip op. at 2 (D. Conn. Mar. 26, 2015), ECF No. 597-1 (Plaintiffs' Unopposed Memorandum in Support of Final Approval of Class Action Settlement); *Haddock v. Nationwide Life Ins. Co.*, No. 01-cv-1552, slip op. (D. Conn. Apr. 9, 2015), ECF No. 601, (Final Order Approving Settlement); *Abbott v. Lockheed Martin Corp.*, No. 3:06-cv-701 (S.D. Ill. July 2, 2015), ECF No. 520 (plaintiffs' memorandum in support of joint motion for settlement); *Abbott v. Lockheed Martin Corp.*, No. 3:06-cv-701 (S.D. Ill. July 20, 2015), ECF No. 526 (final order approving settlement); *Krueger v. Ameriprise Fin. Inc.*, No. 11-cv-2781, slip op. at 1-2 (D. Minn. July 13, 2015), ECF No. 624, (Final Order Approving Settlement); *Krueger v. Ameriprise Fin. Inc.*, No. 11-cv-2781, slip op. at 1-2 (D. Minn. July 13, 2015), ECF No. 623 (Order Granting Motion for Attorneys' Fees).

¹⁰ See *Leber v. Citigroup, Inc.*, No. 07 Civ. 9329 (SHS), 2010 U.S. Dist. LEXIS 25097, *11-12, 48 EB Cases (BNA) 2418 (S.D.N.Y. Mar. 16, 2010) (plaintiffs alleged, in part, that defendants violated their ERISA fiduciary duty when they invested in funds that had higher fees than comparable Vanguard Funds).

¹¹ See *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 806, 56 EB Cases (BNA) 2352 (7th Cir. 2013) (explaining that "SVFs generally outperform money market funds, which invest exclusively in short-term securities. To provide the stability advertised in the name, SVFs are provided through 'wrap' contracts with banks or insurance companies that guarantee the fund's principal and shield it from interest-rate volatility").

¹² As alleged in the complaint. See Amended Complaint, No. 1:15-cv-02062, at 10 (S.D. Ind. March 16, 2016), ECF No. 23.

cost investment options.¹³ This type of claim is not new in fee litigation cases but what is new is that at least ten of the allegedly high cost investment options were Vanguard mutual funds;¹⁴ one of the allegedly high-cost Vanguard funds¹⁵ charged the Anthem plan a fee of 4bps, an extremely low fee compared to an industry where fees can average well over 25bps.¹⁶ Nonetheless, plaintiffs alleged that the plan should have used its bargaining power to bargain for even lower cost share classes, in this case an identical lower-cost mutual fund that charged a fee of 2bps.¹⁷ In total, plaintiffs alleged that Anthem's 401(k) suffered losses of \$18 million as a result of the alleged higher-cost share classes for these funds.¹⁸

- > In claims very similar to the ones asserted against Anthem, plaintiffs alleged that fiduciaries of the Chevron 401(k) plan (with assets over \$19 billion) breached their fiduciary duty by, among other things, offering lower-cost Vanguard funds and a Vanguard money market fund instead of a stable value fund.¹⁹ Plaintiffs alleged that Chevron's decision to offer the Vanguard money market fund instead of a stable value fund cost plan participants \$130 million in retirement savings.²⁰ Plaintiffs also challenged Chevron's inclusion of ten Vanguard mutual funds (some with fees as low as 5bp) because there were allegedly identical Vanguard funds with lower-cost share classes available.²¹ Plaintiffs alleged that Chevron's use of the higher-cost Vanguard funds contributed to plan participants losing over \$20 million through unnecessary expenses.²²

Stable Value Fund Claims

- > Plaintiffs have sometimes demanded that SVFs be provided (as they did in the Chevron case above), but at other times they have claimed that SVFs are bad investments when they fail to perform as hoped because they allegedly deviated from the investment mix "typically" offered by SVFs.²³ These "Goldilocks" type claims are continuing:
 - > In *Ellis v. Fidelity Management*, one of plaintiffs' central claims concerns a fund they claimed was a SVF offered by Fidelity as an investment option in the Barnes

¹³ *Id.* at 2.

¹⁴ *Id.* at 25, 38-45.

¹⁵ *Id.* at 38 (The Vanguard Institutional Index Fund (Instl) (VINIX)).

¹⁶ Rebecca Moore, *Mutual Fund Expense Ratios See 20-Year Low*, PLANSPONSOR (March 16, 2016) available at <http://www.plansponsor.com/Mutual-Fund-Expense-Ratios-See-20-Year-Low/?p=1>.

¹⁷ See Amended Complaint, *Bell v. Anthem Inc.*, No. 1:15-cv-02062, at 38 (S.D. Ind. Mar. 16, 2016), ECF No. 23.

¹⁸ *Id.* at 41.

¹⁹ See Complaint, *White v. Chevron Corp.*, No. 4:16-cv-00793 at 37, 47 (N.D. Cal. Feb. 17, 2016), ECF No. 1.

²⁰ *Id.* at 38.

²¹ *Id.* at 47-48.

²² *Id.* at 55.

²³ See *Abbott v. Lockheed Martin Corp.*, 725 F.3d 803, 811, 56 EB Cases (BNA) 2352 (7th Cir. 2013) (explaining that Plaintiffs "aim to show that the SVF was not structured to beat inflation, that it did not conform to its own Plan documents, and that Lockheed failed to alter the SVF's investment portfolio even after members of its own pension committee voiced concerns that the SVF was not structured to provide a suitable retirement asset").

& Noble 401(k) plan.²⁴ Plaintiffs alleged that the fund performed poorly because Fidelity adopted an unduly conservative investment strategy by investing in shorter average duration securities, like money markets, instead of investing in longer duration bonds.²⁵ Plaintiffs claimed that Fidelity had previously engaged in an overly aggressive and imprudent investment strategy for this fund but over corrected with an overly conservative investment strategy.²⁶ Plaintiffs also alleged that Fidelity allowed wrap contract providers to charge excessive fees, and in turn Fidelity charged its own excessive fees.²⁷

- > In *Pledger v. Reliance*, plaintiffs alleged that Reliance, the trustee of Insperity's \$2 billion dollar 401(k) plan,²⁸ breached its fiduciary duty by offering money market funds that did not keep pace with inflation instead of SVFs that could have earned an additional \$14 million.²⁹ Plaintiffs made this claim despite the fact that Reliance added a SVF to the list of available options to participants of the plan in 2014.³⁰ Plaintiffs claim that the SVF was not an established enough fund because it was in existence for less than a year and underperformed other SVFs.³¹

Claims against ERISA-Exempt Guaranteed Benefit Policies

In several slightly different cases, plaintiffs have challenged the ERISA-exempt status³² of SVFs offered by insurers, including New York Life, Prudential and Great-West Life, which are ERISA-exempt to the extent that they are guaranteed benefit policies.³³ Plaintiffs' principal argument against ERISA exemption is that because the insurers can unilaterally set the rate of return on the investments, the investments are not truly guaranteed benefit policies.³⁴ If the investments are found to not offer guaranteed benefits then, according to plaintiffs' theories, the insurers that manage the funds are subject to ERISA fiduciary standards. In *Teets v. Great-West Life*, the district court

²⁴ See Complaint, *Ellis v. Fidelity Management Trust Co.*, No. 1:15-cv-14128, at 1, 12, 20 (D. Mass. Dec. 11, 2015), ECF No. 1.

²⁵ *Id.* at 2, 47.

²⁶ *Id.* at 47.

²⁷ *Id.* at 2.

²⁸ As alleged in the complaint. See Amended Complaint, *Pledger v. Reliance Trust Co.*, No. 1:15-cv-04444, at 2 (N.D. Ga. Apr. 15, 2016), ECF No. 37.

²⁹ *Id.* at 128-136.

³⁰ *Id.* at 135.

³¹ *Id.*

³² Under ERISA a "guaranteed benefit policy" is exempt to the extent that such "policy or contract provides for benefits the amount of which is guaranteed by the insurer." 29 U.S.C. § 1101(b)(2)(B).

³³ See Complaints, *Wittman v. New York Life Ins. Co.*, No. 1:15-cv-09596 (S.D.N.Y. Dec. 8, 2015), ECF No. 1; *Wood v. Prudential Ret. Ins. & Annuity Co.*, No. 1:15-cv-01785 (D. Conn. Dec. 3, 2015).

³⁴ See *Teets v. Great-West Life & Annuity Ins. Co.*, 106 F. Supp. 3d 1198, 1203, 60 EB Cases (BNA) 2391 (D. Colo. 2015) (denying motion to dismiss because the insurer's ability to unilaterally set the rate of return on the investment at issue raise a genuine issue whether a reasonable rate of return is guaranteed); *Rozo v. Principal Life Ins. Co.*, No. 14-cv-000463, 2015 U.S. Dist. LEXIS 175630, at *6-7, 60 EB Cases (BNA) 2263 (S.D. Iowa Sept. 21, 2015) (denying motion to dismiss because of fact issue as to who bore investment risk where insurer could influence interest rate risk based on how it set rates for new contracts).

certified a class of over 270,000 participants to resolve, in part, the issue of whether ERISA's fiduciary standard applies to Great-West's management of a guaranteed stable value fund and whether the fund falls under ERISA's guaranteed benefit policy exemption.³⁵

In *Great-West*, the 270,000 plan participants came from 13,600 different retirement plans.³⁶ Plaintiffs have previously had mixed results when attempting to satisfy Rule 23's "commonality" and "typicality" requirements against service providers who offer multiple plans (sometimes thousands) with substantial variability in the services and structure offered from one plan to another.³⁷

Claims Challenging Alternative Investments

- Plaintiffs are also attempting to prove new theories of liability related to alternative investments offered in 401(k) plans. For example, in *Johnson v. Fujitsu*, plaintiffs are challenging investments in target date funds that allegedly included too many unique and non-traditional asset classes, such as natural resources and real estate limited partnerships.³⁸

View from Proskauer

The cases discussed above are all in the early stages of litigation, and at least eight have pending motions to dismiss. Regardless of the outcomes in these cases, they illustrate the ever heightening scrutiny being applied to plan fiduciaries – e.g., even index funds with fees of 4bps can now be targets. The low interest rate environment after the Great Recession has also put substantial pressure on money market and stable value funds, which are delivering low returns in this environment. Low returns and poor market performance has also led to a search for alternative investments, which can also increase risk and hindsight-based second-guessing.

Plan fiduciaries can, however, engage in preventive measures that should help them defend against these newly minted claims.³⁹ One such measure is to periodically investigate share classes and fee options to ensure that the 401(k) plan is obtaining the lowest cost option for which it qualifies. This process should be well documented to defend against any later claims that a cheaper share class was readily available. Another is to consider and to document the fiduciary process that led to the selection even of what are considered low-risk investment options, such as money market, stable value, and target-date funds. This will help to defend against the risk of hindsight-based claims

³⁵ See *Teets v. Great-West Life & Annuity Ins. Co.*, No. 1:14-cv-02330, at *22-23 (D. Colo. June 22, 2016).

³⁶ *Id.* at 13.

³⁷ See *Ruppert v. Principal Life Ins. Co.*, 252 F.R.D. 488, 44 EB Cases (BNA) 2727 (S.D. Iowa 2008) (denying class certification because there was substantial variability in the services offered by the service provider from one plan to another and that such variability precluded the plaintiff from satisfying the "commonality" and "typicality" class requirements under Rule 23 of the Federal Rules of Civil Procedure); cf. *Haddock v. Nationwide Fin. Servs. Co.*, 293 F.R.D. 272, 56 EB Cases (BNA) 2189 (D. Conn. 2013) (certifying a class against a service provider who allegedly engaged in revenue sharing in violation of ERISA in the 24,000 ERISA Plans it serviced).

³⁸ See Complaint, *Johnson v. Fujitsu Tech. & Bus. of Am.*, No. 5:16-cv-03698-NC, at 11, 124 (N.D. Cal. June 30, 2016), ECF No. 1.

³⁹ For a further discussion of practices that can lessen fiduciary risk, see Robert Rachal, Lindsey Chopin & Robert Sheppard, *View from Proskauer: 401(k) Fee Litigation – Practices to Mitigate Fiduciary Risk*, BNA Pens. & Ben Daily (Jan. 7, 2015).

whenever any option fails to perform against benchmarks, or if plaintiffs want to challenge why certain investment options, such as SVFs, are not offered.

Rulings, Filings, and Settlements of Interest

Update on Lawsuits Challenging the U.S. Department of Labor's Fiduciary Rule

By Russell Hirschhorn and Benjamin Saper

- > As we previously reported [here](#), there have been five lawsuits challenging the U.S. Department of Labor's new fiduciary rule. (Our client alert on the new rule is available [here](#).)
- > On July 8, 2016, the U.S. Department of Labor (DOL) filed its first formal response to these lawsuits in *The National Association for Fixed Annuities v. Thomas E. Perez et al.*, Case No. 16-cv-1035 (D.D.C.). The DOL's response comes in the form of an opposition to plaintiffs' motion for a preliminary injunction and summary judgment and a cross-motion for summary judgment. The DOL argued that the fiduciary rule is entitled to Chevron deference – which requires federal courts to give deference to agency interpretations unless they are shown to be unreasonable – because the rule is necessary to protect millions of retirees in light of the shift from professionally managed defined benefit pension plans to participant-directed defined contribution plans. The DOL also disputed the accusation that the administrative process of issuing the rule was improper. Among other things, the DOL pointed out that it held an open rulemaking process spanning almost six years, which included the receipt of consideration of more than 3,000 comment letters, held public hearings, and conducted more than three dozen meetings with interested parties, and then it "provided a reasoned explanation for its decision." A hearing on the motions has been scheduled for August 25, 2016.
- > Three of the other lawsuits were filed in the U.S. District Court for the Northern District of Texas and have been consolidated under *Chamber of Commerce of the U.S., et al., v. Perez, et al.*, Case No. 16-cv-1476-M. The parties are currently briefing cross-motions for summary judgment with opening briefs due July 18. A hearing on cross-motions for summary judgment will be heard on November 17, 2016.

The fifth case is pending in the District of Kansas and is captioned *Market Synergy Group, Inc., v U.S. Dept. of Labor, et al.*, Case No. 16-cv-4083. The DOL's brief is currently due July 22, and a hearing on the motion for preliminary injunction is scheduled for September 21, 2016.

Fidelity Prevails In ERISA Float Litigation

By Robert Rachal and Tulio Chirinos

- > The First Circuit joined the Eighth Circuit in finding that Fidelity's practice of earning overnight "float" interest on the cash paid out to 401(k) participants redeeming shares in mutual funds did not violate ERISA's duty of loyalty or prohibition on self-dealing. In so holding, the Court observed that under the terms of the trust agreements between Fidelity and the plan sponsors of the 401(k) plans, Fidelity acted as an intermediary by: (i) opening and maintaining trust accounts for each plan and participant; (ii) accepting contributions from the participant and employer;

(iii) investing those contributions in mutual funds; and (iv) when requested by a participant, withdrawing and distributing participant shares in the mutual fund.

Plaintiffs challenged the final step in Fidelity's intermediary responsibilities because of the float interest earned between withdrawal and redemption. The float was earned in the following manner:

- > Upon request by a participant to withdraw from the plan, their mutual fund shares were redeemed by the mutual fund paying the market value of the shares using an end-of-trading day value.
- > Once valued, the participant's cash was transferred into a "redemption" bank account owned and registered to Fidelity and then transferred into a Fidelity owned interest-bearing account.
- > The next day the value of the participant's mutual fund shares was transferred back to the redemption account and then electronically disbursed to the participant. (A similar process took place for participants receiving paper checks except that interest was earned until the participant cashed the check.)
- > The interest earned, the Float, was then deposited back into the mutual fund.

Plaintiffs did not claim a personal stake in the float; indeed the Court noted that plaintiffs were not "short so much as a penny" and had "no direct stake in the plan assets." Rather, plaintiffs alleged that by returning the float, which they claim was a plan asset, to the mutual fund and not to the 401(k) plan, Fidelity breached its ERISA fiduciary duties. The First Circuit applied ordinary notions of property rights and dismissed plaintiffs' claims. The Court held that because the cash payout from the redemption does not go to, and was never intended to, the plan, it did not become an asset of the plan upon the exchange. The Court also observed that the intermediary actions taken by Fidelity were consistent with ordinary business practices and, more importantly, with the terms of the trust agreement.

The case is *In re Fidelity ERISA Float Litig.*, No. 15-1445, 2016 U.S. App. LEXIS 12874 (1st Cir. July 13, 2016).

District Court Finds Forum Selection Clause Unenforceable in ERISA Action

By J. Robert Sheppard III

- > A federal district court in Illinois ruled that a plan's forum selection was unenforceable because it conflicts with ERISA's public policy of providing plaintiffs "ready access to the Federal courts."

Darlene Harris purchased a life insurance policy for her husband and paid the required policy premiums until his death. When Harris sought the policy benefits, the administrator denied her claim and then she commenced a lawsuit in the Northern District of Illinois. Defendants moved to transfer the case to the Northern District of Texas on the ground that the plan's forum selection clause provided that the "only proper venue for any person to bring a suit against the Plan or to recover Benefits shall be in federal court in Harris County, Texas."

ERISA provides that an action "may be brought in the district where the plan is administered, where the breach took place, or where a defendant resides or may be

found." 29 U.S.C. § 1132(e)(2). Elsewhere, ERISA uses mandatory language when it takes away the parties' freedom to contract for plan provisions. In the court's view, even though there was no textual bar against enforcing plan venue provisions, this provision was susceptible to multiple interpretations and determined that the word "may," as used in this context, could be read as either allowing a plaintiff to file suit in multiple districts or "as providing a right to ERISA plaintiffs to file their action in the most suitable of these locations." The court thus looked to the policies underlying ERISA and identified ERISA's public policy of providing plaintiffs "ready access to the Federal courts" as a guide for determining the enforceability of the forum selection clause. Although the court admitted that it was adopting the minority view, the court held that, in its view, the most persuasive interpretation protects plaintiffs' option of bringing suit in a convenient forum and determined that the forum selection clause was unenforceable.

In so ruling, the court observed that the Sixth and Eleventh Circuit appeared to have conflicting views of the meaning of "ready access to the Federal courts." As the only circuit to date to rule on forum selection clauses for ERISA plans, the Sixth Circuit in *Smith v. AEGON Cos. Pension Plan*, 769 F.3d 922, 931-32 (6th Cir. 2014), interpreted "ready access" as being satisfied as long as the plaintiff was "provide[d] [a] venue in a federal court." The Eleventh Circuit in *Gulf Life Ins. Co. v. Arnold*, 809 F.2d 1520, 1525 (11th Cir. 1987), however, opined in dictum that "ready access to the Federal courts" protects "plaintiffs[]" option of bringing suit in a convenient forum without forcing them to bear the heavy burden of showing that litigating elsewhere would literally foreclose any access to any federal court."

Having determined the forum selection clause was unenforceable, the court applied a *forum non conveniens* analysis and found the most appropriate venue was the Southern District of Illinois because that is where Harris resided and where the alleged breach of the policy occurred.

The case is *Harris v. BP Corp. N. Am. Inc.*, No. 15 C 10299, 2016 BL 221805 (N.D. Ill. July 08, 2016).

Pension Consultant Found Not to be an ERISA Fiduciary

By Steven A. Sutro

- > The Tenth Circuit held that a pension plan consultant, who misstated the amount of monthly pension payments that a pension plan participant would receive in retirement, was not a fiduciary under ERISA. Plaintiffs Trent and Wendy Lebahn, who were participants in the National Farmers Union Uniform Pension Plan, claimed that the Plan, its Pension Committee and consultant breached their fiduciary duties when the consultant told them that if Mr. Lebahn retired soon he would be entitled to \$8,444.18 per month when in fact it turned out that this amount was overstated by nearly \$5,000 per month. Because the overstated amount was paid for several months, the plan demanded that Mr. Lebahn return over \$43,000 in overpayments. The Tenth Circuit affirmed the dismissal of the complaint because the Lebahns failed to adequately allege that the consultant had fiduciary status. The Court, relying on the New Oxford American Dictionary, explained that "fiduciary status requires authority or responsibility that is discretionary, which entails 'the freedom to decide what should be done in a particular situation'" and that conducting a routine computation, as required by one's job, does not require discretion. The Court also

relied on the Department of Labor's regulations, 29 C.F.R. §§ 2509.75-8 and 2509.75-5, which explain that "a person who performs administrative functions, such as calculating benefits, does not automatically have discretionary authority." Because the Court concluded that the consultant was not a plan fiduciary, it determined that it need not decide whether her fiduciary status could support liability of the other defendants.

The case is *Lebahn v. Nat'l Farmers Union Unif. Pension Plan, et al.*, No. 15-3201, 2016 BL 221313 (10th Cir. July 11, 2016).

Marketplace Subsidy Notices – What Employers Should Know

By Damian A. Myers

- > As promised by the Centers for Medicare & Medicaid Services (CMS) in late-2015, the Federally-Facilitated Marketplaces (FFMs) have started sending notices informing employers that employees have enrolled in a FFM and were determined eligible for premium subsidies. Because the employer shared responsibility penalties set forth in Section 4980H of the Internal Revenue Code (the "Code") could be triggered when at least one full-time employee obtains a premium subsidy on the Marketplace, an employer receiving one of these notices should understandably be concerned about the possibility of penalties. Nevertheless, these notices do not guarantee that a penalty will be assessed. Here's what employers should know:
- > There are two potential penalties under the employer shared responsibility (or pay-or-play) mandate – the "A Penalty" and the "B Penalty". The A Penalty may be assessed against an applicable large employer (an employer with 50 or more full-time employees and equivalents) if the employer fails to offer minimum essential coverage to at least 95% of its full-time employees and at least one full-time employee enrolls in the Marketplace and receives a premium subsidy. The A Penalty is generally equal to \$180 per month (\$2,160 per year) multiplied by the number of all full-time employees, minus up to 30 full-time employees. The B Penalty could be assessed against an applicable large employer even if the 95% threshold is met if a full-time employee is offered unaffordable coverage or coverage that lacks minimum value. The B Penalty, which is equal to \$270 per month (\$3,240 per year), is assessed only against those full-time employees who enroll in the Marketplace and get a premium subsidy. Both penalty amounts are adjusted annually for inflation.
- > An employer receiving a FFM subsidy notice is not automatically subject to a shared responsibility penalty. CMS has no authority to make penalty determinations under Code Section 4980H – any such determination will be made independently by the IRS. The IRS has not yet provided concrete procedures related to penalty assessments under Code Section 4980H, but it has indicated that employers will have the opportunity to appeal assessments.
- > Various circumstances could exist under which an employee is entitled to a premium subsidy without triggering a penalty on the employer. For example, the employee could be part-time and ineligible for coverage under the employer's plan. Alternatively, the employee could be in a "limited non-assessment period" such as a 90-day waiting period or an initial measurement period. Also, it may be

that the employer's offer of coverage is unaffordable for Marketplace subsidy purposes (which is based on 9.66% (for 2016) of household income) but is affordable under one of the affordability safe harbors allowed under the pay-or-play regulations. Finally, it may be that the employee was ineligible for coverage under a multiemployer plan, but the employer cannot be assessed a penalty based on the special interim guidance for multiemployer plan coverage.

- > Nevertheless, there will undoubtedly be situations in which an employee receives a subsidy despite having an offer of affordable, minimum value employer-sponsored health coverage. Whether this happens due to an employee's misunderstanding of the Marketplace application or the employee simply misrepresenting his or her opportunity to enroll in other coverage, employers have the ability to appeal a FFM's subsidy determination. When the employee receiving a subsidy is a full-time employee who was offered coverage, the employer should strongly consider appealing. Although CMS cannot impose either the A or B Penalty, the IRS could later impose a penalty and it would be helpful for an employer to have a record showing that the subsidy determination was appealed and resolved in favor of the employer. When the employee is not a full-time employee, or some other circumstance exists such that the employer cannot be assessed a penalty, an employer would have less incentive to challenge the subsidy determination.
- > If an employer decides to appeal a FFM's subsidy determination, the appeal must be submitted no later than 90 days after the date the employer received the notice. If the appeal is resolved in favor of the employer, the relevant employee will receive a notice from CMS asking him or her to update the Marketplace application. The employee will also be informed that the failure to update the application could later result in tax liability.
- > When completing a Marketplace application, employees are likely to enter the address of their worksite, which may not have HR representatives staffed at that location. Therefore, employers with multiple worksites should institute an internal mechanism for identifying the FFM subsidy notices and routing them to the correct person. These internal procedures will help avoid inadvertently missing the 90-day deadline to appeal a subsidy determination.

Employers can expect to receive increasing numbers of FFM notices in the coming months. In the future, subsidy notices may also be received under state-based Marketplaces. In each case, employers should review their internal records to determine if there is any penalty risk. If an employee's receipt of a subsidy could trigger a penalty under Code Section 4980H, employers should consider appealing the subsidy determination if there is a basis on which to do so. As always, employers should consult with counsel and other healthcare advisors when determining whether to appeal.

Senator Warren Leads Coalition to Expand Scope of Limitations on Executive Compensation Tax Deductions

By Joshua Miller and Justin Alex

- > As we have previously reported (see [here](#) and [here](#)), bills to expand the scope of Section 162(m) and/or to narrow or eliminate the exceptions under Section 162(m) have been proposed in recent years, but have not become law.

Recently, a new coalition named "[Take On Wall Street](#)" that is comprised of lawmakers (including Senator Elizabeth Warren (D-MA)), union leaders, civil rights groups, and other community groups has announced plans to pursue five initiatives, one of which is to "end [the] tax exemption for huge CEO bonuses."

Please see our full post on our [Tax Talks blog](#) discussing the legislation introduced by both the House and Senate that would amend Section 162(m) of the Internal Revenue Code.

Our ERISA Litigation practice is a significant component of Proskauer's Employee Benefits, Executive Compensation & ERISA Litigation Practice Center. Led by Howard Shapiro and Myron Rumeld, the ERISA Litigation practice defends complex and class action employee benefits litigation.

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