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ERISA Breach of Fiduciary Duty Class Actions: Avoiding and Defending Claims Against Companies and Fiduciaries

Leveraging Standing, Statute of Limitations, Exhaustion and Mandatory Arbitration to Defeat Claims; Methods to Prevent Claims

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Today's faculty features:

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ERISA Breach of Fiduciary Duty Class Actions: Avoiding and Defending Claims Against Companies and Fiduciaries

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Brian D. Netter is a partner in Mayer Brown's Washington, D.C., office, Co-Chair of the ERISA Litigation practice, and a member of the firm's Supreme Court and Appellate Litigation practice.

Brian regularly represents a wide array of companies, universities and other non-profit organizations, and individuals in lawsuits alleging breach of fiduciary duty and other violations of the Employee Retirement Income Security Act of 1973. For his work in this space, he was named a "Benefits MVP" by Law360 in 2019. He currently represents clients in cases challenging 401(k) and 403(b) administrative fees and investment offerings and pension plan actuarial calculations.

Brian also maintains a robust practice in the federal courts of appeals. His innovative work has been recognized in The National Law Journal's "Appellate Hot List" on four separate occasions, and he has been recognized by The National Law Journal as an emerging star in appellate litigation. He currently serves as appellate counsel to the players of the U.S. Women's National Soccer Team, in their pay equality dispute with the U.S. Soccer Federation.

Earlier in his career, Brian served as a law clerk to Associate Justice Stephen Breyer on the US Supreme Court and to Judge Judith W. Rogers on the US Court of Appeals for the DC Circuit. Prior to his career as a lawyer, Brian earned undergraduate and graduate degrees in Industrial & Operations Engineering.

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Jamie Fleckner is a partner in Goodwin's Financial Industry Practice and Chair of its ERISA Litigation Practice. Mr. Fleckner represents clients in a wide array of complex commercial litigation, with a focus on financial services and products, including investment management. He regularly litigates class and derivative actions under ERISA, the Investment Company Act of 1940, the Securities Exchange Act of 1934, and related federal and state laws. His practice also focuses on regulatory investigations and governmental proceedings, and he has represented clients before the U.S. Department of Labor, the Securities and Exchange Commission, the Department of Justice, the Pension Benefit Guaranty Corporation and state authorities.

Mr. Fleckner represents companies and individual officers in class and derivative actions, regulatory investigations as well as bankruptcy proceedings regarding the discharge of Investment Company Act, ERISA and other fiduciary duties. Currently, he is representing numerous clients in so-called "excessive fee" ERISA and Investment Company Act litigation, and other litigation challenging the discharge of fiduciary obligations.

Since 2014, Mr. Fleckner has been listed in the nationwide ERISA Litigation category in Chambers USA: America's Leading Lawyers for Business, where clients praise his "knowledge of the ERISA area and ability to distill concepts into practical strategic advice." Since 2015 he has been recognized as a leading lawyer in the list of *Who's Who Legal: Pensions and Benefits*. Since 2013 he has been recognized as a national leader in ERISA litigation by The Legal 500 United States.

Mr. Fleckner is a nationally recognized lecturer and author on ERISA, Investment Company Act, and related litigation topics. He has presented at over 90 conferences across the United States to legal and non-legal audiences.

Today's Agenda

I. Current trends in ERISA breach of fiduciary duty class actions
   A. Cases challenging mutual funds and other investment options
   B. Proprietary fund cases
   C. Stock-drop and ESOP cases
   D. 403(b) cases
   E. Cybersecurity and data privacy

II. Strategies for defeating certification
   A. Standing
   B. Statute of limitations
   C. Mandatory arbitration
   D. Other effective strategies

III. Best practices to avoid and reduce ERISA breach of fiduciary duty class actions

Current trends in ERISA breach of fiduciary duty class actions

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I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- *Trend #1*: Cases targeting a much broader range of retirement plans
- Excessive fee lawsuits were once limited to a small group of plaintiffs' lawyers filing lawsuits against a limited number of multi-billion dollar plans. No more.
  - Smaller Plans
  - More Lawsuits
  - New Plaintiffs' Lawyers

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- Despite the changes, much remains the same in terms of the substance of the allegations:
  - Recordkeeping Fees
  - Investment Fees
    - Share Classes
    - Active vs. Passive Management
    - Mutual Fund vs. Commingled Funds and Separate Accounts
  - Investment Performance
  - Prohibited Transactions

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Ramos v. Banner Health,* No. 15-cv-2556 (D. Colo. May 20, 2020)**
  - Plaintiffs proceeded to bench trial on allegations that the plan sustained $85 million in damages from the following supposed violations of ERISA:
    - Failure to monitor mutual fund window
    - Retention of Fidelity Freedom funds
    - Excessive recordkeeping fees
    - Prohibited transaction resulting from recordkeeping fees
    - Prohibited transaction for paying Banner expenses from plan assets
    - Failure to monitor other fiduciaries

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Ramos v. Banner Health,* No. 15-cv-2556 (D. Colo. May 20, 2020)**
  - Court issued a split decision, awarding $2.35 million in damages to Plaintiffs, plus interest:
    - Plaintiffs failed to establish loss stemming from mutual fund window
    - Fidelity Freedom funds were commonly used in the market
    - Banner failed ever to consider its uncapped recordkeeping fees
      - Plaintiffs' damages expert could not be relied upon
      - Court found $1.7 million in damages, plus interest at 3.25%
    - Banner failed properly to account for reimbursements to itself.
      - Banner had already repaid reimbursements since 2012
      - Damages of $688,000 for 2010 and 2011
    - Duty to monitor damages were coextensive with other damages

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Martin v. CareerBuilder LLC,*** **No. 19-cv-6463 (N.D. Ill. July 1, 2020)**
  - Complaint alleged:
    - Plan overpaid for recordkeeping
    - Plan should have procured institutional share classes, or other funds that were cheaper
    - Plan should have avoided actively managed offerings
  - Court dismissed the complaint, without prejudice:
    - Plaintiffs’ claims are paternalistic
    - Plaintiffs are comparing apples to oranges

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Marks v. Trader Joe's Co.*, No. 19-cv-10942 (C.D. Cal. Apr. 24, 2020)**
  - Complaint alleged:
    - Plan overpaid for recordkeeping
    - Plan should have procured institutional share classes, or other funds that were cheaper
  - Court dismissed the complaint, without prejudice:
    - Plaintiffs were wrong about the plan's recordkeeping fees
    - Plaintiffs weren't specific enough about share-class allegations

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Falberg v. Goldman Sachs Group,*** **No. 19-cv-9910 (S.D.N.Y. July 9, 2020)**
  - Complaint alleged:
    - Plan should have offered separate accounts instead of mutual funds
    - Plan should have offered better funds not affiliated with Goldman Sachs
  - Court denied motion to dismiss

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- *Trend #2*: Proprietary fund cases
- Claims against proprietary funds:
  - Retaining proprietary funds despite the availability of similar lower cost and better performing investment options
  - Underlying theme: inherent conflict

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 685 (W.D. Mo. Jan. 23, 2019)**
  - One of a few excessive fee cases to be tried to verdict
    - 11-day bench trial from September 4 to September 20, 2019
    - Complete defense verdict, decided January 23, 2020
  - Allegations
    - Plan lineup consisted *exclusively* of proprietary mutual funds, which purportedly placed American Century's interests above plan participants' interests
      - Plaintiffs allege that there were better-performing and less expensive investment options available
    - Plan offered too many "duplicative" funds
    - Prohibited transactions

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 685 (W.D. Mo. Jan. 23, 2019)**
  - Prohibited transaction claims dismissed at summary judgment stage
    - Fee paid from mutual fund assets are not paid out of plan assets
    - PTE 77-3 applied – revenue sharing did not show that plan participants were being treated less favorably than other shareholders
  - Findings of Fact and Conclusions of Law
    - Focused on *process* – after examining all of the evidence, the judge concluded that the defendant fiduciaries used a prudent process
    - No loss causation – court rejected plaintiffs' expert testimony in its entirety; failed to identify a comparable benchmark

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Wildman v. Am. Century Servs., LLC*, 362 F. Supp. 685 (W.D. Mo. Jan. 23, 2019)**
  - No duty to utilize passively-managed index fund
  - No duty to use stable value funds instead of money market funds
  - Use of mutual funds in 401(k) plan is allowed, even when the plaintiffs allege that cheaper products exist
  - Sector funds are allowed
  - No requirement to use only a limited number of funds (up to 46 funds and a self-directed brokerage were offered during the class period)
  - No duty to utilize competitors' funds – plan participants were sophisticated, and preferred proprietary actively-managed mutual funds

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- *Trend #3*: Stock-drop cases
  - Typically filed as class actions. These lawsuits allege that the company, its board of directors, its senior officers, and/or plan administrators are ERISA fiduciaries who breached their fiduciary duties
  - Typical allegation: company established a defined contribution plan, featuring company stock as an investment option, and participants suffered losses because the company declined
  - Alleged fiduciary breaches associated with these lawsuits include:
    - Imprudently offering employer stock as a plan option;
    - Misleading participants into investing in company stock; and
    - Failing to inform participants of material information related to the company

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- **Two Supreme Court cases:**
- ***Fifth Third Bancorp v. Dudenhoeffer*, 134 S. Ct. 2459 (2014)**
  - The Supreme Court dismantled the long-standing principle that plan investments in employer stock are presumptively prudent
  - ESOP fiduciaries are now subject to the same general duties governing the behavior of all ERISA fiduciaries (other than the duty to diversify plan assets)
  - "*Dudenhoeffer* appears to have *raised* the bar for plaintiffs seeking to bring a claim based on a breach of the duty of prudence." *In re Lehman Bros. Sec. & ERISA Litig.*, 113 F. Supp. 3d 745, 755 (S.D.N.Y. 2015)
  - A claim against ESOP fiduciary only when:
    - 1. Fiduciary could have acted consistent with security laws; and
    - 2. Unlikely to harm fund with actions
  - Can rely on market price

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016) (per curiam)**
  - The Supreme Court doubles down on its “more harm than good” standard from *Dudenhoeffer*
  - The Ninth Circuit sided with Participants-Plaintiffs, concluding that they had shown that it was “quite plausible” that stopping further purchases of employer securities would not harm plan participants
  - Supreme Court reversed
  - After *Dudenhoeffer* and *Amgen*, it is not enough to allege that it would have been a good idea to stop buying employer securities. Plaintiffs must allege that doing so could not possibly have been a bad idea

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- Following *Dudenhoeffer* and *Amgen*, plaintiffs have generally fared poorly in company stock cases
  - More than a dozen stock drop cases were dismissed at the motion to dismiss stage for failing to allege a plausible action that the fiduciary could have taken, consistent with securities laws, that would not have done more harm than good
- ***Jander v. Retirement Plans Comm. of IBM*, 910 F.3d 620 (2d Cir. Dec. 10, 2018)**
  - Potential game changer: Second Circuit reversed trial court decision, finding that the complaint's allegations were sufficient to satisfy *Dudenhoeffer* standard
  - Second Circuit focused on five key allegations:
    - Stock price artificially inflated due to inside information
    - Fiduciaries were also in a position to disclose the truth
    - A "reasonable business executive" could foresee that delaying disclosure would eventually have harmed the corporation more than immediate disclosure
    - The stock trades in an "efficient market"
    - Disclosure was inevitable, given the nature of the inside information

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Retirement Plans Comm. of IBM v. Jander*, 140 S.Ct. 592 (2020)**
  - Supreme Court granted certiorari on June 13, 2019
  - Supreme Court invited the Solicitor General to file a brief. Brief filed on August 13, 2019, joined by both the SEC and the DOL
    - SEC's joinder is notable; in *Dudenhoeffer*, the Supreme Court stated that the SEC "has not advised us of its views on these matters, and we believe that those views may well be relevant"
    - The SEC and DOL argued that fiduciaries should only be obligated to comply with securities laws – *i.e.* that ERISA does not impose any separate disclosure obligations
    - If federal securities laws require disclosure, then the disclosure ***could not*** do more harm than good

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- ***Retirement Plans Comm. of IBM v. Jander*, 140 S.Ct. 592 (2020)**
  - Supreme Court remanded to the Second Circuit on January 14, 2020
    - Arguments before the court did not directly address the question presented (*i.e.* whether the Second Circuit misapplied *Dudenhoeffer*)
    - Appellant argued that securities laws should be the *exclusive* remedy, and that fiduciaries should never be expected to use inside information to avoid a fiduciary breach
    - DOL & SEC argued that securities laws should control
  - Second Circuit remanded to the trial court on June 22, 2020 (*Jander v. Retirement Plans Committee of IBM*, 962 F.3d 85 (2020)
    - Second Circuit invited the parties to submit supplemental briefing
    - Reinstated previous judgment – declining to revisit previously-raised arguments and holding that arguments not previously raised were forfeited
  - Takeaway: courts have not yet ruled on SEC and DOL's position – expect to see the position revisited in a future case

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- *Trend #4*: 403(b) cases
- 403(b) plans can be either governed by ERISA or not
- Since 2016, 21 universities have been sued
- Litigation now targeting large health systems
- These plans are similar, but not identical, to 401(k)s:
  - Both are subject to ERISA's fiduciary rules
  - Both are subject to ERISA's reporting requirements
  - Both allow participants to self-direct investments
  - But 403(b)s historically offered more limited investment choices, and had multiple recordkeepers

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- The lawsuits allege:
  - Excessive fees, including the use of multiple recordkeepers
  - Too many investment choices
    - Many plans offer hundreds of investment options
    - Allegedly duplicative investment options that dilute the plan's ability to pay lower fees
    - Amount of options allegedly confuses participants
  - Offering of retail share-class mutual funds instead of identical, lower-cost institutional share-class funds
  - Not conducting a competitive bidding process for the plan's recordkeeping services

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- The lawsuits allege other claims similar to those lodged at 401(k)s
  - Failure to leverage plan's asset size to demand lower administrative and investment management fees
  - Failure to replace expensive, poor-performing investments
  - Engaging and failing to monitor recordkeepers who earned asset-based administrative fees through revenue-sharing arrangements (rather than flat per participant fees)

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- Results are all over the map
  - Dismissals at outset
    - 2 dismissals affirmed, 2 dismissals partially reversed
  - Pretrial settlements
  - Summary judgment
  - Trial

I. Current Trends in ERISA Breach of Fiduciary Duty Class Actions

- *Trend #5*: Cybersecurity/Data Privacy
  - Is participant data a “plan asset”?
  - Are plans obligated to control how vendors use participant data?
  - What are a plan’s obligations to avoid a data breach?

Strategies for Defeating Certification

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Strategies for Defeating Certification: <u>(FRCP 23)</u>

- Federal Rule of Civil Procedure 23 controls plaintiffs' ability to bring class actions in federal court
- Rule 23(a):
  - (1) numerosity: "the class is so numerous that joinder of all members is impracticable";
  - (2) commonality: "there are questions of law or fact common to the class";
  - (3) typicality: "the claims or defenses of the representative parties are typical of the claims or defenses of the class"; and
  - (4) adequacy: "the representative parties will fairly and adequately protect the interests of the class"

II.A. Strategies for Defeating Certification: Standing

- Defendants may be able to defeat certification or limit the size of any class by arguing that all or some of the proposed class lack constitutional or statutory standing
- ***Thole v. U.S. Bank*, No. 17-1712 (U.S. June 1, 2020)**
  - 5-4 decision by U.S. Supreme Court, holding that participants in a defined-benefit pension lack standing to sue for breach of fiduciary duty based solely on losses to the plan as a whole
  - Lower courts will need to grapple with how *Thole* applies to defined-contribution plans
    - General applicability
    - Lawsuits challenging multiple funds

II.B. Strategies for Defeating Certification: Statute of Limitations

- ***Sulyma v. Intel Corp. Inv. Policy Comm.*, 909 F.3d 1069 (9th Cir. 2018)**
  - Reversed a district court decision holding that plaintiff had actual knowledge of conduct underlying breach of fiduciary duty claims merely because he received disclosures
  - Focused on distinction between actual and constructive knowledge.
    - Plaintiff must be "actually aware of the facts constituting the breach, not merely that those facts were available to the plaintiff . . . [there must be] no dispute of material fact that the plaintiff was actually aware that the defendant acted imprudently"
  - Acknowledged circuit split
    - Contrast with Sixth Circuit decision holding that participant's receipt of disclosures was sufficient to convey actual knowledge. Receipt of disclosures are only constructive knowledge in Ninth Circuit's view

II.B. Strategies for Defeating Certification: Statute of Limitations

- ***Intel Corp. Inv. Policy Comm. v. Sulyma*, 140 S.Ct. 768 (2020)**
  - Affirmed on February 26, 2020
  - Distinguished prior precedent, which held that the word “discovery” includes constructive knowledge
    - “Knowledge” of a topic includes “not only those facts the plaintiff actually knew, but also those facts a reasonably diligent plaintiff would have known”
    - The addition of the word “actual” in § 1113(2) means that knowledge must be more than “potential, possible, virtual, conceivable, theoretical, hypothetical, or nominal”
    - Plaintiff “must in fact have become aware of [the] information”
  - Receipt of disclosures is relevant to demonstrating actual knowledge, but is not determinative
    - Can show that plaintiff viewed records electronically, or took some action in response to receiving the disclosures
    - A plaintiff’s denial of knowledge can be “blatantly contradicted by the record,” to show actual knowledge

II.C. Strategies for Defeating Certification: <u>Mandatory Arbitration</u>

- Advantages of a mandatory arbitration policy prohibiting class-based dispute resolution include that such a policy:
  - Minimizes risk of class actions;
  - Minimizes public exposure related to allegations;
  - Increases the likelihood of having an adjudicator with expertise in ERISA law; and
  - Increases the likelihood of overall success;
  - Could result in lower cost of arbitrating single claim vis-à-vis federal litigation over class claims (and single claim might not be economically feasible for a plaintiff to pursue)
- Disadvantages of a mandatory arbitration policy prohibiting class-based dispute resolution include that such a policy:
  - Decreases the likelihood of success on appeal in the event of an adverse decision; and
  - Decreases chance of prevailing on early motions

II.C. Strategies for Defeating Certification: Mandatory Arbitration

- Class action waivers in arbitration agreements are generally valid
- ***AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011)**
  - “[C]ourts must place arbitration agreements on an equal footing with other contracts . . . and enforce them according to their terms”
  - “Requiring the availability of classwide arbitration interferes with fundamental attributes of arbitration and thus creates a scheme inconsistent with the FAA”
- Three 9th Circuit Cases decided June 28, 2019
  - ***Tillage v. Comcast Corp.*, No. 18-15288; *McArdle v. AT&T Mobility LLC*, No. 17-17246; *Blair v. Rent-A-Center*, No. 17-17221**
  - CA Supreme Court held that agreements purporting to waive a party’s right to seek “public injunctive relief” are unenforceable. *McGill v. Citibank, N.A.*, 393 P.3d 85 (Cal. 2017)
  - FAA did not preempt California law
    - Plaintiffs sought a “public injunction”; CA law prohibits waiver of such claims.
    - CA law permits parties to agree to informal procedures, and the law therefore does not conflict with the FAA

II.C. Strategies for Defeating Certification: Mandatory Arbitration

- ***Munro v. Univ. of S. Cal.*, 896 F.3d 1088 (9th Cir. 2018)**
  - Motion to compel arbitration denied – although employees agreed to arbitration in their employment contracts, the plans themselves were not party to or bound by the arbitration clauses
  - Suggested (but did not decide) that 9th Circuit would consider reversing prior precedent on other grounds, which struck down arbitration clause because "[a]rbitrators, many of whom are not lawyers, lack the competence to interpret and apply statutes"
    - *Amaro v. Continental Can. Co.*, 724 F.2d 747 (9th Cir. 1984)
- ***Dorman v. Charles Schwab Corp.*, 934 F.3d 1107 (9th Cir. 2019)**
  - As suggested by *Munro*, reversed the *Amaro* precedent
  - Plan itself contained an arbitration clause
  - Reversal based on Supreme Court decision recognizing that arbitrators are competent to interpret federal statutes
    - *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013)
  - Remanded to district court, compelling arbitration

II.D. Strategies for Defeating Certification: Stipulating

- (1) Some defendants prefer to litigate ERISA claims on a class-wide basis
  - Strength of defense
  - Desire to avoid repeat litigation
  - Costs of opposing certification
  - Risks of an unfavorable certification ruling
- (2) Defendants no longer oppose certification reflexively