

A Litigator's Perspective on ERISA Claims

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Litigation Objectives

- Defeat claims at the motion to dismiss stage
 - Claims that survive motions to dismiss typically settle for large sums, regardless of merit
- Focus on viability of claims and procedural defenses, i.e. pleading standards, standing and statute of limitations

Supreme Court Developments

- Supreme Court has shown increased sensitivity to Defendants' concerns
- Recent rulings and grants of certiorari are directed toward strategic objectives of the defense bar

Viability of Claims at the Motion to Dismiss Stage

Company Stock Fund Litigation

- ERISA Section 404(a)(1)(B) requires fiduciaries of retirement plans to manage a plan's assets prudently.
- U.S. Supreme Court Rulings
 - *Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014)
 - To plead an “inside information” breach of duty of prudence claim, a participant must plausibly allege an alternative action that the defendant could have taken that a prudent fiduciary in the same circumstances *could* not have viewed as more likely to harm the fund than to help it.
 - *Amgen v. Harris*, 136 S. Ct. 758 (2016)
- Subsequently, all courts have dismissed such claims, until

Company Stock Fund Litigation *cont'd*

- *Jander v. Retirement Plans Committee of IBM*, 910 F.3d 620 (2d Cir. 2018)
 - Plaintiffs stated a plausible claim by alleging that a prudent fiduciary in the plan defendants' position could not have concluded that an earlier corrective disclosure about the value of the business would do more harm than good.
 - 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.

Company Stock Fund Litigation *cont'd*

- Conflict with Fifth, Sixth, and Ninth Circuits.
 - Same allegations, same plaintiffs' lawyers in Sixth Circuit case.
- IBM's Petition For Certiorari
 - *Whether the “more harm than good” pleading standard set forth in Fifth Third Bancorp v. Dudenhoeffer can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time?*
- The Court granted *certiorari* on this question.
 - Oral argument set for November 6, 2019

Open Issues

- Will pleadings standards in employer stock cases lead to parallel trends elsewhere?
 - See e.g., *PBGC v. Morgan Stanley Inv. Management Inc.*, 712 F.3d 705, 720 (2d Cir. 2012)
 - Claim for breach of fiduciary duties arising from investments in mortgage-backed securities.
 - To survive a motion to dismiss, a plaintiff relying on inferences from circumstantial allegations must “allege facts, accepted as true, showing that a prudent fiduciary in like circumstances would have acted differently.”

Statute of Limitations Defense

Statute of Limitations

- *Sulyma v. Intel Corp. Investment Policy Committee*, 909 F.3d 1069 (9th Cir. 2018)
- ERISA Section 413(2) provides that an action under Section 404 may not be commenced more than “three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation.”
 - Ninth Circuit overturned dismissal on SOL grounds.
 - Sulyma testified that he was unaware that he had been invested in alternative investments and didn’t recall seeing any documents.

Statute of Limitations *cont'd*

- Conflict with Sixth 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).
- Intel's Petition For Certiorari
 - *Whether the three-year limitations period in 29 U.S.C. § 1113(2) 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?*
- The Supreme Court granted *certiorari* to address the actual knowledge standard in 29 U.S.C. § 1113(2).

Statute of Limitations *cont'd*

- Implications:
 - What knowledge is needed to bar claims?
 - Potential Class Cert Issues

Standing Defense

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Standing

- **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.

Standing *cont'd*

- *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.

Standing *cont'd*

- Thole's petition for certiorari
 - *May an ERISA plan participant seek restoration of plan losses caused by fiduciary breach under § 29 U.S.C 1132(a)(2) without demonstrating individual financial loss or imminent risk thereof?*
 - *May an ERISA plan participant seek injunctive relief against fiduciary misconduct under § 29 U.S.C 1132(a)(3) without demonstrating individual financial loss or imminent risk thereof?*
- Supreme Court granted *certiorari* on the above questions. Additionally, the Court directed the parties to brief whether petitioners have demonstrated Article III standing.

Standing *cont'd*

- Open Issues:
 - How widespread will impact of case be?