ERISA Litigation

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Tom is Of Counsel with The Wagner Law Group, a law firm specializing in ERISA & Employee Benefits. His expertise encompasses all aspects of employee benefits programs, including the design, implementation and compliance of retirement plans, health and welfare plans, and executive and incentive compensation arrangements. He also has a robust practice assisting covered service providers in meeting their ERISA compliance needs. Earlier in his career, Tom worked for the law firm of Schlichter, Bogard & Denton including on such landmark cases as Tibble v. Edison, which was decided by the U.S. Supreme Court last year. Tom is Editor-in-Chief of the Fiduciary Matters Blog, a blog visited over 160,000 times since its first publication in March 2013. He teaches ERISA Fiduciary Law as an Adjunct Professor at the Washington University in St. Louis School of Law, his alma mater. Tom is a co-author on the forthcoming Second Edition of ERISA: Principles of Employee Benefits Law, a one of a kind treatise discussing the policies behind our national employee benefits scheme.
The Swinging Pendulum

- *Hecker v. Deere & Co.* – 7\textsuperscript{th} Cir.
  - High watermark – Stephen Rosenberg
- *Braden v. Walmart* – 8\textsuperscript{th} Cir.
- Successful Settlements (and trials)
- Tibble v. Edison
- New Wave of Lawsuits
  - New Plaintiffs Firms
  - Impending Wave not yet seen
- Chevron - First Favorable Decision in a While for Plan Sponsors
Lawsuit Updates Since NIPA 2016
Tibble v. Edison Int’l

- After the Supreme Court ruling finding a duty to monitor the amount of revenue sharing generated by the funds, the 9th Circuit panel found Plaintiffs failed to argue this in the lower courts.
- 9th Circuit En Banc agreed to hear the case.
- Reversed decision of the panel. Complete vindication of the arguments made by the plaintiffs since spring of 2009. Took 8 years of appeals to get to this point.
- If not appealed to the Supreme Court again (very very very rare), this case will go back to trial before the district court.
Tatum v. RJR Pension Committee

- **4th Circuit - Majority – Would Have**
  - Failure of procedural prudence – no real process
  - Causation is shifted to defendant
  - 51 of 100
- **4th Circuit – Dissent – Could Have**
  - 1 of 100
- **Supreme Court – Declined to Hear**
- **District Court – On remand still found for Defendants.** Found that prudent fiduciary could have made decision to sell stock.
- **We will hear about this case again at the appellate level**
Plaintiffs win on excess recordkeeping fees paid to Fidelity affirmed.
Fidelity wins reversal victory over float. Not appealed.
Court vacates Plaintiffs’ win over investment mapping and prohibited transaction citing deference.
Supreme Court denied cert petitions.
District Court rules that ABB still breached its fiduciary duties regarding replacing the Wellington fund with the Freedom Funds, but found no damages on a procedural technicality.
8th Circuit heard oral arguments in September 2016 – could have a decision very soon.
Fidelity Float Cases

- As noted, Fidelity wins this issue before the 8th Circuit in Tussey
- Different plaintiffs firm goes after Fidelity on behalf of all clients
- District of Mass. and the 1st Circuit have both ruled that float interest is not a plan asset given the way Fidelity handles it and the contract they have in place with clients
- Still leaves open claims by big plan participants:
  - Burgess v. HP. Inc. – On behalf of large HP, Inc. And United Airlines Plans – Plan sponsors and Fidelity are defendants
Grabek v. Northrop Grumman
Marshall v. Northrop Grumman

- Original lawsuit goes all the way back to 2006

- Primary allegations concern company use of assets in paying itself back – very aggressive in reimbursing fees

- New lawsuit filed by new plaintiffs but same firm alleging that administrative fees are still excessive because of rebates from Financial Engines and doubling of administrative services
Fleming v. Fidelity

- Should be in new case section but fits with last case
- Fidelity participated in a pay to play with Financial Engines
- Up to 45 basis point charge and up to half went to Fidelity for no actual service & Fidelity received excessive fees from more expensive share class
- Fidelity is fiduciary because it controls share class in BrokerageLink and it hired Financial Engines
- Similar case filed in Scott v. Aon-Hewitt
Urakhchin v. Allianz – C.D.CA

- Brought by firm out of Minnesota
- Plaintiffs are Allianz and Pimco employees
- Claims
  - All proprietary funds
  - Average fees of 74bps for plans between $500 and $750 million is excessive
  - No prohibited transaction claims
  - No excessive recordkeeping fees
- MTD Denied except technicality on tracing and equitable relief
Bowers v. BB&T Corp. – M.D.NC

- Brought by firm out of Minnesota
- Plaintiffs are BB&T own employees
- Claims
  - Excess administrative fees funneled to BB&T
  - Proprietary funds many kept in until shut down
  - Most funds offered as SA elsewhere for lower fees
  - Poor performing large cap fund
  - Poorly performing money market fund instead of stable value fund
- MTD Denied – one page order
Gordan v. Mass Mutual

• Brought by own employees of MM re: in house plan
• Claims – proprietary funds, CEO controlled SVF
• Settlement - $30,900,000
  • Hire consultant with SVF experience
  • No more than $35 a head...no asset based RK fees
  • Identify fiduciaries and ensure that they get training
  • Include cost, collective, and passive strategies in investment process
  • Consider at least three finalists for investments
Church Plan Cases

• Original dozen lawsuits against church affiliated hospitals challenging church plan exemption...now 50+
• Issue— does a church need to establish the plan to be considered a church plan?
• How it applies here— if you are a church affiliated school...who established your plan?
• Three circuit courts to address have all said hospitals cannot use exemption
  • Kaplan v. Saint Peter’s – 3rd Circuit
  • Stapleton v. Advocate Health Care Network – 7th Circuit
  • Rollins v. Dignity Health – 9th Circuit
• Supreme Court has agreed to hear the case
New Cases Since NIPA 2016
University 403(b) Cases

- Cassell v. Vanderbilt
- Cates v. Columbia
- Clark v. Duke
- Cunningham v. Cornell
- Divane v. Northwestern
- Henderson v. Emory
- Kelly v. John Hopkins
- Munro v. USC
- Sacerdote v. NYU
- Sweda v. U Penn
- Tracey v. MIT
- Vellali v. Yale
University 403(b) Cases

• Two histories are at a crossroads
  • 403(b) individual contracts which have been around since 50s
  • Best practices re: institutional jumbo 401(k) plans

• Claims
  • Multiple recordkeepers (2-5)...excessive admin fees
  • Too many funds
  • Wrong share class
  • Underperforming funds
  • Funds too closely associated with platform
Plan Sponsor as Service Provider

- Brotherston v. Putnam – MTD Denied
  - Expensive funds, Proprietary funds, Untested Funds
- Cooper v. DST
  - Has improper relationship with discretionary advisor
- Kilpatrick v. Great-West
  - Excessive recordkeeping fees, Comp from separate accounts
  - Dismissed on a technicality - standing
- Moreno v. Deutsche Bank
  - Proprietary Funds
Plan Sponsor as Service Provider

- Pledger v. Reliance Trust
  - Proprietary recordkeeper
- Habib v. M&T Bank Corporation
- Allen v. M&T Bank Corporation
  - Proprietary funds, Wilmington Funds, Trowe separate accounts, Share Classes
- Patterson v. Morgan Stanley
  - MS Funds and Others Underperformed
Plan Sponsor as Service Provider

- Cryer v. Franklin Templeton
  - Proprietary Funds, MMF, Total Excessive Costs
- Bekker v. Neuberger Berman
  - Proprietary Funds
- McDonald v. Edward Jones
  - Partner Funds, Excessive RK Costs, MMF, Passive v. Active
- Wildman v. American Century
  - Proprietary Funds, Share Class, Excessive RK Costs, MMF
- Andrus v. NY Life
  - Proprietary Funds,
Process Cases

- Bell v. Anthem
  - Vanguard too expensive, revenue sharing
- Troudt v. Oracle
  - Fidelity is large shareholder, excessive fees, poor funds
- Sulyma v. Intel
  - Risky target date funds - alternatives
- Lorenz v. Safeway
  - JP Morgan TD Funds generated excessive fees to GW
  - 502(a)(2) – Safeway & 502(a)(3) – Great-West
- DuVall v. Disney
  - Failed to remove Sequoia Fund
  - Dismissed by Court
- Johnson v. Delta Air Lines
  - Excessive fees
- Creamer v. Starwood Hotels
  - Excessive fees, no stable value fund
- Morin v. Essentia Health
  - Excessive fees
White v. Chevron

- Process Case
- Claims – SVF v. MMF, Cheaper Share Classes Available, Excessive Fees Paid to Vanguard as Rker, Separate Accounts v. MFs
- District Court Decision – Granting Motion to Dismiss
  - Complaint has no real concrete evidence of a lack of process
  - Evidence of change not to be used against fiduciaries
  - Focusing just on price or share class is not enough
  - Alleging an underperforming fund is not enough
  - Alleging SVF v. MMF is not enough
- If you flip a coin enough, you expect to heads and tails
- Plaintiffs will get another chance
- Why different than Tibble – lack of process v. having a process…but Tibble court let plaintiffs gather evidence…
Stable Value Cases

- Bishop-Bristol v. MassMutual
- Lau v. MetLife
- Wood v. Prudential
- Whitman v. New York Life
- Dezelen v. Voya
Recordkeeper Controls Rev. Share

- Rosen v. Prudential
  - Dismissed by Court

- Krikorian v. Great-West
Questions?

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