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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

5 ERISA Cases To Watch In The 2nd Half Of 2019

By **Emily Brill**

Law360 (June 21, 2019, 8:47 PM EDT) -- Federal appellate courts could greatly limit workers' ability to win Employee Retirement Income Security Act class actions against employers and benefit plan managers — or even file them at all — over the next several months.

The U.S. Supreme Court could cut workers' deadline for suing over retirement plan mismanagement in half, giving many employees just three years from the time they receive plans' financial documents to sue.

The high court could also ban mismanagement suits involving fully funded pension plans, essentially ban suits against employers who keep workers' savings invested in ailing company stock and make it harder for workers to win cases by shifting the burden of proof.

Not only that, but the Ninth Circuit could give employers something they've been pursuing in court for a year: the ability to ban class actions against employee retirement plan managers by writing consent-to-arbitration language into plan sign-up documents.

Corporate-friendly decisions in these cases would fly in the face of ERISA's intent to make it easy for workers to hold companies accountable for the way they manage employees' retirement savings, plaintiffs attorneys said.

But corporate attorneys said workers' ability to file these suits should be limited, or plaintiffs attorneys could file "frivolous" lawsuits on workers' behalf to make themselves money.

In this mid-year case roundup, Law360 lists five pending ERISA cases that attorneys should have on their radar.

Intel v. Sulyma

In June, the Supreme Court picked up **a pair of ERISA class actions**, ending a several-year drought of benefits litigation review by the nation's highest court.

One case was Intel v. Sulyma, which could determine whether workers have three or six years to sue over retirement plan mismanagement.

ERISA gives workers six years from the date of a company's misconduct to file a lawsuit. But if companies can identify the date workers learned of that misconduct, the deadline changes. In those instances, workers get three years from the date they discovered the misdeeds to sue.

Companies can only invoke the three-year deadline when they can prove workers had what courts call "actual knowledge" of the misconduct on a certain date.

In Intel v. Sulyma, the high court will be asked to set a definition for "actual knowledge."

The case comes to the Supreme Court from the Ninth Circuit, **which ruled in November** that workers obtain "actual knowledge" of wrongdoing when they read about it in financial documents or are told about it.

Intel appealed the Ninth Circuit's ruling, saying that workers gain "actual knowledge" of wrongdoing when they are given financial documents, whether they read the paperwork or not.

Intel workers have argued that this interpretation of "actual knowledge" doesn't make sense, because when workers are given financial documents but don't read them, another legal term applies: "constructive knowledge."

Federal lawmakers decided in 1987 that workers needed to have "actual knowledge," not "constructive knowledge," of misdeeds to trigger the three-year suit-filing deadline.

"Prior to 1987, there was a constructive knowledge standard under ERISA, and Congress decided to remove it," said R. Joseph Barton, a plaintiffs attorney with Block & Leviton LLP.

Congress' intent was clear, Barton said, but nonetheless, certain appellate courts have interpreted "actual knowledge" the way Intel suggests the Supreme Court should.

R. Bradford Huss, a Trucker Huss APC partner who represents corporations in ERISA cases, said corporations' financial disclosure forms could become "less important" if they can't be used to shorten the statute of limitations for ERISA suits.

"If plaintiffs can say they lacked actual knowledge of a violation simply because they never read all of the disclosures they've been provided, I think that renders the disclosures less important," he said.

The case is Intel Corp. Investment Policy Committee et al. v. Sulyma, case number 18-1116, in the U.S. Supreme Court.

Jander v. IBM

About a week before the high court agreed to look at the Intel case, it **granted a petition by IBM** to revisit the Second Circuit's ruling in a case called Jander v. IBM.

The first worker-friendly decision in a so-called "stock-drop" case in a long time, Jander v. IBM revived IBM employees' claims that the company breached its fiduciary duty under ERISA by failing to take action on 401(k) investors' behalf when it knew IBM stock was about to plummet.

Most stock-drop suits bite the dust because judges decide a prudent fiduciary might think taking action before a stock decline would do more harm than good. The "more harm than good" standard, laid out in the Supreme Court's 2014 Fifth Third Bancorp v. Dudenhoeffer , is relatively easy to meet, attorneys say.

But **in the Second Circuit's IBM ruling**, a panel of judges held that no prudent fiduciary would think it proper to keep workers' retirement savings invested in company stock after learning IBM's microchip division was losing $700 million per year, even though the company maintained publicly that the business was doing well.

IBM could have at least told employees or halted the trade of company stock before paying another company $1.5 billion to take the microchip division, sending stocks plummeting, the Second Circuit said.

The Second Circuit's decision didn't establish a standard itself — the ruling simply described the level of conduct that must occur to flout the "more harm than good" standard. In that sense, the ruling "creates more questions than answers" for employers, Mayer Brown LLP partner Nancy Ross has said.

"We can't take the IBM opinion and use it as a litmus test for how to prudently operate a company stock fund," Ross told Law360 earlier this year. "That, to me, is the greatest problem."

The high court's decision to accept review of the case means that companies might get a better idea of what they should do when they learn their stocks are about to fall, when they know workers have savings invested in that stock. Corporate attorneys say they hope the high court will clarify what type of behavior companies must exhibit to beat the "more harm than good" standard in court — or establish a new standard.

"My wild speculation here is they would come up with a standard that's more fact-specific and less generic than the Second Circuit approved, and vacate and remand to see if the new standard can be met," said John Houston Pope, a member of Epstein Becker & Green PC's benefits practice area.

The case is Retirement Plans Committee of IBM et al. v. Larry W. Jander et al., case number 18-1165, in the U.S. Supreme Court.

Putnam v. Brotherston

The Supreme Court is considering taking up two other notable ERISA class action petitions this year: Putnam v. Brotherston and Thole v. US Bank.

In Putnam v. Brotherston, the high court will be asked to consider a burden-of-proof question that could make it harder for workers to get cases over bad retirement plan investments over the finish line.

The issue has pitted five circuit courts against four others. The First, Second, Fourth, Fifth and Eighth circuits have ruled that after workers show that misconduct occurred and the plan suffered a loss, the burden of proof shifts to companies, which must prove their investments were good.

The Sixth, Ninth, Tenth and Eleventh Circuits have ruled that after workers show there's been misconduct and a loss, the burden of proof stays with them, and they must connect the misconduct and the loss or their case will be dismissed.

If the high court accepts review, it would have to decide which appellate courts got it right. In April, the high court **sought the solicitor general's view** on the case, which arrives at the high court **from the First Circuit**.

"There's a very clearly defined circuit split, so the basis for accepting cert is there," said Huss, who said he hopes the high court takes up the case.

He said some corporations might stop establishing benefit plans if the Supreme Court issues a worker-friendly ruling in this case.

"Employers establish plans voluntarily, and as the risk of potential liability increases from establishing a plan, it could discourage employers from establishing plans," Huss said.

The case is Putnam Investments LLC et al. v. John Brotherston et al., case number 18-926, in the U.S. Supreme Court.

Thole v. US Bank

The second petition under consideration by the high court is Thole v. US Bank .

This case has caught attorneys' eyes because it asks a question of key importance in benefits litigation: Can workers sue over plan mismanagement when defined-benefit pension plans are fully funded?

The Second, Third and Sixth Circuits have said yes. They found that a violation of workers' ERISA rights was enough to justify a claim for injunctive relief.

The Eighth Circuit, in the Thole case, said no. It held that workers haven't suffered harm sufficient to justify a lawsuit if their plan is fully funded.

In May, **the solicitor general urged the Supreme Court** to take up the case, saying the question it presented was an important one.

Michael Khalil, the vice chair of Miller & Chevalier's employee benefits department, said he agrees that it's an important case, because it could let companies off the hook for a lot of their plan-management behavior as long as the plan is fully funded.

But he's not sure the high court will take up the case, because it already has a busy docket of ERISA cases this year.

"The reason I don't think it's likely to be granted is we've already got two ERISA cases," Khalil said.

The case is James J. Thole et al. v. U.S. Bank NA et al., case number 17-1712, in the U.S. Supreme Court.

Dorman v. Charles Schwab

The Ninth Circuit recently **held oral arguments** in Dorman v. Charles Schwab , a case that stands to decide whether employers can ban ERISA class actions by writing consent-to-arbitration language in benefit plan documents.

A California federal judge ruled in January 2018 that they cannot. The Ninth Circuit has also ruled against the notion of forced arbitration of ERISA class actions, ruling in Munro v. USC that the University of California couldn't force its workers to arbitrate a fiduciary-breach lawsuit because the workers signed general arbitration agreements when they got their jobs.

Just because the workers waived their right to file class actions against the school doesn't mean the benefit plan agreed to give up that right, the Ninth Circuit ruled in Munro v. USC, siding with a lower court against the university. ERISA fiduciary-breach suits are filed by workers on behalf of their benefit plans.

"The Dorman v. Schwab arbitration issue is similar to what the Ninth Circuit looked at in the USC case," said Daniel Feinberg, a partner at the plaintiffs firm Feinberg Jackson Worthman & Wasow LLP. "It's another important case in which there's a concern that mandatory arbitration is going to limit the ability of ERISA retirement plan participants to get a complete remedy."

Feinberg said he hopes the Ninth Circuit sides with the workers, because "one of the reasons Congress enacted ERISA was to enable plan participants to gain access to the federal courts to address breaches of fiduciary duty."

"If mandatory arbitration with limited remedies is allowed to become standard operating procedure for ERISA plans, we're going to be right back where we started from," Feinberg said.

The case is Michael Dorman v. The Charles Schwab Corp. et al., case number 18-15281, in the U.S. Court of Appeals for the Ninth Circuit.

--Editing by Kelly Duncan.
