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'Class of Plans' Actions Could Be Next Wave of ERISA Litigation, Gretchen Obrist Says

GRETCHEN S. OBRIST (INTERVIEWED BY ANDREA L. BEN-YOSEF)

BLOOMBERG BNA: How many years have you been an ERISA litigator?

Obrist: I have been litigating ERISA cases since 2007.

BLOOMBERG BNA: What is your primary focus within ERISA litigation?

Obrist: I have primarily worked on large class action ERISA cases, representing plaintiffs. The first ERISA cases I worked on were cash balance plan conversion cases, bringing claims under ERISA Section 204(h). These cases alleged insufficient notice of the reductions in future benefit accruals that the pension structure conversions had caused. While cash balance conversions took place 20 or more years ago, the employees simply did not understand what was happening at the time, because the companies did not provide adequate disclosures. Participants only figured out their losses when they were nearing retirement age and asking questions about their benefits.

I have also litigated company stock cases. While my firm Keller Rohrback pioneered this field more than a decade ago with Enron, WorldCom, Global Crossing, and cases against other companies whose accounting fraud caused massive employee retirement savings losses, my experience with this group of cases has been in a second big wave—on the heels of the financial crisis of 2008. When executives who were also ERISA fiduciaries engaged in risky practices, building over-leveraged and under-capitalized investment banks on securitized mortgage products whose values were massively overstated, their employees' retirement savings collapsed with their business models.

The third major area of my ERISA practice has focused on excessive and/or hidden fees associated with Section 401(k) plan investment options and platforms. Like company stock cases, these cases can be brought against plan sponsor fiduciaries who should be doing a better job monitoring the fees and expenses paid out of plan assets or to plan service providers. ERISA fee cases also can be brought against service providers who hide fees or overcharge. Such cases can be brought by participants, but they are unique because they frequently are brought by fiduciaries aligned with the plans.

Gretchen S. Obrist (gobrist@kellerrohrback.com) is a member of Keller Rohrback's complex litigation group. She has litigated ERISA fiduciary breach, cash balance pension plan, and excessive fee cases, as well as antitrust, RICO, consumer protection, torts, and contracts claims.

BLOOMBERG BNA: Where is ERISA litigation heading, for example, do you think there will be more class actions or more of a focus on individual lawsuits?

Obrist: Cash balance plan, company stock, investment prudence, welfare plan, and excessive/hidden fee ERISA cases often proceed as class actions, because many ERISA claims are perfect for class treatment. Indeed, claims under ERISA Section 502(a)(2) for plan-wide relief are considered paradigmatic class actions. In the past, most of these cases were on behalf of classes of all participants in the same plan or in a set of plans operated by a single employer. With the recent success of many ERISA fee cases and with the ERISA

Section 408(b)(2) disclosure rules now forcing service providers to disclose more about their fees and profits to plan sponsors, I expect more class actions against service providers who hide or inflate their fees—by both participants and fiduciaries. Unlike many ERISA class actions that are focused on a single plan, these cases are well-suited to proceed as ''class of plans'' cases—with claims brought on behalf of a large group of plans sponsored by many different employers—because each plan (and participant) had the same experience with respect to the service provider defendant.

Class of plans jurisprudence is still developing, and it remains to be seen whether class of plans cases will flourish, but as long as there are both common questions and common answers, they are viable class actions. Classes of plans have recently been certified in *Healthcare Strategies Inc. v. ING Life Ins. & Annuity Co.*, No. 11-282 (D. Conn.) and *Glass Dimensions v. State Street*, No. 10-10588 (D. Mass.). The class certification phase in *Haddock v. Nationwide*, No. 01-1552 (D. Conn.) is now on remand from the Second Circuit to consider whether a Rule 23(b)(3) class of plans is appropriate. Other plaintiffs in pending cases in districts across the country will seek class of plans certification in the next year or two.

That said, the largest volume of ERISA cases in district courts is in the area of long-term disability claims—and these are individual claims that show no sign of slowing down. Additionally, while there are still traditional pensions, there will be individual pension benefits cases—either as claims for benefits or for equitable relief, the latter of which should increase given that the Supreme Court's *Cigna v. Amara* decision breathed new life into ERISA Section 502(a)(3) claims and the remedies of surcharge and estoppel.

BLOOMBERG BNA: What is the next big thing in ERISA litigation?

Obrist: It is more of an ongoing ''big thing,'' because it is not a new fight, but determining fiduciary status is a widely litigated and hotly contested issue that shows no signs of abating in future ERISA litigation. It will be a centerpiece in ERISA fee litigation against service providers, who will continue to argue that even if they are fiduciaries, the purpose for which they are fiduciaries is limited to roles outside the scope of whatever case they are defending.

Fiduciary status for investment advisers and brokers will soon take on new contours on a going-forward basis when the Department of Labor re-proposes its rule on the ''Definition of the Term 'Fiduciary' ''—which was first proposed in 2010 and will be released in an amended format now that an extensive notice and comment process has run its course. Once this rule is in place, new claims will be available against individuals and entities who will become fiduciaries under the new rule and who engage in prohibited transactions or fiduciary breaches.

Health care reform under the Affordable Care Act (Obamacare) also appears to be a likely source of new ERISA claims. For example, if employers cut employee hours or reduce their workforce to avoid having to provide health benefits, this could be a claim under ERISA Section 510 (which prohibits discrimination and retaliation) or under the ACA's whistleblower provision.

BLOOMBERG BNA: Are there a couple of big decisions pending that could be ''game changers''?

Obrist: Yes—there always are potential game changers out there, because ERISA is constantly developing.

The Eighth Circuit appeal of the landmark bench trial outcome and award for losses, fees, and costs in *Tussey v. ABB*, No. 06-4305 (W.D. Mo.) is being briefed right now and will be argued soon. The district court's decision in *Tussey* was important in several ways, including finding that an employer fiduciary cannot subsidize corporate administrative services with an ERISA plan, that share class selection must be prudent, and that revenue sharing must be evaluated in the context of the whole plan's cost and expense picture. The district court's decision is also the basis for a set of new cases against trustee and service provider Fidelity for the retention of ''float'' on a class of plans basis. The outcome in the *Tussey* appeal could spur additional litigation or upend pending claims.

Another appellate case that could (again) change the landscape is *Tibble v. Edison*, Nos. 10-56406, 10-56415 (9th Cir.), where the court may entertain an en banc review petition filed by the plaintiffs on two key issues: (1) the statute of limitations for claims based on investment options chosen more than six years before the claim was filed and (2) whether *Firestone* deference should apply in an ERISA Section 502(a)(2) fiduciary breach case.

A third appellate case just argued is *Abbott v. Lockheed Martin*, Nos. 12-3736, 12-8037 (7th Cir.), which will address the plaintiffs' second Rule 23(f) petition from a partial denial of class certification in an excessive fee case. This will be interesting because on the panel is judge Diane Wood, author of ERISA fee opinions in *Spano* and *Hecker*.

Finally, an undisclosed fee case with a $5 million bench trial award, *Hi-Lex Controls Inc. v. Blue Cross and Blue Shield of Mich.*, No. 11-12557, and its companion case which is now conditionally stayed, *Borroughs v. Blue Cross and Blue Shield of Mich.*, No. 11-12565, will hang in the balance pending the defendants' appeal to the Sixth Circuit.

ERISA litigation is a dynamic practice area, and pending cases that promise to make new law or flesh out the boundaries of existing doctrines are plentiful.

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