Legal Updates

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Legal Updates

Litigations

- Thole – US Supreme Court Decision
- Snitzer – settlement
- Scalia v. Hayes – cost-sharing settlement

DOL Regulations

- Final DOL Regulation on Selecting Plan Investments

Thole v. U.S. Bank Supreme Court Opinion (June 1, 2020)

- ERISA class action lawsuit brought by two retirees in U.S. Bank's defined benefit pension plan.
- Allegations pertained to poor investments made between 2007 and 2010 (e.g., investing assets in bank's own mutual funds and fiduciaries paying themselves excessive fees)
- Plaintiffs sought reimbursement to the plan of $750 million in losses, replacement of plan fiduciaries and attorney's fees (which had amounted to $31 million at the District Court level).
- The District Court dismissed the complaint and the Eight Circuit Court of Appeals affirmed the dismissal on the ground that the plaintiffs lacked standing.
- In a 5-4 opinion by Justice Kavanaugh, the Supreme Court held that the plaintiffs lacked standing and affirmed the Eight Circuit's dismissal.

Thole v. U.S. Bank
Supreme Court Opinion (June 1, 2020)

- The Court focused on the fact that the plan was a defined benefit ("DB") plan rather than a defined contribution ("DC") plan, with retirees receiving a fixed payment with no fluctuation due to the fiduciaries' good or bad investment decisions.
- The Court noted that plaintiffs have received all the benefits they are entitled to and will continue to do so for the rest of their lives, and that the outcome of this suit would not affect their benefits.
- The Court concluded that plaintiffs have no concrete stake in this case and, thus, do not have standing under Article III of the Constitution.
- The Court found that the interest in attorney's fees is insufficient to create a case or controversy where none exists on the underlying claims.
- In response to the plaintiff's argument that the result in this case will mean that no one will meaningfully regulate fiduciaries, the Court stated that employers possess strong incentives to root out fiduciary misconduct because employers are entitled to the plan surplus and are often on the hook for plan shortfalls, that the DOL can be expected to aggressively pursue fiduciary misconduct, and that "ERISA fiduciaries who manage defined-benefit plans face a regulatory phalanx."
- The Court noted the protection provided by the PBGC, without commenting on the PBGC's projected insolvency.
- The Court noted that the complaint did not allege that the mismanagement substantially increased the risk of plan failure or inability to pay future benefits and that a bare allegation of underfunding is insufficient to have standing.

Thole v. U.S. Bank Dissent by Justice Sotomayor (joined by Justices Ginsburg, Breyer and Kagan)

- The dissent described the Court’s decision as “prevent[ing] millions of pensioners from enforcing their rights to prudent and loyal management of their retirement trusts” and as “treat[ing] beneficiaries as mere bystanders to their own pensions.”
- The dissent noted that plan assets shall never inure to the benefit of the employer and that plan participants have a residual interest in the plan’s assets if the plan were terminated.
- “In barely more than a decade, the country (indeed the world) has experienced two unexpected financial crises that have rocked the existence and stability of many employers once thought incapable of failing. ERISA deliberately provides protections regardless whether an employer is on sound financial footing one day because it may not be so stable the next.”
- The dissent noted that the Court’s references to the PBGC “overlooked sobering truths about the PBGC.”
- The dissent criticized the Court’s focus on attorney’s fees, noting that, after this suit was filed, the employer restored $311 million to the plan.
- The dissent stated that “[i]t is hard to overstate the harmful consequences” of the decision and that the decision “allows fiduciaries to misuse pension funds so long as the employer has a strong enough balance sheet during (or, as alleged here, because of) the misbehavior. Indeed, the Court holds that the Constitution forbids retirees to remedy or prevent fiduciary breaches in federal court until their retirement plan or employer is on the brink of financial ruin.”

Snitzer v. Board of Trustees of the American Federation of Musicians & Employers Pension Fund (SDNY complaint filed in 2017; settlement in 2020)

- Class action ERISA complaint filed in 2017 by two participants.
- Plan had significant losses in 2008 and 2009 and has been in critical status and then critical and declining status; the Treasury Department recently denied trustees' MPRA application to cut benefits.
- Allegations pertained to trustees' increasing allocation to emerging markets equities ("EME"); alleged that when managers and consultants were advising of decreasing investments in EME due to significant downside risk, limited upside potential, and volatility, trustees kept increasing the fund's asset allocation to EME (from 6% to 11% to 15%) ("Defendants nonetheless persisted in their outsized gamble on emerging markets equities. As alleged herein, an investment of $243.5 million in the Vanguard Balanced Index Fund Admiral Shares would have produced a return of over $96 million by March 31, 2017, far more than the $7.3 million return from the outsized emerging market equities bet.").

Snitzer v. Board of Trustees of the American Federation of Musicians & Employers Pension Fund (SDNY complaint filed in 2017; settlement in 2020)

- Plaintiffs survived a motion to dismiss and, after extensive discovery, settlement reached. Settlement terms included:
  - $18.3 million to the plan
  - $7,786,500 (29% of the Gross Settlement Amount) to the plaintiffs' lawyers, plus
  - $713,204.45 to be deducted from the Gross Settlement Amount for legal expenses
  - $10,000 each to the two Class Representatives
  - The settlement amount does not include approximately $9 million spent in defense fees
  - Appointment of Neutral Independent Fiduciary Trustee for 4 to 5 years
  - Replacement of OCIO Monitor
  - Website disclosures
  - Release only goes through 2017; new lawsuit anticipated for later period

Snitzer v. Board of Trustees of the American Federation of Musicians & Employers Pension Fund (SDNY complaint filed in 2017; settlement in 2020)

- Judge Caproni stated:
  - "Not a shred of evidence that these trustees were not endeavoring to operate in the best interests of the beneficiaries. There is no evidence of self-dealing here."
  - "In terms of likelihood of success for the plaintiffs at trial, this is a risky case. When I denied defendants' motion to dismiss, I explained that although plaintiffs managed largely to succeed in getting past the motion to dismiss, this was going to be a hard road to hoe on the merits. The reason it is a hard case to make is that this is not a board of trustees that did nothing or that engaged in self-dealing. The board asked questions. They participated. They listened to their consultants who are not fly-by-night operators. They have a reasonable defense, both in terms of the allocations decisions they made and in terms of the active versus passive management. Moreover, even if plaintiffs had prevailed on showing that there was a breach of fiduciary duty, which is by no means clear, it would have been a substantial battle of the experts over whether and to what extent the fund was harmed and significant uncertainty as to what type of equitable relief would be appropriate, if any."

Scalia v. Hayes, EDNY

- ERISA complaint filed by the DOL in the Eastern District of New York in January of 2020
- The suit was filed against the Union, the individual Union Trustees, and the individual Employer Trustees (including the Estate of a Deceased Employer Trustee) of four ERISA funds for allegedly improper cost-sharing reimbursement to the Union.
- The funds were administered by a Third-Party Administrator (TPA) rather than self-administered at a Fund Office. The funds reimbursed the union part of the union's costs for the salaries of two union employees (one of whom was also a union trustee and one was a secretary for the union) as well as for the union's costs for rent and other overhead, and costs related to the union's services in collection and audits.
- Case settled for $570,000 in September 2020 without any litigation other than the filing of the complaint; $475,000 of the settlement was paid to the funds and $95,000 was paid to the DOL in penalties.
- DOL settlement provides that reimbursement to the union for future shared expenses must be based on reimbursement schedule adopted each year by the trustees; reimbursement schedule must be based on "an allocation study that is reasonable, documented, and prepared by a CPA, and that is updated as necessary when facts and circumstances change;" and costs of preparing such study shall be shared equally between the fund and the union.
- Note that, in 2014, the NY DOL office sued the Trustees of the Plumbers & Steamfitters Local 21 Funds and the related Union in the Southern District of New York for the Funds' reimbursement to the Union of a portion of a Union employee's salary. That case quickly settled with reimbursement to the Funds by the Trustees and payment of a penalty to the DOL.
- DOL recently announced a $6.5 million consent order and judgment regarding an Ohio union short-term disability fund for monies paid to union for reimbursement related to union duties for the fund.

Final DOL Regulations re Selection of Plan Investments

- On October 30, 2020, the DOL release a final rule entitled "Financial Factors in Selecting Plan Investments" which sets forth fiduciary standards for selecting and monitoring investments and addresses the scope of fiduciary duties surrounding non-pecuniary issues.
- The rule had been issued in proposed form in June 2020.
- This had been called the "ESG Rule" for environmental, social and governance factors by fiduciaries in making investment decisions. In the final rule, the DOL eliminated the usage of the term ESG.

Final DOL Regulations re Selection of Plan Investments

- The final rule makes the following “five major amendments” to ERISA’s investment duties regulation (first issued in 1979):
    1. Fiduciaries must evaluate investments and investment courses of action based solely on pecuniary factors – financial considerations that have a material effect on the risk and/or return of an investment based on appropriate investment horizons consistent with the plan’s investment objectives and funding policy.
    2. In order to comply with ERISA’s exclusive purpose/duty of loyalty, fiduciaries are prohibited from subordinating the interests of participants to unrelated objectives and from sacrificing investment return or taking on additional investment risk to promote non-pecuniary goals.
    3. Fiduciaries must consider reasonably available alternatives to meet their prudence and loyalty duties.
    4. Certain investment analysis and document requirements apply for those circumstances when fiduciaries use non-pecuniary factors when choosing between or among investments that the fiduciary is unable to distinguish on the basis of pecuniary factors alone.
    5. ERISA’s prudence and loyalty standards apply to the selection of designated investment alternatives offered to participants in a participant-directed individual account plan.