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Commentary

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In fall 2006, Schlichter, Bogard & Denton L.L.P. (now Schlichter Bogard L.L.P.), acting on behalf of putative class action plaintiffs, filed more than a dozen lawsuits against employer plan sponsors of 401(k) plans in federal district courts nationwide. The lawsuits generally alleged that the employers breached their fiduciary duties under the Employee Retirement Income Security Act of 1974 ("ERISA") , as amended, 29 U.S.C. §§ 1001 et seq., by allowing plan participants to pay excessive fees with respect to their 401(k) plan accounts. After having success with this initial round of "test" cases, a flood of copy-cat lawsuits was filed by this firm and others eager to cash-in on a new wave of class action litigation.

Schlichter Bogard fired again in 2016—this time filing a flurry of lawsuits against large private universities in connection with their management of university-sponsored 403(b) plans. These lawsuits largely borrowed the theories developed in the prior round of lawsuits, asserting such claims against a fresh crop of defendants.

In the past 15 years, hundreds of "excessive fee" cases have been filed and employer plan sponsors have collectively paid hundreds of millions of dollars to resolve them. Two such cases have made their way to the Supreme Court.[1] While the theories of liability have evolved, they generally follow a familiar pattern: the lawsuits are filed as putative class actions and the named plaintiffs (current or former participants in their employer-sponsored defined-contribution retirement plans) claim that the plan fiduciaries violated ERISA in selecting and/or retaining investment options and service providers.

The initial tranche of lawsuits targeted employers sponsoring billion-dollar plans, but the litigation subsequently moved downstream to smaller public, private, and not-for-profit employer plans. Across-the-board, plan fiduciaries have changed their practices to address the significant threat of litigation related to plan management decisions.

There are clear indications that another, related wave of litigation is now on the way—this time targeting employer plan sponsors of self-funded ***health*** plans. One firm has been actively soliciting current and former employees of about a dozen large employers' health plans to act as plaintiffs in potential class action lawsuits. Lead plaintiff attorney Jerome Schlichter has publicly acknowledged that his firm intends to file litigation against health plan sponsors, building upon

the theories developed through its successes litigating against fiduciaries of defined-contribution retirement plans.[2] Schlichter specifically pointed to recently adopted fee disclosure requirements for health plans, including the Consolidated Appropriations Act, 2021 ("CAA"), as a basis for his firm's anticipated campaign against this largely untapped source of litigation.[3] Another law firm has issued its own solicitations for plaintiffs, recently filing a suit against a large employer plan sponsor over the costs of prescription drug coverage.

Are health plan sponsors the next set of defendants to face class actions lawsuits and if so what might this next wave of ERISA litigation look like? Let's take a closer look.

Defined-Contribution Plan Litigation Regarding Excessive Fees And Imprudent Investments

Theories of Liability

Plaintiffs have alleged that their employer-sponsored defined-contribution retirement plans have been mismanaged with respect to the funds included in the investment lineup and recordkeeping services used to administer the plan. They have alleged that plan fiduciaries failed to offer the cheapest or best-performing investment options and offered proprietary funds as investment options to line the pockets of the employer plan sponsor or the plan's service provider.

Additionally, plaintiffs have alleged that plans are paying higher recordkeeping service fees than those paid by comparably-sized plans, despite the fact that most recordkeepers provide nearly identical services. Plaintiffs also have alleged that the use of "revenue sharing" arrangements to pay for recordkeeping fees constitutes a prohibited transaction under ERISA.

Causes of Action

Plaintiffs have claimed that these practices amount to breaches of ERISA's duties of prudence and loyalty. ERISA's duty of prudence requires fiduciaries to manage plans with the "care, skill, prudence, and diligence," that a "prudent man acting in a like capacity and familiar with such matters would use,"[4] while ERISA's duty of loyalty requires fiduciaries to "discharge [their] duties with respect to a plan solely in the interest of the participants and beneficiaries[.]"[5]

Further, plaintiffs have alleged that certain practices identified above are transactions prohibited by ERISA. ERISA prohibits a plan from engaging in certain transactions with persons providing services, *i.e.*, a "party in interest,"[6] and transactions between a plan and a fiduciary, *i.e.*, self-dealing.[7]

Defendants

The defendants in these cases have included the employer plan sponsor; the board of the plan sponsor; the committee/fiduciaries charged with managing the plan; and plan service providers.

The Supreme Court's Decision in *Hughes*

Lower courts initially applied differing standards when evaluating alleged ERISA violations. The uncertainty in the pleading standard had a significant impact on defendants, who faced discovery in cases where courts allowed complaints arguably based on mere labels and conclusions to proceed past a motion to dismiss.

The Supreme Court addressed the applicable pleading standard in *Hughes v. Northwestern University*.[8] *Hughes* narrowly held that the duty of prudence requires plan fiduciaries to independently assess each investment option offered on an ongoing basis. The fact that a plan offers a variety of investment options, only some of which may be prudent investment options, is insufficient to defeat a motion to dismiss.[9]

On its face, the *Hughes* decision appeared to be a victory for plaintiffs. However, the decision provided a pathway for lower courts to dismiss complaints. The Supreme Court underscored that ERISA claims must meet the pleading standards articulated in *Ashcroft v. Iqbal*[10] and *Bell Atlantic v. Twombly*.[11] Further, the Supreme Court directed lower courts considering motions to dismiss ERISA claims to conduct a "context-specific inquiry" based on the circumstances prevailing at the time the fiduciary acts.[12] The Supreme Court recognized that "the circumstances facing an ERISA fiduciary will implicate difficult tradeoffs" and emphasized that courts must "give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."[13]

Key Takeaways Post-*Hughes*

Hughes, and its progeny, have underscored that there is no "one size fits all" approach to pleading an ERISA claim regarding excessive fees or the selection/retention of plan investment options. The *Hughes* decision leaves room for lower courts to hold that the "range of reasonable judgments" may vary based on the context—*i.e.*, the size of the plan, the quality and type of recordkeeping services offered, etc.

Several circuit courts have held allegations of high costs or low returns do not give rise to plausible inference that the defendants acted imprudently. Rather, plaintiffs must provide "a sound basis for a comparison" (a "meaningful benchmark") for the services and investment options at issue.[14] Applying this rationale, courts have held that plaintiffs cannot compare funds following active and passive investment strategies because it is akin to comparing "apples" to "oranges."[15]

Another circuit court has held that a plaintiff must "plausibly allege fiduciary decisions outside a range of reasonableness."[16] That court held that a plaintiff need not demonstrate that an alternative recordkeeper would have accepted a lower fee or that a share class of an investment option was available—instead, the court only required the plaintiffs to allege that such alternatives were "plausibly available."[17]

Ultimately, post-*Hughes*, the outcome of a motion to dismiss may depend on the specific facts governing the plan fiduciary's decision. It also may depend, in part, on the circuit court in which the case is filed. That uncertainty has created considerable, ongoing risk for plan fiduciaries.

Health Plan Fee Litigation – What's Next?

ERISA fee litigation may now be shifting from retirement savings and benefits to healthcare-related benefits, thus increasing exponentially new liability theories and exposures against ERISA plan fiduciaries and related actors.

Parties

Several prominent ERISA plaintiff firms have been seeking out current and former employees of large, national employers on social media sites, such as LinkedIn. In one example, the solicitations directed current and former employees to contact the firm regarding a potential legal claim: *"Are you a current or former ---- employee who has participated in the company's healthcare plan?"*[18] Lead plaintiff's counsel initially stated that his firm's solicitations "should not be looked on as the beginning of some all-out campaign," and that his firm had specific information regarding targeted employers.[19] But, his firm later widened the net, seeking out employees of additional employers to serve as plaintiffs in potential lawsuits.[20] To date, that firm is soliciting plaintiffs for potential lawsuits against about a dozen large, national employers.[21]

Copycat solicitations by other plaintiffs' firms have followed. Another firm that claims to "take[] on some of the largest corporate bad actors"[22]—has run a solicitation on the website "Top Class Actions" seeking current and former participants in a health plan sponsored by a large, national employer to assist with an ongoing investigation.[23] The solicitation asks: *"Are you paying more than ever for health care and drugs through your [employer's] benefit plans? Does it have to cost so much?"*[24] The posting goes on to claim that employees are "surprised" by the amounts they are paying in premiums and "by changes in deductibles and cost-sharing percentages."[25] It seeks out current and former employees who "did not fully understand the costs and increased in [the] plan" when they enrolled in coverage; did not know how their employer "uses funds it collects for premiums"; "feel [they] are not getting what [they] pay for" through their health insurance coverage; are concerned that they cannot "count on [their] savings to see [them] through medical emergencies"; and are concerned about "how [they] will pay for increases in healthcare."[26]

Based on these solicitations, we anticipate that the plaintiffs in this tranche of lawsuits will be current or former participants in self-funded, employer-sponsored health plans. The suits likely will be filed against the employer, as the named fiduciary of the health plan, the health plan itself, and the fiduciary managing the plan.

Putative Class Actions

We anticipate that the lawsuits will be pleaded as putative class actions on behalf of all plan participants—plaintiffs will allege that all participants paid too much for the coverage and/or services offered by the plan.

Where will the lawsuits be filed?

Venue in ERISA cases is proper in any district where the plan is administered, where the alleged breach occurred, or where the defendant resides or may be found (*i.e.*, where the court has personal jurisdiction over the defendant).[27] We anticipate that when considering where to file these suits, plaintiffs' counsel will have a mindful eye to recent appellate courts decisions interpreting *Hughes*.

Potential Causes of Action

We anticipate that plaintiffs' counsel will borrow from theories developed in the defined-contribution retirement plan space when crafting complaints related to health plans. We also anticipate that they will leverage publicly available information regarding fees paid by health plans—some of which is now available as a result of relatively new disclosure requirements—when developing ERISA breach of fiduciary duty and prohibited transaction claims related to health plans.

New Disclosure Requirements Applicable to Health Plans

The CAA amended ERISA's prohibited transaction exemption rules to require "covered service providers" to ERISA-covered group health plans to provide "responsible plan fiduciaries" with a disclosure describing their fees and services.[28] "Covered service providers" are the providers of "brokerage services" and "consulting services."[29] If this disclosure requirement is not complied with, the services arrangement is considered to be a prohibited transaction for which the employer plan sponsor is liable.

The CAA also prohibits plans from entering into provider contracts that bar the disclosure of provider-specific cost and quality information and prevent plans from accessing de-identified claims information. Further, as of July 1, 2022, the Transparency in Coverage Rule requires group health plans to disclose in-network and out-of-network allowed amounts and billed charges by posting machine-readable files on a publicly available website.[30]

These disclosure requirements were intended to create fee transparency, giving plan sponsors tools to negotiate lower costs.[31] An unintended consequence, however, is that information which could be fodder for a lawsuit is now in the public domain. Indeed, one plaintiff's lawyer has expressly tied these new disclosure requirements to the anticipated wave of litigation against health plan sponsors, noting that the CAA "defined" health plan fiduciaries' ERISA duties "in a specific way."[32]

Potential Breach of Fiduciary Duty and Prohibited Transaction Claims

In this context, we anticipate that plaintiffs will attempt to allege breaches of fiduciary duties and prohibited transactions as violative of ERISA. Plaintiffs may not only target the underlying fee and compensation arrangements but could allege that out-of-pocket expenses paid by plan participants—including employee contributions for their health insurance and prescription drug coverage, deductibles, co-pays, or co-insurance—are excessive.

Key Issues for Motions to Dismiss

We anticipate that the following three issues will arise when evaluating whether plaintiffs have plausibly alleged ERISA fiduciary breach and prohibited transaction claims.

Article III Standing

Plaintiffs may face hurdles alleging Article III standing—*i.e.*, that the plaintiffs suffered an injury-in-fact, caused by the defendant, that can be redressed through a favorable judgment. Some plaintiffs already have tried to bring ERISA claims related to health plan fees, and the courts have held that the plaintiffs lacked Article III standing to sue.

Recently, the Ninth Circuit held that plaintiffs in a multiple employer welfare arrangement (MEWA) failed to establish Article III standing where they claimed that their health insurance premiums were too high as a result of administrative fees paid to insurers by the plan, and commissions paid to the broker by such insurers.[33] The plaintiffs attempted to assert ERISA claims against the insurance broker, claiming that without administrative fees and commissions, the amount they contributed to their health insurance coverage would have been less.

The Ninth Circuit unanimously rejected the plaintiffs' claims, finding that they had failed to allege any of the elements of Article III standing. The Circuit held that plaintiffs were ***not*** injured by any alleged mismanagement of their health plan because they had received all benefits promised under their plan. Critically, the Ninth Circuit reasoned that a health plan

is analogous to a defined benefit pension plan—the benefits are contractually fixed, and when the plaintiffs receive all promised benefits, there is no plausible claim of injury.[34] This was the first decision to apply the Supreme Court's decision in *Thole v. U.S. Bank, N.A.*[35], which addressed alleged mismanagement of a defined-benefit pension plan, to a health plan. The U.S. District Court for the District of New Jersey recently applied the same reasoning when dismissing claims related to the costs of health plan coverage in the context of a self-funded health plan.[36]

Pleading Standard – What is a Meaningful Benchmark for a Health Plan?

As the *Hughes* decision made clear, the plausibility of ERISA claims is a context-specific inquiry dependent on the circumstances facing the fiduciary at the time of the decision.

As circuit courts have repeatedly held in the context of defined-contribution retirement plan litigation, simply alleging that the health plan paid "too much" for services or that a participant paid "too much" for coverage should be insufficient to allege a claim for relief. In the retirement plan space, a plaintiff may attempt to plead an excessive fee claim by identifying substantially similar record-keeping services provided to a comparable plan at a lower price point. Similarly, plaintiffs may attempt to plead imprudence claims by identifying better-performing investment options with similar aims, risks and potential returns than the option offered by their plan. How plaintiffs identify such a comparison in the context of a health plan may be a key area of focus for defendants arguing against an alleged inference of imprudence.

Fiduciary Conduct

Finally, plaintiffs may face challenges demonstrating that the defendants were acting as ERISA fiduciaries when making decisions. Plan design decisions are considered to be "settlor" decisions (*i.e.*, the employer is not acting as an ERISA fiduciary).

Concluding Thoughts

A new wave of ERISA litigation against health plan sponsors is starting as relatively new health plan disclosure requirements have made a bevy of fee information available to enterprising plaintiffs and their counsel. We likely will see plaintiffs' counsel try to translate some of the same theories developed in the retirement plan space to health plans. Plaintiffs may initially face roadblocks alleging ERISA violations, and as seen with defined-contribution retirement plans, we can expect the plaintiffs' bar to pivot until they find the "formula" for surviving a motion to dismiss.

Endnotes

1. *See Tibble v. Edison Int'l,* 575 U.S. 523 (2015); *Hughes v. Northwestern Univ.*, 595 U.S. 170 (2022).
2. *See* Nevin E. Adams & John Sullivan, *Litigation*, Nat'l Ass'n of Plan Advisors (June 11, 2023) https://www.napa-net.org/news-info/daily-news/schlichter-exclusive-does-new-wave-fiduciary-litigation-loom.
3. *See id.*
4. 29 U.S.C. § 1104(a)(1)(B).
5. 29 U.S.C. § 1104(a)(1).
6. 29 U.S.C. § 1106(a).
7. 29 U.S.C. § 1106(b).
8. 595 U.S. 170 (2022).
9. *Id.* at 173.
10. 556 U.S. 662, 678 (2009).
11. 550 U.S. 544, 555 (2007).
12. 595 U.S. at 177.
13. *Id.*
14. *See, e.g.*, *Matousek v. MidAm. Energy Co.*, 51 F.4th 274, 278 (8th Cir. 2022).
15. *See*, *e.g.*, *Smith v. CommonSpirit Health*, 37 F.4th 1160, 1166 (6th Cir. 2022).
16. *Hughes v. Northwestern Univ.*, 63 F.4th 615, 630 (7th Cir. 2023).
17. *Id.* at 635.
18. *See* Nat'l Ass'n of Plan Advisors, *Regulatory Compliance* (Aug. 9, 2023) https://www.napa-net.org/news-info/daily-

news/schlichter-widens-net-fiduciary-claims.

19. *See* Nevin E. Adams & John Sullivan, *supra* n.2.

20. *See* Nat'l Ass'n of Plan Advisors, *supra* n. 16.

21. *Id.*

22. *See* Fairmark Partners, L.L.P. https://fairmarklaw.com/ (last visited Jan. 25, 2024).

23. *See* Kelly Hooper, *Paying a lot for your health insurance? You might have a lawsuit*, PoliticoPro (Dec. 21, 2023) https://subscriber.politicopro.com/article/2023/12/paying-a-lot-for-your-health-insurance-you-might-have-a-lawsuit-00132744?source=email.

24. Jeanne Pinder, *Law firms take aim at employers spending on healthcare plans*, Clear Health Costs (Dec. 8, 2023) https://clearhealthcosts.com/blog/2023/12/law-firms-take-aim-at-employers-over-spending-on-healthcare-plans/

25. *Id.*

26. *Id.*

27. *See* 29 U.S.C. § 1132(e)(2).

28. 29 U.S.C. § 1108(b)(2).

29. 29 U.S.C. § 1108(b)(2)(B)(I)(AA)-(BB).

30. Transparency in Coverage, 85 Fed. Reg. 72,158-72,310 (Nov. 12, 2020).

31. *See* Kelly Hooper, *supra* n.21.

32. *See* Nevin E. Adams & John Sullivan, *supra* n.2.

33. *See Winsor v. Sequoia Benefits & Ins. Servs.*, 62 F.4th 517 (9th Cir. 2023).

34. *Id.* at 527-28.

35. 140 S. Ct. 1615 (2020)

36. *See Knudsen v. MetLife Group, Inc.*, No. 2:23-cv-00426, 2023 U.S. Dist. LEXIS 123293, 2023 WL 4580406, at *5 (D.N.J. July 18, 2023). ■

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