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## 5th Circ. Preserves Class Cert. In Fringe Benefits Fee Fight

By **Kellie Mejdrich**

Law360 (July 16, 2024, 6:26 PM EDT) -- The Fifth Circuit affirmed a district court's decision to certify a mega class of more than 290,000 workers in a suit against several benefits administration companies alleging mismanagement of their non-union fringe benefits, but found the action should proceed as opt-out and not mandatory class action.

In an **order docketed Monday**, a three-judge panel of the appellate court withdrew its previous opinion from August in the Employee Retirement Income Security Act suit and granted a petition for panel rehearing.

In a **published opinion** also docketed Monday, the panel said that a Texas federal court correctly certified a class of participants in thousands of benefit plans alleging mismanagement against three benefits administration companies: Plan Benefit Services, Fringe Insurance Benefits, and Fringe Benefit Group. The participants allege the companies, led by FBG, breached ERISA when they mismanaged trusts that individual employees paid into through contracts with their employers and allowed the trusts to be charged excessive fees.

As the **August ruling did**, the Fifth Circuit's ruling to uphold certification Monday affirms that participants in more than 3,000 benefit plans across more than 2,000 employers have standing to pursue their claims against the benefits companies. Still, the panel modified the district court's class certification to exclude the option for a mandatory class, meaning that settlement class members would not be able to opt out.

"The district correctly determined that this litigation may proceed as a class-action lawsuit," the panel said in its opinion.

The panel explained how under FBG's contracts with various employers, the trusts funded wage and fringe benefits provided to non-union workers whose employers compete for government contracts. The employers would contract with FBG to deposit funds in amounts that corresponded with applicable prevailing wage determinations. Prevailing wages are often required in government contracts, meaning competing employers have to pay their employees wages and benefits at a level that corresponds with the majority of similarly situated laborers in the area.

Even while upholding the lower court's decision to certify, the panel reversed on some certification terms. The panel said the district court was wrong to certify the class as either a mandatory or opt-out class "because this is primarily an action for damages, and it is not evident that individual adjudications would substantially impair the interests of members not parties to the individual adjudications."

"The ability of individual class members to opt out and pursue separate remedies should be preserved despite the claim for damages in the class complaint," the panel said. The panel also said a large portion of the monetary damages that the class sought stemmed from their "desire to disgorge FBG of ill-gotten profits" and restore those assets to the benefit trusts.

In addition to reversing part of the district court's order that had found in favor of mandatory class certification under Rule 23(b)(1), the panel remanded to the lower court with detailed instructions on how to proceed with the case. Those instructions included that the lower court consider whether "severing liability from individual damage issues and trying them separately may be appropriate."

The panel also said in its remand instructions that some distinctions between class members' claims across retirement and welfare benefit plans "could be handled via certification of specific issues or subclasses."

Another instruction from the panel to the lower court was to consider on remand "whether liability and damages should be resolved commonly and whether injury, causation, and actual damages should be resolved individually."

The panel said its opinion did not express a view on how the district court decided to split up the case nor was it making an opinion on the "ultimate merits of the substantive claims."

Benefit plan participants first sued in 2017, and a Texas district court certified a **90,000-person group in 2019**. However, the following year, the Fifth Circuit **upended that certification**, faulting insufficient analysis by the lower court. Then in 2022, the Western District of Texas **certified the mega class**, spurring the present appeal.

The decision Monday comes after a three-judge panel **heard oral arguments in March 2023**.

Richard J. Burch, counsel for the participants, said Tuesday: "We're pleased that the class remained certified. We're looking forward to presenting the class's claims on the merits."

Counsel for the benefit companies didn't immediately return a request for comment Tuesday. A spokesperson for Fringe Benefit Group didn't immediately return a request for comment.

U.S. Circuit Judges Jacques L. Wiener Jr., Carl E. Stewart and Kurt D. Engelhardt sat on the panel for the Fifth Circuit.

The participants are represented by Catha A. Worthman and Nina R. Wasow of Feinberg Jackson Worthman & Wasow LLP, by Danielle E. Leonard, Eileen B. Goldsmith and Connie K. Chan of Altshuler Berzon LLP and by Richard J. Burch of Bruckner Burch PLLC.

The companies are represented by Al Holifield of Holifield & Janich PLLC and by Matt Dow, Jonathan D. Neerman, Joshua A. Romero and Peter C. Hansen of Jackson Walker LLP.

The case is Chavez et al. v. Plan Benefit Services et al., case number 22-50368, in the U.S. Court of Appeals for the Fifth Circuit.

--Editing by Nick Petruncio.