



Litigation Lessons and Minimizing Risks

Joseph C. Faucher

Angel L. Garrett

Brian D. Murray

March 10, 2020

Technical Issues

- ✦ If you experience technical difficulties during this webinar please call Shawn Tenney at 415-277-8050.

Issues Accessing Materials

- ✦ If you have any issues accessing materials, please call Shannon Oliver at 415-277-8067 or email at soliver@truckerhuss.com

MCLE Credit

- ✦ This program is eligible for Continuing Legal Education (CLE) credit. Please contact Joe Harrison at jharrison@truckerhuss.com to receive a CLE certificate of completion.

SUPREME COURT CASES

ERISA Cases on the Supreme Court's Docket this Term

- ★ *Intel Corp. Inv. Policy Comm. v. Sulyma*, 589 U.S. ____ (S.Ct. Feb. 26, 2020)
- ★ *Thole v. U.S. Bank, N.A.*, 873 F.3d 617 (8th Cir. 2017)
- ★ *Jander v. Ret. Plans Comm. of IBM*, (Sup. Ct., Jan. 14, 2020)
- ★ *Pharmaceutical Care Management Ass'n v. Rutledge*, 891 F.3d 1109 (8th Cir. 2018)

Intel Corp. Inv. Policy Comm. v. Sulyma, 589 U.S.__(2020)

- ✦ DC retirement plan participant brought fiduciary breach action against plan fiduciaries, alleging funds were imprudently invested in violation of ERISA.
- ✦ Intel moved to dismiss under ERISA's statute of limitations on the grounds that the plaintiff had "actual knowledge" of the alleged breach more than three years before filing the complaint.
- ✦ Intel pointed to various documents it made available to plaintiff and all other plan participants, and several disclosures on Intel websites explaining Intel's investment choices.

Sulyma (cont.)

- ✦ Plaintiff accessed some of this information online, but testified that he was not actually aware that his retirement accounts were invested in alternative investments (hedge funds and private equity).
- ✦ Ninth Circuit: Plaintiff did not have “actual knowledge” of alleged breaches more than three years prior to filing complaint. “Actual knowledge” means something between “bare knowledge of the underlying transactions” and actual knowledge of the existence of a claim under ERISA.

Sulyma (cont.)

- ✦ Supreme Court – participant does not possess actual knowledge based solely on disclosure of information. While evidence of disclosure is relevant to this determination, a plaintiff does not have actual knowledge unless he is aware of this information.
- ✦ Fiduciaries can't prove "actual knowledge" merely by showing information was disclosed.

Sulyma (cont.)

- ★ Court noted that its holding does not prevent plan fiduciaries from proving “actual knowledge” in the “usual ways,” such as when plaintiffs provide testimony that they had in fact read the plan disclosures, or through circumstantial evidence, such as when a plaintiff is shown to have received disclosures and “took action” in response.

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

- ★ Participants in the U.S. Bank defined benefit pension plan brought action for fiduciary breach and prohibited transactions against the plan's fiduciaries.
- ★ Plaintiffs alleged that the fiduciaries imprudently invested the plan's entire portfolio in equities, including over 40% of the plan's assets in parent company U.S. Bancorp's own mutual funds, resulting in \$1.1 billion in losses to the plan.
- ★ The plan became underfunded in 2008, where it remained through the filing of the lawsuit in 2013.

Thole (cont.)

- ★ The district court ruled that plaintiffs had standing because defendants' alleged breaches caused an increased risk of default to the plan.
- ★ Defendants then made \$311 million in voluntary excess contributions to the plan, causing it to again become overfunded. The court then dismissed the case as moot.
- ★ Eighth Circuit: dismissal affirmed on the grounds that plaintiffs lacked statutory standing because no injury exists where a DB plan is overfunded.
- ★ Broke from Second, Third and Sixth Circuits.

Ret. Plans Comm. Of IBM v. Jander (Sup. Ct., Jan. 14, 2020)

- ✦ Participants in IBM's ESOP alleged that IBM failed to disclose poor financial condition of microelectronics division prior to announcing its sale.
- ✦ Plaintiffs claimed IBM could have made earlier public disclosures about division's financial health.
- ✦ Second Circuit: Reversed district court's dismissal, and held that earlier disclosures might constitute the "alternative action" that fiduciaries could take without causing more harm than good.

Jander (cont.)

- ★ SCOTUS vacated and remanded the case back to Second Circuit, since lower courts had not engaged in an analysis of the potential conflict between ERISA and the federal securities laws (which generally do not require disclosure of inside information).

Pharmaceutical Care Management Ass'n v. Rutledge, 891 F.3d 1109 (8th Cir. 2018)

- ★ In 2015, Arkansas passed a law that would regulate conduct of pharmacy benefit managers (“PBMs”) – intermediaries between health plans and pharmacies.
- ★ The concern: the networks formed by PBMs resulted in some pharmacies losing money in some transactions. That, in turn, caused a reduction in the number of pharmacies in the state, particularly in rural areas.

Rutledge (cont.)

- ★ The leading association representing PBMs sued, alleging that the Arkansas law (which is similar to many states' laws) is preempted by ERISA and by Medicare Part D.
- ★ Eighth Circuit held: the Arkansas law both “relates to” and has a “connection with” ERISA governed health plans, and is therefore preempted by ERISA. The Arkansas state law is also preempted by Medicare Part D.
- ★ Oral argument at SCOTUS scheduled April 27, 2020.

ARBITRATION

A Closer Look at Arbitration Clauses After *Dorman v. Charles Schwab Corp.*

- ✦ On August 20, 2019, the Ninth Circuit issued two decisions in *Dorman v. Charles Schwab Corporation* – an unpublished opinion (2019 WL 3939644) and a published opinion (934 F.3d 1107) – enforcing an arbitration agreement and class action waiver.
- ✦ Michael Dorman, individually and on behalf of the Schwab Retirement Savings and Investment Plan (“Schwab Plan”), brought claims under ERISA sections 502(a)(2) and (a)(3) alleging that the Schwab Plan’s fiduciaries (the “Schwab Defendants”) breached their fiduciary duties and violated prohibited transaction rules.
- ✦ The Schwab Defendants moved to compel arbitration.
- ✦ The District Court denied the Schwab Defendants’ motion to compel arbitration, but the Ninth Circuit reversed the lower court’s decision.

Dorman v. Charles Schwab Corp. (cont.)

- ✦ The Ninth Circuit held that ERISA claims were arbitrable.
- ✦ The Ninth Circuit held that Dorman's claims must be arbitrated on an individual basis and that Dorman was barred from bringing a collective or class action in arbitration because the Schwab Plan's arbitration clause included a waiver of class action or collective.

Schwab Plan Language

- ✦ “Any claim, dispute or breach arising out of or in any way related to the Plan shall be settled by binding arbitration”
- ✦ The upshot – in the Ninth Circuit, ERISA fiduciary breach claims are arbitrable, provided ***the plan*** includes a provision allowing individual arbitration and waiving class treatment. [Note: it is not sufficient to include arbitration provisions in employment agreements with employees.]

Pros and Cons of Arbitration Provisions

★ **Binding Nature of the Decision:**

- > **Pro:** If the plan does include an arbitration provision and a class action waiver, then a party is limited to arbitration of his or her individual claim.
- > **Con:** Limiting a party to individual arbitration may result in repeated claims as different parties come forward. A court's decision in a class action case would mean that there is finality (even with appeals, there is a final step in this process) and that this decision is applicable to everyone within the class, thereby ensuring consistent results.

Pros and Cons of Arbitration Provisions (cont.)

♦ Costs:

- > **Pro:** Because discovery may be limited in an arbitration setting, the expense of arbitration may be less than litigation.
- > **Con:** The parties have to pay for the arbitrators' time, and there is little opportunity to dispose of cases via pre-trial motions. Also, the costs of defending multiple individual actions, as opposed to a single class action, may outweigh the benefits of individual arbitration.
 - Possible mass arbitration campaigns (e.g. Uber, Chipotle, Lyft).

Pros and Cons of Arbitration Provisions (cont.)

♦ Finality:

- > **Pro:** Dispute resolution process is relatively quick.
- > **Con:** There are very limited bases for appealing arbitration awards.

RECURRING RISK MANAGEMENT ISSUES

Issues That May Arise

- ✦ Plan sponsor fails to forward premiums providing coverage.
- ✦ Participant mistakenly informed that he/she is eligible for coverage (e.g, you're eligible for life insurance coverage even if not actively at work).
- ✦ Plan sponsor/administrator fails to carry out participant instructions regarding 401(k).

Best Practices

- ★ Use of a disclaimer (e.g. recorded disclaimer) – make it clear that the plan document controls.
- ★ How to discover such errors – audits, claims review.
- ★ Contact the participant.
- ★ If there is an overpayment, pursue recoupment.

INSURANCE COVERAGE

Insurance Considerations

- ✦ Fiduciaries of ERISA-governed plans have *personal liability* for losses resulting from their breaches of fiduciary duty.
- ✦ Who is a fiduciary?
 - > Certain persons are always fiduciaries by virtue of their role with respect to a benefit plan:
 - Trustees.
 - Persons identified in the plan as the “administrator.”

Who Is A Fiduciary?

- ✦ ERISA defines “fiduciary” in functional terms – that is, the role you play matters, even if you don’t have a formal title.
- ✦ A person is a fiduciary with respect to a plan to the extent:
 - > he *exercises any discretionary authority or discretionary control respecting management* of such plan or exercises *any authority or control respecting management or disposition of its assets*;
 - > **NOTE THE DISTINCTION:** *Discretionary authority or discretionary control* regarding management of the plan, but *any authority or control – even if not discretionary – over its assets*;
 - > he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so; or
 - > he has any discretionary authority or discretionary responsibility in the administration of such plan.

Who is a Fiduciary? (cont.)

- ♦ Examples of potential fiduciaries:
 - > Executives who appoint plan committee members.
 - > HR/Benefit Department representatives.
 - > Committee members:
 - Administrative committee.
 - Investment committee.

What Types of Lawsuits Are Out There?

- ★ Two main varieties of ERISA-related cases:
 - > Benefit claims.
 - > Fiduciary breach claims.
- ★ Benefit claim disputes.
 - > Example: Employee claims that he retired in reliance on information regarding the amount of his anticipated monthly pension benefit – and it turns out the amount is less than what he was “promised.”

What Types of Lawsuits Are Out There? (cont.)

★ Fiduciary breach claims:

- Example: Employee/participant brings a lawsuit alleging that the fiduciaries responsible for investing plan assets invested in assets that were:
 - Too conservative.
 - Too risky.
 - Too expensive.
 - Underperforming.

What Types of Lawsuits Are Out There? (cont.)

♦ “Hybrid” cases:

- > Claims involving benefit denials where breaches of fiduciary duty are also alleged.
- > Plaintiffs may seek remedies in addition to benefits claimed to be owed, including “surcharge” or disgorgement.
- > These “hybrid” cases carry the specter of more expense than benefit claims – discovery is more readily available.

Insurance

- ✦ Policies that typically *do not* cover ERISA claims:
 - > Comprehensive general liability (“CGL”) policies.
 - > Errors and omissions (“E&O”) policies.
 - > Directors and officers liability (“D&O”) policies.
 - > But note: some insurance companies may issue “riders” to one or more of those types of policies to cover ERISA claims – at an extra expense.

Insurance (cont.)

♦ Fiduciary liability insurance:

- > Generally provides coverage for claims that fiduciaries have breached their duties to plans.
- > Provides *indemnity* for losses sustained as a result of a breach.
- > Generally covers the costs of *defense* (i.e., attorney fees and other litigation expenses, such as expert witness fees, travel expenses, court reporter fees, etc.).

Insurance (cont.)

♦ Fiduciary liability insurance (cont.)

- > Depending on the insurance company, fiduciary liability insurance may also cover the cost of defending *benefit claims*.
- > However, fiduciary liability insurance policy will typically not provide coverage for the benefits claimed to be owed.

Insurance (cont.)

> Example:

- Plaintiff sues his company's defined benefit pension plan, and the plan administrator (the company/plan sponsor), claiming that the benefits he is receiving are less than the benefit formula provided for by the plan, and alleges that he was promised that his monthly benefit would be \$2,000/month greater than the amount he is receiving.

In this instance, fiduciary liability insurance would likely cover the cost of defending the litigation, but in the event the court determined that additional benefits were owed, the policy would not cover the difference.

Insurance (cont.)

- ★ NOTE: Whether a claim is covered is determined in large part by the nature of the allegation that is made in a complaint.
- ★ This means that an inexperienced or unsophisticated plaintiff's attorney can allege claims that don't apply, and therefore, can have an impact on whether you have adequate insurance coverage or not.
 - > Example: Plaintiff alleges fiduciary breach claims against ERISA plan service provider. Service provider typically not viewed as a fiduciary. CGL policy may not cover those ERISA claims.

Insurance (cont.)

- ★ How much insurance should we have?
 - > Generally, it's a good idea to get as much as you can afford.
- ★ Factors to consider:
 - > How many plans do you operate?
 - > Amount of assets held in plan trust(s).
 - > Whether any of the plans are likely subjects of litigation.
 - ESOPs.
 - Association plans.
 - MEWAs.

Insurance (cont.)

- ★ How much insurance should we have? (cont.)
 - > Keep in mind – the limit of liability under most policies is exhausted *both* by litigation expenses (i.e., attorney fees and other costs associated with litigation) *and* by any amounts paid to settle or to satisfy a judgment.
 - Example: Assume the limits of liability under the policy are \$2 million. Over the course of litigation, combined litigation expenses are \$1.5 million. In that event, only \$500,000 remains to pay a settlement or satisfy a judgment.

Insurance (cont.)

- ✦ Compare: ERISA fidelity bonds – a common misconception is that employers have fiduciary liability insurance, when in fact, they do not, and have only a fidelity bond.
- ✦ ERISA § 412 provides that “[e]very fiduciary of an employee benefit plan and every person who handles funds or other property of such a plan ... shall be bonded as provided in this section.
- ✦ The purpose is to protect the plan against *loss by reason of fraud or dishonesty*.
- ✦ Bond amount: not less than 10% of the amount of funds “handled” – in no case less than \$1,000 nor more than \$500,000.

Insurance (cont.)

- ✦ ERISA fidelity bonds, cont.
- ✦ What fidelity bonds do *not* do:
 - > Bonds don't provide insurance for fiduciaries, or cover the cost of defense of fiduciaries that are sued for breaching their fiduciary duty – they strictly provide recovery for losses to the *plan*.
 - > Bonds don't cover losses resulting from standard breaches of fiduciary duty. For example, bonds typically will not cover losses associated with decisions to include overly expensive investment options in retirement plans.

Contact

★ Joseph C. Faucher, Esq.
Trucker ♦ Huss, APC
15821 Ventura Blvd.
Suite 510
Los Angeles, CA 91436

(415) 788-3111

jfaucher@truckerhuss.com

www.truckerhuss.com

★ Brian D. Murray, Esq.
Trucker ♦ Huss, APC
15821 Ventura Blvd.
Suite 510
Los Angeles, CA 91436

(415) 788-3111

bmurray@truckerhuss.com

www.truckerhuss.com

★ Angel L. Garrett, Esq.
Trucker ♦ Huss, APC
One Embarcadero Center
12th Floor
San Francisco, CA 94111

(415) 788-3111

agarrett@truckerhuss.com

www.truckerhuss.com

Disclaimer

- ✦ These materials have been prepared by Trucker ♦ Huss, APC for informational purposes only and constitute neither legal nor tax advice.
- ✦ Transmission of the information is not intended to create, and receipt does not constitute, an attorney-client relationship.
- ✦ Anyone viewing this presentation should not act upon this information without first seeking professional counsel.
- ✦ In response to IRS rules of practice, we hereby inform you that any federal tax advice contained in this writing, unless specifically stated otherwise, is not intended or written to be used, and cannot be used, for the purpose of (1) avoiding tax-related penalties or (2) promoting, marketing or recommending to another party any tax-related transaction(s) or matter(s) addressed herein.