Special Edition: Supreme Court Sides with Plaintiffs

A case that has been closely watched by the retirement industry has a long-awaited outcome. Industry experts have expressed that this outcome could increase future ERISA litigation. This case serves as a good reminder for plan sponsors, who face continued scrutiny over their fiduciary duties, to consider proactively reviewing their fiduciary practices to ensure compliance with ERISA and regulations promulgated thereunder. This heightened attention will help mitigate excessive fee lawsuits while helping plan sponsors to uphold their responsibilities to plan participants.

Here's What You Really Need to Know:

- The U.S. Supreme Court issued a unanimous 9-0 decision in favor of the plaintiffs, placing a greater burden on defendants to prove their transactions did not violate ERISA at the motion to dismiss stage.
- The case, *Cunningham v. Cornell University*, marks nearly a decade of ongoing litigation as it was initially filed in August 2016 and was one of the first 403(b) university excessive fee lawsuits.
- Plaintiffs for this case were represented by the Schlichter Board law firm, who has now achieved a notable 3-0 record in cases before the U.S. Supreme Court.

Let's Dive In...

What was the issue?

The plaintiffs in *Cunningham v. Cornell University* alleged that Cornell University and its fiduciaries violated their duties of prudence and loyalty under ERISA, resulting in excessive fees paid by participants. As the case made its way through the courts, it also has become the "burden of proof case," which means who would bear the burden of proof in ERISA litigation at the motion to dismiss stage. The Circuits have been split on the issue, which is why it went from the Second Circuit to the Supreme Court. The issue before the U.S. Supreme Court was: should it be the plaintiff who must prove that the fiduciary breached their duties and prove that a loss to the plan and participants occurred? Alternatively, should the plan sponsor (as the defendant) bear the burden and prove that they did not cause the injury alleged by the plaintiffs?

The Decision

In a unanimous decision, authored by Justice Sotomayor, who had been one of the more vocal justices during the oral arguments in January, the Court reversed the decision of the Second Circuit. The court previously had granted the Cornell defendants' motion to dismiss the suit. As for that opinion, the court held that “plaintiffs seeking to state a [prohibited transaction] claim must plausibly allege that a plan fiduciary engaged in a transaction proscribed therein, no more, no less. Plaintiffs are not required to plead and prove that the myriad [prohibited transaction] exemptions pose no barrier to ultimate relief”.

In other words, those bringing a suit alleging an ERISA fiduciary breach only need to assert the existence of a prohibited transaction, and some resulting injury from that transaction between parties-in-interest to proceed past a motion to dismiss and proceed to discovery and eventually trial.

Why It Matters

The U.S. Supreme Court ruling may lead to an increase in ERISA litigation, as plaintiffs now have a lower burden of proof in the initial phases of the case, which makes it easier for plaintiffs to survive motions to dismiss and bring ERISA claims – and ultimately ERISA class action cases. In doing so, Justice Sotomayor expressed concerns that proving a fiduciary breach in process or intent would be challenging for plaintiffs before discovery or trial. On the flip side, the Court did address the issue of meritless lawsuits but believed that the lower district courts had a mechanism for addressing such frivolous lawsuits such as Federal Rule of Civil Procedure 7.

What This Means for Plan Sponsors

The long-awaited outcome of this case is a good reminder that you can be sued, but having a good process in place and documenting your process will help mitigate risk. Plan sponsors should:

1. **Review the current process for documenting decisions for the plan.** Maintain documentation of all decisions and actions taken, including the rationale for the decisions. ERISA is a law for process, not outcomes.

2. **Stay Informed.** Keep current with legal and regulatory developments and court rulings related to ERISA.

3. **Review Fiduciary Practices.** Ensure that all fiduciary practices are thoroughly reviewed and aligned with up-to-date ERISA best practices. Maintain a governance calendar; identify and assign associated roles and responsibilities.

4. **Evaluate fees.** Regularly evaluate and negotiate service provider fees to ensure they are reasonable and competitive. Excessive fees can lead to litigation. Use benchmarking tools to compare fees and services with industry standards.

5. **Prioritize communication.** Communicate clearly and regularly with participants about fees, investment options, and any changes to the plan.

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