ERISAFest
Webinar Series

ERISA at The Supreme Court

Myron D. Rumeld
Partner, Proskauer

Joseph E. Clark
Associate, Proskauer

May 13, 2020

Proskauer

Statute of Limitations

Poll Questions:

- **Does your record keeper have the ability to track when participants obtain access to the benefits website?**
  - **Yes**
  - **No**
- **In determining the content of disclosures on plan investments do you take into account statute of limitations issues?**
  - **Yes**
  - **No**

Background

- Section 413 provides a statute of limitations for fiduciary breach:
  - (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or omission, or
  - (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation
  - If fraud or concealment, six years after discovery

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- Class action brought by former employee challenging two of 401(k) plan investment options as being overinvested in alternative investments such as hedge funds and private equity, which allegedly caused losses through excessive fees and underperformance. Employee also brought parallel claims relating to investments that were not participant directed.
- Defendants said the investments and investment strategy were revealed in plan communications that were available via website disclosures and moved to dismiss based on 3-year SOL.
- Plaintiff testified at his deposition that he visited website but was not aware of alternative investments.

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- The District Court held that "[i]t would be improper to allow Sulyma's claims to survive merely because he did not look further into the disclosures made to him."
- The Ninth Circuit reversed and held that Defendants must show that Plaintiff was actually aware of the nature of the alleged breach (or "alerted to the particular claim") more than 3 years before suit.
  - The Ninth Circuit concluded that Plaintiff had sufficient information available to him relating to claim that plan fiduciaries violated ERISA's prudence requirement by adopting excessively risky asset allocation, but because he testified that he never looked at specific information, summary judgment on 3-year SOL was inappropriate.

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- Ninth Circuit's decision in *Sulyma* created a circuit split between the Sixth Circuit and the Ninth Circuit.
  - Furnishing plan documents creates actual knowledge; failure to read plan documents is no excuse. *Brown v. Owens Corning Investment Review Committee*, 622 F.3d 564 (6th Cir. 2010).
  - Plaintiff cannot have actual knowledge where he cannot recall reading or understanding the disclosed information. *Sulyma*, 909 F.3d 1069 (9th Cir. 2018).
- The question before the Supreme Court:
  - Whether the 3-year SOL "bars suit where all of the plan documents and relevant information was disclosed to the plaintiff more than three years before plaintiff filed the complaint, but plaintiff chose not to read the information"

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- Petitioners' main arguments at the Supreme Court:
  - If statutory disclosure requirements are met, plaintiff *a fortiori* has actual knowledge.
  - Plaintiff can create a factual dispute for purposes of the 3-year limit by claiming not to have read or remembered disclosures, thus rendering 3-year limit inapplicable in many cases.
  - Rewarding willful decision to remain ignorant.
  - Subjecting most claims to 6-year statute of repose will disrupt ERISA's careful balance.

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- Respondent's main arguments:
  - Statutory language is "actual knowledge."
  - ERISA formerly had a constructive knowledge standard for the 3-year SOL.
  - Section 413's three-tiered structure underscores statutory goal of protecting "ready access to the Federal courts" for plan participants and beneficiaries.

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- The Court unanimously affirmed the Ninth Circuit's decision on February 26, 2020
- The Court held that "actual knowledge" cannot be satisfied by information contained in disclosures that plaintiff does not read or cannot recall reading.
- Meaning of "actual knowledge" is plain based on dictionary definitions (basic and legal definitions).
- Congress has drawn the distinction between actual and constructive knowledge elsewhere
- Policy considerations must be taken up by Congress
  - Court would not decide which side policy should favor (plans or participants) because that is better left to Congress

Intel Corp. Investment Policy Committee v. Sulyma, 140 S. Ct. 768 (2020)

- Potential good news for plan fiduciaries:
- "nothing in this opinion forecloses any of the 'usual ways' to prove actual knowledge at any stage in the litigation" (including summary judgment)
  - Plaintiffs who recall reading disclosures are bound by oath to say so in depositions
  - Inference from circumstantial evidence
  - Evidence of electronic records showing that a plaintiff viewed disclosures and took action in response "would no doubt be relevant"
  - Denial of knowledge that is "blatantly contradicted by the record"
  - Evidence of "willful blindness" supports a finding of "actual knowledge."
- Consider class action implications

Pleading Standard for Stock Drop Claims

Background

- ERISA Section 404(a)(1)(B) requires fiduciaries of retirement plans to manage a plan's assets prudently.
- However, Congress also has encouraged the use of ESOPs.
- And ERISA Section 404(a)(2) exempts ESOP fiduciaries from the duty to diversify and the duty of prudence, but only to the extent the duty of prudence requires diversification.

Poll Question:

- **Do company executives/members of management serve as fiduciaries of your company retirement plan?**
  - **Yes**
  - **No**

Background

- Prior U.S. Supreme Court Rulings
  - ***Fifth Third Bancorp v. Dudenhoeffer***, 134 S. Ct. 2459 (2014)
    - Participants in ESOP sued fiduciaries for failures related to their knowledge that stock was overvalued
    - Defendants argued that ESOP fiduciaries are presumed prudent (***Moench*** presumption) when investing ESOP assets in employer stock
    - Supreme Court reversed, holding that ESOP fiduciaries are not excused from duty of prudence or subject to lower prudence standard

Background

- ***Fifth Third Bancorp v. Dudenhoeffer***, 134 S. Ct. 2459 (2014) **(cont'd)**
  - No unique pleading standards for employer stock claims under ERISA, but the Court provided more rigid criteria for satisfying these standards.
    - **Claims based on inside information:** 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."
    - **Claims based on public information:** "[A]llegations that a fiduciary should have recognized from publicly available information alone that the market was over- or undervaluing the stock are implausible as a general rule, at least in the absence of special circumstances."

Background

- ***Amgen v. Harris***, 136 S. Ct. 758 (2016)
  - Supreme Court subsequently confirmed that the *Dudenhoeffer* standard sets a high bar
  - Overturned Ninth Circuit and held that the court erred by permitting a breach of fiduciary duty claim to proceed without first determining whether the complaint contained facts and allegations supporting a claim that removal of the Amgen stock fund was an alternative action that no prudent fiduciary could have concluded would cause more harm than good.
- Subsequently, every court since *Dudenhoeffer* to address these claims has dismissed them at the motion to dismiss stage
- Until . . .

Jander v. Retirement Plans Committee of IBM, 910 F.3d 620 (2d Cir. 2018)

- Plaintiff alleged that the defendants knew of, and should have disclosed, accounting irregularities overstating the value of IBM's microelectronics business, which IBM was seeking to sell.
  - Individual defendants were part of IBM senior leadership: CAO, CFO and General Counsel.
  - Failure to disclose left IBM's stock price artificially inflated and harmed participants when irregularities were eventually disclosed and the price of the stock declined by more than $12 per share.
- SDNY dismissed, holding that the complaint lacked context-specific allegations as to why a prudent fiduciary could not have concluded that plaintiff's proposed alternatives were more likely to do harm than good and therefore failed to satisfy the *Dudenhoeffer* pleading standard.

Jander v. Retirement Plans Committee of IBM (2d Cir. 2018)

- **Second Circuit reversed**, finding that plaintiff pled a plausible fiduciary breach claim because:
  - Plan fiduciaries allegedly knew that company stock was artificially inflated;
  - Certain defendants were "uniquely situated to fix [the accounting irregularities] inasmuch as they had primary responsibility for the public disclosures that had artificially inflated the stock price to begin with" and disclosure could have been made within IBM's quarterly SEC filings;
  - Failure to promptly disclose the truth allegedly caused reputational harm to the company that exacerbated the harm to the stock price;
  - Stock traded on an efficient market and there was thus no need to fear that disclosure would result in an overreaction by the market;
  - Disclosure of the truth was inevitable.

Jander v. Retirement Plans Committee of IBM (2d Cir. 2018)

- Second Circuit also held that:
  - A stock-drop following early disclosure would be no more harmful than the inevitable stock drop that would occur following a later disclosure.
  - Plaintiffs' citations to general economic studies showing that the longer a fraud continues, the more damage is done, supported plaintiffs' imprudence claim and were not merely theoretical.
    - Fifth and Sixth Circuits previously had found these general principles too generic to support a claim.
- Supreme Court granted *certiorari*

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- The question before the Supreme Court:
  - "*Whether Dudenhoeffer's* 'more harm than good' pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time."
- Theories/Arguments of Petitioner
  - Plan fiduciaries could have concluded that disclosure could have done more harm than good, particularly since plan was a net seller of employer securities.

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- Theories/Arguments of Petitioner **(cont'd)**
  - Respondent's position would open the floodgates to actions against ESOP fiduciaries
  - Fiduciaries with access to inside information because of their corporate position have no duty to consider that information to advance the interests of the plan

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- Theories/Arguments of Respondent
  - Petitioner's argument that insider fiduciaries never have an obligation to disclose or act on inside information under ERISA's rules is not the issue before the Court and in effect would insulate ESOP fiduciaries from liability for imprudent action.
  - Allegations were not generalized, but included fact-specific arguments about GAAP violations, timing of needed disclosures and the inevitable disclosure of info after the sale of the division.

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- Brief for the United States as Amicus Curiae Supporting Neither Party
  - Argued that federal securities law guides the *Dudenhoeffer* analysis.
  - Differentiated between obligations of fiduciaries who have duties under the securities laws and those who do not
  - Duty to inform others about potential violation
  - More harm than good guided by similar determinations under the securities laws
  - Independent ERISA claim

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- Per curiam decision issued on January 14, 2020.
  - Court vacated and remanded to consider whether to decide the Petitioners' and Government's arguments that were raised but not addressed by the Second Circuit:
    - IBM petitioners argued that ERISA imposes no duty on an ESOP fiduciary to act on inside information
    - Government argued that an ERISA-based duty to disclose inside information that is not otherwise required to be disclosed by the securities laws would conflict with the objectives of the insider trading and corporate disclosure requirements imposed by the federal securities laws

Retirement Plans Committee of IBM v. Jander, 140 S. Ct. 592 (2020)

- Dispute in two concurring opinions over whether the arguments are foreclosed by *Dudenhoeffe*r.
  - Justice Kagan: if arguments advanced by IBM and Government were not properly preserved, "sound judicial practice" pointed toward declining to address them. Expressed skepticism as to whether the merits of either argument would be consistent with *Dudenhoeffer.*
  - Justice Gorsuch: if arguments advanced by IBM and Government are not addressed immediately on remand, they will only prove "unavoidable later." Parties' arguments were not foreclosed by *Dudenhoeffer* because *Dudenhoeffer* did not address whether fiduciaries can be held liable for alternative actions they could have taken only in a non-fiduciary capacity.


Standing

Thole v. U.S. Bank, NA, 873 F.3d 617 (8th Cir. 2017)

- Interplay of Article III Standing and ERISA Sections 502(a)(2) and (3)
  - **Article III:** Plaintiff must show an injury-in-fact, a causal connection between the injury and the misconduct, and a likelihood that the injury will be redressed by a favorable decision in the plaintiff's favor. *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992).
  - **Section 502(a)(2):** Authorizes participants to commence suit for appropriate relief under Section 409, which in turn provides that plan fiduciaries are personally liable to the plan for any losses to the plan resulting from fiduciary breaches.
  - **Section 502(a)(3):** Authorizes participants to commence suit to enjoin any violation of ERISA or to obtain other appropriate equitable relief that Section 502 does not elsewhere adequately remedy.

Thole v. U.S. Bank, NA, 873 F.3d 617 (8th Cir. 2017)

- Two participants in a defined benefit pension plan sued plan fiduciaries alleging that an "all equities" investment strategy violated ERISA and used investment vehicles that benefited the employer.
- They sought, among other things, restoration of nearly $750 million in plan losses and injunctive relief requiring diversification, disgorgement of profits and removal of breaching fiduciaries.

Thole v. U.S. Bank, NA, 873 F.3d 617 (8th Cir. 2017)

- Although the plan was very "underfunded" when the suit began, the bank then contributed enough to meet minimum funding requirements.
- The Eighth Circuit, following its own precedent in *Harley v. 3M* and *McCullough v. Aegon*, held that once the Plan passed the minimum funding threshold, the participants could no longer sue for any kind of relief under ERISA.
  - The Eighth Circuit decided the issue as a matter of statutory construction, not Article III standing.

Thole v. U.S. Bank, NA, 873 F.3d 617 (8th Cir. 2017)

- Plaintiffs did not have statutory standing to seek restoration of plan losses under (a)(2) or injunctive relief under (a)(3).
- Plaintiffs failed to show actual injury because the defined benefit plan was overfunded, meaning that there was no actual or imminent injury to the plan that caused injury to the plaintiffs' interests.
- Plaintiffs did not fall within the class of plaintiffs authorized to bring suit.
- Dissenting Judge Kelly would have held that participants may seek injunctive relief under (a)(3) against fiduciaries of overfunded plans

- Plaintiffs sought and obtained cert. The Supreme Court asked for briefing on Article III grounds.

Thole v. U.S. Bank, NA, 139 S. Ct. 2771 (2019)

- The Issues before the Supreme Court:
  - (1) "Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof";
  - (2) "Whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof"; and
  - (3) "whether petitioners have demonstrated Article III standing."

Thole v. U.S. Bank, NA, 139 S. Ct. 2771 (2019)

- Petitioners' main arguments:
  - Participants, like trustees, can assert the plan's interests as the plan's representatives.
  - Participants are beneficial owners and the plan's losses are theirs.
  - The traditional law of trusts permitted such suits, as ERISA expressly does.
  - Defendants' approach eviscerates ERISA's protections, even for egregious breaches, whenever a plan becomes fully funded.

Thole v. U.S. Bank, NA, 139 S. Ct. 2771 (2019)

- Respondents' main arguments:
  - Under *Spokeo v. Roberts*, Article III standing requires a concrete injury even in the context of a statutory violation.
  - Where fiduciary violations do not create or increase risk of default, participants have not suffered an injury in fact.
  - Funding status is a good measure of risk of default, which in turn is a good measure of whether participants have been injured.
  - Traditional law required risk of personal injury.

Preemption

Poll Question:

- **Does your health plan manage pharmacy benefits directly, or has it retained a pharmacy benefit manager (“PBM”) to do so?**
  - **Manages directly**
  - **PBM**
  - **Don’t know**

PCMA v. Rutledge, 891 F.3d 1109 (8th Cir. 2018)

- ERISA Section 514(a) preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plans."
- Pharmacy Benefits Managers (PBMs) are entities that verify benefits and manage financial transactions among pharmacies, healthcare payors, and patients.
- Contracts between PBMs and pharmacies create "pharmacy networks." Some prescription drug reimbursement practices have resulted in independent rural pharmacies being reimbursed less than the cost of drugs, which, in turn, has driven them from the marketplace.
- Arkansas attempted to address the trend of having significantly fewer independent and rural-serving pharmacies in the state by mandating that pharmacies be reimbursed for generic drugs at a price equal to or higher than the pharmacies' cost for the drug.

PCMA v. Rutledge, 891 F.3d 1109 (8th Cir. 2018)

- The Pharmaceutical Care Management Association (PCMA) commenced litigation on behalf of its members, arguing that Arkansas statute was preempted by ERISA
- The Eighth Circuit (and the district court) concluded that ERISA preempted the Arkansas statute because it both related to, and had a connection with, employee benefits plans governed by ERISA.
  - The court explained that the Arkansas statute made implicit reference to ERISA through regulation of PBMs, which administer benefits for plans, employers, labor unions, and other groups that provide health coverage, and which are necessarily subject to ERISA.

PCMA v. Rutledge, 891 F.3d 1109 (8th Cir. 2018)

- Eighth Circuit aligned itself with D.C. Circuit and held that the state statute was preempted because it regulated the conduct of PBMs, creating a circuit split.
  - Conflict with First Circuit
    - State law not preempted because PBMs are not ERISA fiduciaries and thus "outside of the intricate web of relationships among the principal players in the ERISA scenario." *PCMA v. Rowe*, 429 F.3d 294 (1st Cir. 2005).
  - 36 states have such laws.
    - Laws come in several flavors:
      - protect pharmacies from excessively low reimbursement rates (e.g., Arkansas law)
      - protect consumers from high PBM spread between acquisition price and retail price

Rutledge v. PCMA, 140 S. Ct. 812 (2020)

- *Certiorari* granted in January 2020.
- Government recommended the Court grant the petition.
  - Agreed with the states that the Eighth Circuit erred and Arkansas' law on PBMs is not preempted.
- Issue before the Supreme Court:
  - Whether the 8th Circuit "erred in holding that Arkansas' statute regulating pharmacy benefit managers' drug-reimbursement rates, which is similar to laws enacted by a substantial majority of states, is pre-empted by [ERISA], in contravention of the Supreme Court's precedent that ERISA does not pre-empt rate regulation."

Rutledge v. PCMA, 140 S. Ct. 812 (2020)

- Petitioners' main arguments:
  - The Arkansas law does not have a prohibited "connection with" ERISA plans.
    - ERISA does not preempt rate regulation or drug reimbursement rates.
    - The law's enforcement mechanisms are "necessary incidents" to its regulation of rates and ERISA does not preempt these.
    - The law does not regulate "central matters" of plan administration.
  - The existence of ERISA plans is not essential to the law's operation.

Rutledge v. PCMA, 140 S. Ct. 812 (2020)

- Brief for the United States as Amicus Curiae Supporting Petitioner:
  - The Arkansas law does not "make reference" to ERISA plans; it applies to third-party PBMs, including pharmacy benefits for non-ERISA plans.
  - No "impermissible connection" with an ERISA plan, only an "indirect economic influence" that might affect PBM's cost of providing benefits (and thus a plan's decision to contract with a PBM). But this does not bind a plan administrator to a particular choice and thus does not regulate the plan itself.
  - Court need only decide whether ERISA preempts application of the statute to third-party PBM; not whether ERISA preempts application to ERISA plans that manage benefits themselves.

Rutledge v. PCMA, 140 S. Ct. 812 (2020)

- Respondent's main arguments:
  - Arkansas law directly regulates administration of prescription drug benefits for ERISA plans. Establishes state-specific rules controlling:
    - Amounts paid and methods for determining amounts to be paid
    - Timing and procedures for updating payment schedules
    - Dispute resolution processes and remedies
  - Law not "incident to" regulation of rates because it does not regulate rates for goods and services in the marketplace (silent as to pharmacy pricing).
  - Determining reimbursements and paying for benefits is central to processing claims and to design of plan benefits.
  - No support for U.S. distinction between plans that directly administer benefits and those that retain third-party to do so.

Biographies

Myron D. Rumeld
Partner
T: +1.212.969.3021
mrumeld@proskauer.com

Education
Columbia Law School, J.D., 1983

State University of New York at Binghamton, B.A., 1980

Admissions & Qualifications
New York

Myron D. Rumeld has over thirty years of experience handling all aspects of ERISA litigation at both the trial and appellate level. His broad experience includes numerous representations of 401(k) plan fiduciaries defending class action employer stock and excessive fee claims. He is defending class action suits against Foot Locker, Charles Schwab and Neuberger Berman.

Chambers USA cites Myron as a “brilliant” and “sensational litigator,” who is "sharp, articulate, clever, and deeply committed to the work he does." Similarly, *The Legal 500 United States* has called Myron an “outstanding ERISA lawyer.”

Myron is the former co-chair of Proskauer’s nationally renowned Employee Benefits & Executive Compensation Group. He also served as the immediate past co-chairman of the Board of Editors for the American Bar Association publication, *Employee Benefits Law (BBNA).*

Biographies

Joseph E. Clark
Associate
T: +1.212.969.3178
jclark@proskauer.com

Education
University of Southern California Law School, J.D., 2011

Duke University, B.A., 2008

Admissions & Qualifications
California
New York

Joseph E Clark is an associate in the Labor & Employment Law Department and a member of the Employee Benefits & Executive Compensation Group where he focuses on complex employee benefits litigation.

Joe represents a diverse range of clients including financial service providers, Fortune 500 corporations, plan fiduciaries, and multiemployer funds in matters including government investigations, breach of fiduciary duty claims, cash balance plan conversions, denials of claims for benefits, and withdrawal liability and delinquent contribution claims. He was an integral member of the trial team for two recently tried ERISA lawsuits.

A frequent contributor to Proskauer's Employee Benefits & Executive Compensation blog, Joe has authored pieces on employee stock ownership plans, excessive fee claims, fiduciary breach, investigation and determination of benefits claims, and best practices for plan drafting. He has also published several articles regarding benefit claims in *BNA Insights*.

ERISAFest

Proskauer