ERISA LITIGATION UPDATE

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1 SIXTH CIRCUIT COURT OF APPEALS AFFIRMS GRANT OF MOTION TO DISMISS

Key Takeaway: The Sixth Circuit Court of Appeals issued a published opinion that takes a broad view of the deference due to plan fiduciaries, noting that ERISA "does not give the federal courts a broad license to second-guess the investment decisions of retirement plans."

On June 21, 2022 the Sixth Circuit Court of Appeals affirmed the district court's dismissal of a lawsuit against CommonSpirit Health. The underlying complaint (filed in the Eastern District of Missouri) alleged that the fiduciaries of the CommonSpirit 401(k) plan had violated ERISA's duty of prudence by including actively managed funds (alongside passively managed funds) as plan investment options, selecting certain allegedly underperforming funds as plan investment options, and paying an allegedly excessive amount in recordkeeping fees. The plaintiff's allegations relied heavily on comparing the investment options in CommonSpirit's plan to purportedly similar options in third-party plans. In the plaintiff's view, those comparisons established that CommonSpirit could (and should) have selected less expensive and/or better performing funds. The district court granted CommonSpirit's motion to dismiss.

The Sixth Circuit Court of Appeals affirmed. In broad strokes, the court held that the plaintiff's performance-based allegations merely suggested "the possibility of imprudent conduct—that parallel offerings performed differently over a few years." That was insufficient to state a plausible claim because "disappointing performance by itself does not conclusively point towards deficient decision-making," especially after accounting for "competing explanations" and other "common sense" rationales for long-term investment decisions. For example, the Sixth Circuit observed the different risk profiles of the challenged funds and funds used by the plaintiff as comparators, explaining that fiduciaries can offer actively-managed funds "suited for risk-tolerant investors" that might underperform other funds in certain market conditions. And, while noting that a plan sponsor cannot simply "offer a broad range of options and call it a day," the court held that the plaintiff could not plausibly allege imprudence merely by pointing to another investment that "performed better in a five-year snapshot of the lifespan of the fund." As to recordkeeping fees, the court explained that the plaintiff had failed to allege that the at-issue fees were excessive relative to the services that the recordkeeper offered.

The decision is Smith v. CommonSpirit Health, No. 21-5964, in the Sixth Circuit

Court of Appeals, and is available here.

2 DISTRICT COURT GRANTS MOTION TO DISMISS, INTERPRETING THE SUPREME COURT'S HUGHES V. NORTHWESTERN DECISION

Key Takeaway: A district court granted the defendants' motion to dismiss claims alleging excessive fees, and in so doing found that the Supreme Court's recent decision in Hughes v. Northwestern did not affect the pleading standard for at least the claims at issue.

On April 7, 2022, the U.S. District Court for the Western District of Pennsylvania granted the defendants' motion to dismiss in a case alleging that the defendants breached their fiduciary duty by failing to evaluate and reduce recordkeeping fees and investment management fees for Wesco Distribution's 401(k) plan. Specifically, the plaintiffs alleged that the plan improperly paid its recordkeeper through asset-based revenue sharing, which they alleged grew to unreasonable levels based on the growth of plan assets. Along those same lines, the plaintiffs alleged that the plan should have used lower-cost share classes for certain of the mutual funds offered in the plan, instead of retail share classes with higher fees and which provided for revenue sharing payments. To demonstrate that the plan's administrative and recordkeeping fees were excessive, the plaintiffs compared the plan's fees with fees of purportedly similar plans, as reflected in a consultant's survey.

The district court granted the defendants' motion to dismiss with leave to amend, finding that the plaintiffs had insufficiently presented only a "price tag to price tag" comparison of recordkeeping fees without pleading the complete nature and scope of services provided to the plan or by the recordkeepers of other plans. Although the plaintiffs argued that they could not plead more details regarding recordkeeping fees because they did not have access to the plan's recordkeeping agreement, the court did not find that argument persuasive, noting that ERISA requires defendants to provide a copy of the recordkeeping agreement upon request and that the plaintiffs did not make such a request. The Court also dismissed the plaintiffs' share-class allegations, finding that merely alleging the use of retail share classes is insufficient to state a claim for fiduciary breach. For example, plaintiffs failed to address whether the retail share classes may have offered other benefits to the plan than did institutional share classes. In ruling on the motion to dismiss, the court found that the decision by the Supreme Court in *Hughes v. Northwestern University* did not "shift[] the pleading standards" for ERISA claims and so did not otherwise affect the court's analysis of the plaintiffs' complaint. This is one of the first decisions to interpret *Hughes*. Goodwin's analysis of the *Hughes* decision can be found here.

The case is *Mator v. Wesco Distrib., Inc*., No. 21-00403, in the Western District of Pennsylvania. The decision is available here. The plaintiffs amended their complaint on April 1, 2022 and the defendants have again moved to dismiss.

3 NINTH CIRCUIT COURT OF APPEALS REVERSES TWO DECISIONS THAT HAD DISMISSED LAWSUITS

Key Takeaway: The Ninth Circuit recently issued a pair of unpublished decisions that reversed district court dismissals of lawsuits alleging a failure to offer lower-cost share classes as plan investment options.

In April 2022, the Ninth Circuit Court of Appeals issued two decisions addressing the pleading standard for class actions alleging a violation of the duty of prudence. Both complaints—one filed against Trader Joe's Company, and one filed against Salesforce.com, Inc.—alleged that the defendants had acted imprudently by offering higher-cost share classes of mutual funds as plan investment options that, according to the plaintiffs, were materially identical to other, lower-cost share classes that the defendants should have offered instead. In the case against

Salesforce.com (filed in the District of Arizona), the plaintiffs identified two lower-cost share classes of a target-date suite of mutual funds offered by the plan, as well as various collective investment trusts that were allegedly superior options. Similarly, in the case against Trader Joe's (filed in the Central District of California), the plaintiffs alleged that the plan options were overly weighted toward actively managed funds, and that the defendants should have offered R-share classes rather than A-share classes. The district courts in both cases granted the defendants' motion to dismiss under Rule 12(b)(6).

The Ninth Circuit Court of Appeals reversed both decisions. In both cases, the defendants argued that their plans' revenue-sharing arrangements accounted for the cost difference between the share class options, meaning there was an obvious alternative explanation for the defendants' investment choices. While both decisions from the Ninth Circuit recognized that this justification might ultimately prevail, the court concluded that the plaintiffs' explanation was equally plausible, and that the defendants were therefore not entitled to dismissal under prior Ninth Circuit caselaw that had held that "if there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss." The court thus remanded the cases to the district courts for further proceedings.

The two Ninth Circuit Court of Appeals decisions are *Davis v. Salesforce.com, Inc*., No. 21-15867 (available here), and *Kong v. Trader Joe's Co* ., No. 20-56415 (available here).

4 SUMMARY JUDGMENT GRANTED FOR DEFENDANTS IN NOVEL CASE CHALLENGING TREATMENT OF FOREIGN TAX CREDITS

Key Takeaway: John Hancock Life Insurance Company was found not to be a fiduciary with respect to its treatment of foreign tax credits as recordkeeper to 401(k) plans, and alternatively was found not to have breached any duties even if it had any relevant fiduciary duties. John Hancock was represented by Goodwin in the case.

On May 2, 2022, the U.S. District Court for the Southern District of Florida granted summary judgment in favor of John Hancock in a class-action lawsuit filed by the trustees of a retirement plan. The suit alleged that John Hancock, when acting as a plan recordkeeper, breached its ERISA fiduciary duties and entered into prohibited transactions in connection with its treatment of foreign tax credits ("FTCs") relating to international investments options selected by clients' plan fiduciaries for their plans. In short, the plaintiffs alleged that John Hancock should have provided rebates or credits back to client plans in the amount of the FTCs rather than (or in addition to) applying the FTCs on its own tax returns.

The district court ruled in favor of John Hancock. First, it held that John Hancock was not an ERISA fiduciary with respect to its treatment of FTCs in the filing of its corporate tax returns. In reaching this conclusion, the court determined that the only act that resulted in an alleged economic benefit—John Hancock applying FTCs to its own corporate taxes—was not conducted by John Hancock in any fiduciary capacity. The court further held that FTCs are not ERISA plan assets, because they "are not assets that can be owned by plans under ordinary notions of property law," but rather, "FTCs are attributes of U.S. tax law, unique to the taxpayer to whom the [tax] Code specifically allows the credit," which is John Hancock—not its clients. Second, and alternatively, the court held that, even if John Hancock was a fiduciary, it did not breach any duties. The court reasoned that there was no evidence that John Hancock had a subjectively disloyal intent when it complied with U.S. tax law and there were no contractual requirements for it to provide credits to plans based on FTCs.

The case is *Romano v. John Hancock Life Ins. Co. (USA)*, No. 19-21147, in the Southern District of Florida. The decision is available here.

5 MOTION TO DISMISS GRANTED IN CASE BROUGHT BY

PARTICIPATING EMPLOYER IN MULTI-EMPLOYER PLAN

Key Takeaway: A participating employer in a multi-employer plan lacked standing to sue regarding alleged fiduciary breaches by the plan's administrator where it failed to sufficiently allege that it was a fiduciary of the plan, in a ruling that may affect companies' decisions to join multi-employer plans.

On March 31, 2022, the District of New Jersey granted a motion to dismiss, without prejudice, by the defendants in connection with claims brought by McCaffree Financial Corporation. McCaffree participates in a multi-employer 401(k) plan along with approximately 5,000 other employers, and for which ADP, Inc. has been appointed the agent of each participating employer for purposes of interfacing with the plan's trustee and plan administrator. ADP also appoints the members of the committee that serves as the plan administrator and named fiduciary. McCaffree brought suit against ADP and that committee, alleging that the defendants had breached their duties to the plan by causing the plan to pay excessive costs and by permitting the plan to include imprudent investment options.

The district court ruled that McCaffree lacked statutory standing to sue under ERISA. Only participants, beneficiaries, fiduciaries, or the United States Secretary of Labor may bring civil actions under ERISA. McCaffree alleged that it had standing to sue as a fiduciary of the plan. However, the court found that McCaffree had failed to sufficiently allege that it is a plan fiduciary because it did not allege that it had any authority or control over plan assets, and did not allege that the plan document conferred authority to it over the plan's named fiduciary, plan administrator, or trustee. McCaffree argued that it was a fiduciary because of its decision to join the plan or due to contributions it made to the plan, but the court found these to be settlor acts and not fiduciary ones. McCaffree further pointed to a preamble to a Department of Labor regulation that suggested that employers participating in a multi-employer plan had a fiduciary duty to ensure that the plan was operating well, but the court ruled that the preamble is not entitled to deference.

The case is *McCaffree Fin. Corp. v. ADP, Inc.*, No. 20-05492, in the United States District Court for the District of New Jersey, and the decision is available here. The plaintiffs have since amended their complaint and the defendants have moved to dismiss that amended complaint.

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