CIVIL PROCEDURE UPDATE

2019 EBC MIDWINTER MEETING

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2019 Civil Procedure Update

* Agenda:
  * Pleading Standards
  * Class Actions
  * Remedies
  * Statute of Limitations
  * Lagniappe
    * Standard of Review
    * Appropriate Equitable Relief
    * Benefit Claim or Breach of Fiduciary Duty Claim
    * Exhaustion
    * Supplemental Jurisdiction and Preemption
Pleading Standards

* Barchock v. CVS, 886 F. 3d 43 (1st Cir. 2018); Ellis v. Fidelity Mgmt. Tr. Co., 883 F.3d 1 (1st Cir. 2018).
* Stable Value Funds cases.
  * Barchock: Imprudence cannot be inferred from allegation that SVF’s strategy “departed radically” from industry averages and underlying financial logic of stable value management.
  * Ellis: Imprudence cannot be inferred from allegation of alleged mismanagement of a SVF by establishing overly-conservative benchmark and not investing in higher-risk, higher-return instruments.
Pleading Standards

* White v. Chevron, 2018 WL 5919670 (9th Cir. 2018).

* Plaintiff may not state a claim for breach of duty of prudence merely by alleging that there was a less expensive, “identical” alternative to the service/fund provider selected by plan fiduciaries.

* Allegations showed only that defendants could have chosen different vehicles for investment that performed better during the relevant period, or sought lower fees for administration of the fund.

* Factual content did not allow the court to draw a reasonable inference that the defendants were liable for the misconduct.
Pleading Standards

  * “ERISA plaintiffs claiming a breach of fiduciary duty have a challenging pleading burden because of their different levels of knowledge regarding what investment choices a plan fiduciary made as compared to how a plan fiduciary made those choices.”
  * The challenge for ERISA plaintiffs is to use the data about the selected funds and some circumstantial allegations about methods to show that “a prudent fiduciary in like circumstances would have acted differently.”
  * Meiners did not plead facts showing the Wells Fargo TDFs underperformed. He only pled that one Vanguard fund, which he alleges is comparable, performed better than the Wells Fargo TDFs. The fact that one fund with a different investment strategy ultimately performed better does not establish anything about whether the Wells Fargo TDFs were an imprudent choice.
  * When both lawful and unlawful conduct would have resulted in the same decision, a plaintiff does not survive a motion to dismiss by baldly asserting that unlawful conduct occurred.
Pleading Standards


  * Plaintiff alleged the defendants knew of and should have disclosed to plan participants, certain accounting irregularities. The alleged failure to disclose led to the stock being artificially inflated and harmed the participants when the irregularities were eventually disclosed and the stock price declined by more than $12 per share.

  * District court dismissed the complaint twice holding that Plaintiffs failed to meet the *Dudenhoeffer* standards – complaint lacked context-specific allegations as to why a prudent fiduciary could not have concluded that plaintiff’s proposed alternatives were more likely to do harm than good.
**Jander v. Retirement Plans Committee of IBM, cont.**

- Second Circuit became the first circuit since *Dudenhoeffer* to allow this type of claim to survive a motion to dismiss.
  - Fiduciaries allegedly knew that company stock was artificially inflated.
  - Defendants were uniquely situated to fix the accounting irregularities because they had primary responsibility for the public disclosures and disclosure could have been made within IBM’s quarterly SEC filings.
  - Failure to promptly disclose the truth allegedly caused reputational harm to the company which exacerbated the harm to the stock price.
  - Stock traded on an efficient market and thus there was no need to fear that disclosure would result in market overreaction.
  - Disclosure was inevitable.
Non-ERISA Appellate Class Decisions
You Need to Know


**Low v. Trump U., LLC**, 881 F.3d 1111, 1121 (9th Cir. 2018): Members of Rule 23(b)(3) class have no right to second opt out opportunity at settlement if they failed to exclude themselves at the class certification stage.

**Sali v. Corona Regl. Med. Ctr.**, 909 F.3d 996, 1004 (9th Cir. 2018): Inadmissibility alone is not a proper basis to reject evidence in support of class certification.

- Agrees with the 8th Cir, disagrees with the 5th Cir, possibly 3rd and 7th Cirs.
2018 Changes to Rule 23 You Need to Know

- Electronic class notice explicitly allowed. Rule 23(c)(2)(B).
- Rule 23(e)(2) outlines factors for settlement approval:
  (A) class reps and counsel have adequately represented class.
  (B) proposal negotiated at arms length.
  (C) relief provided is adequate considering (i) “costs, risks, delay of trial and appeal”; (ii) effectiveness of distributing relief; (iii) “terms of proposed award of attorneys’ fees including timing of payment”; (iv) any other (fka side) agreement.
  (D) “proposal treats class member equitably relative to each other.”
- Rule 23(e)(5) Class Member Objections:
  (A) objector must state with specificity;
  (B) court approval required for payment to objector.
- Rule 23(f): keeps 14 days for private parties, but 45 days for US govt or employee
Issues in ERISA Class Certification:
Issue #1: Certifying ERISA Claims Seeking Monetary Relief under Rule 23(b)(1) or (b)(2)?

Most courts say “Yes”:


- **401(k) case:** Troudt v. Oracle Corp., 325 F.R.D. 373, 81 (D. Colo. 2018).


Issues in ERISA Class Certification:
Issue #2: Do Participants Have Standing to Sue Participants Who Invest in Other Funds?

Yes, at least if based on same conduct:

Cassell v. Vanderbilt U., 2018 WL 5264640, at *2-3 (M.D. Tenn. Oct. 23, 2018);

Sometimes, “No”

Issues in ERISA Class Certification:

Issue #3: How Does the Statute of Limitations Affect Class Certification?

* **Approach #1:** Limit class to “the usual limitations period” imposed by ERISA § 413 (rather than its exception) and require Plaintiff to seek to modify the class if there is evidence to support fraud or concealment. *Ramos v. Banner Health*, 325 F.R.D. 382, 397-98 (D. Colo. 2018).


* **Approach #4:** Limiting class by statute of repose is premature where complaint alleges fraud or concealment of fiduciary duties. *Troudt v. Oracle Corp.*, 325 F.R.D. 373, 376 (D. Colo. 2018).
REMEDIES – First Circuit on Proving Loss: Did a Loss Occur?

- Reversed, in part, the district court’s judgement for defendants after a bench trial
- Joined Fourth, Fifth, and Eighth Circuits on who has the burden of proof on ERISA causation, holding that once an ERISA plaintiff has shown a breach of fiduciary duty and loss to the plan, the burden shifts to the fiduciary to prove that such loss was not caused by its breach

- District court: plaintiffs failed to establish a prima facie case of loss. The court concluded that plaintiffs’ damages theory under their “procedural breach” theory (which assumed the entire investment lineup was imprudent if the monitoring process was flawed) was fundamentally flawed. The court considered this theory an “unwarranted expansion of ERISA’s seemingly narrow focus on actual losses to a plan resulting from specific incidents of fiduciary breach.”

- The First Circuit disagreed that plaintiffs’ evidence was insufficient to support a finding of loss where the district court (i) had tentatively found that Putnam breached its fiduciary duty in its inclusion and monitoring of the Putnam funds, and (ii) plaintiffs’ expert showed that when considering fees and performance the Putnam funds underperformed two comparable funds by over $30 million.

- The district court conflated the concepts of loss (which comes first) and causation when the district court had ruled that even though Putnam had not followed a prudent process, this did not mean every fund in the lineup was imprudent since it was possible that many could have been objectively prudent.
REMEDIES – Fifth Circuit Addresses (for the first time) Remedy for COBRA Notice of Violation

- *Hager v. DBG Partners, Inc.*, 903 F.3d 460 (5th Cir. 2018).
- Reversed and remanded a district court decision dismissing plaintiff’s claim for alleged COBRA notice violations but held that plaintiff could not pursue his claim under § 502(a)(3) for restitution.
- The Fifth Circuit noted that this was an issue of first impression for the court and therefore examined all “potential avenues for enforcement under 29 U.S.C. § 1132(a)” including § 502(a)(3).
- The court held that plaintiff’s claim could not be brought for restitution pursuant to § 502(a)(3)(B)’s “other appropriate equitable relief” clause because “restitution in the form of money is not equitable relief” and plaintiff’s request for medical expenses was a request for money to be paid from defendant’s general assets.
Moore v. Apple Cent., LLC, 893 F.3d 573 (8th Cir. 2018).

Affirmed the district court’s ruling that plaintiff’s claim for unpaid insurance proceeds was preempted and in so ruling noted that plaintiff could have brought his claim under § 502(a)(3) for breach of fiduciary duty.

Eighth Circuit explained that if the insurance policy was denied because the plan sponsor failed to properly submit required information then plaintiff could bring a breach of fiduciary duty claim under § 502(a)(3) and seek the amount of benefits denied as an “equitable make-whole or surcharge remedy.”
REMEDIES – Equitable Accounting of Profits

  The Fourth Circuit affirmed the district court’s dismissal after a four-day bench trial of plaintiff’s § 502(a)(3) claim seeking an equitable accounting of profits where defendant showed that it did profit from the alleged conduct.

- Plaintiffs were former 401(k) plan participants who accepted their employer’s offer to transfer all of their funds in the 401(k) plan to a defined benefit plan that would still allow participants “notional” individual accounts that they could invest in investment options they wanted but the employer would invest the actual money in the account however it saw fit. If the participant’s hypothetical investments outperformed the defined benefit plan’s actual investments then the employer would make up the difference but if the plan’s investments outperformed participants’ investments the difference would be allocated back to the defined benefit plan’s assets. Participants transferred nearly $2 billion from the 401(k) plan to the defined benefit plan.

- The Fourth Circuit found no fault in the district court’s decision to follow defendant’s approach because § 502(a)(3) empowers courts to invoke their equitable authority and gives courts discretion to consider whether equitable relief is appropriate under the particular facts of a case. The Fourth Circuit said its decision in “no way” marks a retreat from its previous holdings that under § 502(a)(3), a plan participant can seek an accounting of profits even if the participants suffered no monetary harm but here the plan sponsor simply did not earn an profit and therefore it cannot “disgorge its ill-gotten benefit to plan participants.”
Remedies: What Is the Proper Interest Rate?

* **Bryant v. Community Bankshares, Inc.,** 736 Fed. Appx. 841 (11th Cir. June 12, 2018), the court affirmed the district court’s use of the Alabama interest statute to determine the rate to calculate prejudgment interest. The Alabama interest statute is intended to compensate beneficiaries when their health benefit plan fails to pay a claim within the applicable time period. The court held that the district court reasonably applied the interest statute by analogy to make the participants whole after the plan sponsor refused to honor the participants’ ESOP diversification elections, have company stock transferred to their individual retirement accounts and to exercise their stock redemption rights.

* **Gross v. Sun Life Assurance Company of Canada,** 880 F.3d 1 (1st Cir. Jan. 18, 2018), the court noted the complexity in selecting an appropriate interest rate is the ever-changing relationship between statutory interest rates and the actual cost of money. The court ruled that when a district court has concluded that a plaintiff should be awarded prejudgment interest, its task in selecting the rate is to identify, in the particular case, a fair percentage reflecting “both the rationale of full compensation and ERISA’s underlying goals.” Here, the court could not evaluate the district court’s use of the federal § 1961(a) rate because the district court did not explain its reasoning. Also of importance to the court was the lengthy delay in the benefits payment to a plan participant that approached eleven years. Accordingly, the court held that a mechanical adoption of the § 1961(a) rate would be an abuse of discretion. The court vacated the award of prejudgment interest and remanded to the district court.
Statute of Limitations – Benefit Claims: Which Statute Applies: Statutory or Contract?


* Reinstated plaintiffs’ claims for underpayment of retiree benefits, reversing the district court which had held that certain underpayments were time-barred.

* Class action suit filed in 2008; plaintiffs alleged, in part, that the plan erred in its interpretation of the plan document when calculating their lump-sum payments of pension benefits.

* District court previously dismissed claims related to benefits paid before January 2003, concluding that Kentucky’s five-year statute of limitations for statutory claims applied, rather than the 15-year statute of limitations for claims on written contracts.

* The Sixth Circuit reversed, finding that although the five-year period applies when “a plaintiff seeks benefits under the Plan and those claims depend on alleged violations of ERISA’s statutory protections,” the 15-year period applies “when a claim is based on the contract alone.”

* Here, plaintiffs argued that the plan “misconstrued the Plan terms and failed to pay [plaintiffs] what the Plan required,” and their claims did not depend on ERISA’s statutory protections. Thus, the 15-year statute of limitations applied.
Statute of Limitations: Ninth Circuit Announces Actual Knowledge “Something Between” Standard

- Reversed the district court which had granted the employer’s motion for summary judgment on actual knowledge
- There’s been “some confusion in our case law over the scope of the ‘actual knowledge’ standard”
- Actual knowledge of the breach” does not mean that a plaintiff has knowledge that the underlying action violated ERISA. Further, it does not mean that a plaintiff has knowledge that the underlying action occurred.
- Therefore, it “must therefore mean something between bare knowledge of the underlying transaction, which would trigger the limitations period before a plaintiff was aware he or she had reason to sue, and actual knowledge, which only a lawyer would normally possess.”
- “In light of the statutory text and our case law, we conclude that the defendant must show that the plaintiff was actually aware of the nature of the alleged breach more than three years before the plaintiff’s action is filed. The exact knowledge required will thus vary depending on the plaintiff’s claim.”
Statute of Limitations: District Court Cases on “Actual Knowledge”

* **Cassell v. Vanderbilt Univ., 285 F. Supp. 3d 1056 (M.D. Tenn. 2018).** The court held that the issue of whether the plaintiffs’ prohibited transaction claim was barred could not be resolved at the motion-to-dismiss stage of the litigation. The court explained that when a plaintiff claims the fiduciary made an imprudent investment, actual knowledge of the breach, as required to trigger the three-year period, would generally require some knowledge of how the fiduciary selected the investment. Defendants contended that plaintiffs had actual knowledge through the annual fee disclosures made available to Plan participants beginning in 2012. Plaintiffs argued that defendants' disclosures did not inform Plaintiffs, but rather, they had been harmed by a failure to adequately monitor and manage Plan investments and fees. Plaintiffs alleged that defendants chose and maintained imprudent investments with excessive fees; the disclosure of fees alone does not reveal defendants' selection process or the evaluation they undertook to choose those investments or to choose the record-keepers. The court concluded that it is possible that further development of the record will reveal that Plaintiffs had actual knowledge of these alleged breaches prior to filing; however, at this point, the Court could not dismiss this particular count based on the three-year statute of limitations.

* **Stolarik v. N.Y. Times Co., 323 F. Supp. 3d 523, 2018 Empl. Benefits Cas. 317, 730 (S.D.N.Y. 2018).** The court held that the adjustable pension plan trustees failed to establish that a freelance newspaper photographer’s claim for benefits was time-barred; although the photographer was made aware that he was classified as an independent contractor, and therefore, ineligible for benefits at the time he signed the freelance agreement, the repudiation of benefits occurred approximately nine years prior to the creation of the plan. The court explained that a cause of action accrues upon a clear repudiation by the plan that is known, or should be known, to the plaintiff, regardless of whether the plaintiff has filed a formal application for benefits.

University fee case, plaintiffs contending that defendants committed the Plan to an imprudent arrangement in which certain investments had to be included and could not be removed from the Plan, even if they were no longer prudent investments, and in which the Plan was prevented from using alternative record-keepers who could provide superior services at a lower cost.

Defendants argued this claim is barred by the six-year statute of limitations under ERISA.

Court held that to the extent Plaintiffs are challenging the initial commitment of the Plan to the TIAA–CREF arrangement, that claim is time-barred, because that initial commitment occurred at the latest in 2009, more than six years from the date the complaint was filed.

Any claim based upon the initial commitment to this specific alleged “imprudent arrangement” was barred by the six-year statute of limitations.

* Action brought by healthcare plan subscribers and fiduciary against the pharmacy benefits manager and health benefits company alleging that the agreement between the manager and the company unlawfully allowed for inflation of prescription drug prices

* District court held not time-barred.

* Although the agreement was originally executed more than six years before the complaint was filed, the agreement was renewed within the six-year limitations period.

* The renewal of a contract implicates a fiduciary’s duty under ERISA to review plan investments and eliminate imprudent ones, and the renewal of a contract that violates ERISA is itself a violation of ERISA. Therefore, a plaintiff may sue under ERISA for the renewal of a contract where the renewal took place within six years of the filing of the complaint even if it the original execution of the contract fell outside the statute of limitations.
* Leirer v. Proctor & Gamble Disability Benefit Plan, 910 F.3d 392 (8th Cir. 2018).

- In both of these cases, the Eighth Circuit Court of Appeals addressed a 1998 precedent on the applicability of the abuse of discretion standard of review for a plan administrator’s decision.
- In Woo v. Deluxe Corp., 144 F.3d 1157 (8th Cir. 1998), the Eighth Circuit previously held that the general abuse of discretion standard is not applicable when there is a “serious” procedural irregularity in the administrative process which “cause[s] a serious breach of the plan administrator’s fiduciary duty to [the participant].”
- In Boyd, the Court examined the Woo precedent for the first time since the U.S. Supreme Court “abrogated the ‘procedural irregularity’ component of the . . . sliding-scale approach” in Metro. Life Ins. v. Glenn, 554 U.S. 105 (2008).
- The Eighth Circuit, in both cases, dodged the question of whether de novo review was still available in light of Glenn, declining to decide the issue because plaintiffs had failed to demonstrate a “serious procedural irregularity” that would require the court to re-examine Woo’s holding.
**Appropriate Equitable Relief**

  - The Ninth Circuit held that the removal of a trustee was not within the realm of “appropriate equitable relief” designed to “redress [a] violation” of section 510 or to “enforce” section 510.
  - The District Court had issued a permanent injunction to remove trustee and prevent him from serving as a fiduciary.
  - Because the remedy was not targeted to serve as a correction of an ERISA 510 violation, it was not an appropriate remedy available to the Secretary under 502(a)(5).
Claim for Benefits or Breach of Fiduciary Duty?


* The Fifth Circuit reversed the district court’s dismissal of plaintiff’s § 502(a)(3) claim for breach of fiduciary duty based on defendants failure to provide plaintiff an SPD. The district court had dismissed plaintiff’s fiduciary breach claim because it believed it was duplicative of plaintiff’s claim for plan benefits.

* The Fifth Circuit explained that a court “[b]y looking at the underlying alleged injury [can] determine whether a given claim is duplicative of a claim that could have been brought under ERISA 502(a)(1)(B).”

* Applying that analysis, the Fifth Circuit found that plaintiff’s alleged injuries based on a deficient SPD were only remediable as a breach of fiduciary duty, as the plan itself did not provide for such benefits.
Exhaustion and Assignment Clauses

  * the court vacated and remanded a participant’s claim for benefits which was dismissed by the district court solely on the ground that the participant failed to plead exhaustion.
  * the court found that dismissal for lack of exhaustion was premature where there was evidence of participant’s attempts to resolve claims about his pension.
  * The court remanded, and suggested the district court may wish to conduct proceedings limited to the questions of whether the participant had exhausted his claim and if not, whether exhaustion would be futile.

* **Am. Orthopedic & Sports Med. v. Independence Blue Cross Blue Shield, 890 F.3d 445 (3d Cir. 2018).**
  * Following a participant’s assignment of benefits to the medical provider, the out of network submitted a claim to the plan (which paid at out of network rates). The plan contained an anti-assignment provision. After partial payment on the claim, the provider appealed and then brought suit, but the Third Circuit followed other Circuits and found that anti-assignment clauses in ERISA welfare plans are enforceable.
Supplemental Jurisdiction and Preemption

  * The lawsuit was initially filed in state court by mental health providers (who held assignments from plan participants) alleging violations of the Washington Mental Health Parity Act. The defendant-insurer removed, stating that this was preempted because it related to denials under ERISA plans.
  * The district court granted the insurer’s motion to dismiss based upon preemption. The court declined to exercise jurisdiction over remaining state law claims.
  * The Ninth Circuit reversed: the claims were not preempted, the district court lacked jurisdiction to dismiss, and claims should be remanded to the state court.
  * The claims asserted a violation of law that was independent of ERISA plans. The Ninth Circuit explained that Washington’s Mental Health Parity Act imposed duties on health insurers that did not require the interpretation of, or “piggyback” on, any specific rights provided under ERISA plans.

  * The Ninth Circuit held that ERISA does not preempt a Nevada state law that curtailed the ability of multiemployer plans to recover unpaid employer contributions.
  * The Nevada state law permitted general contractors to be held vicariously liable for the labor debts of their subcontractors, but limited those claims to a one year statute of limitations.
  * The Ninth found that the state law did not conflict with ERISA’s comprehensive regulatory framework. While ERISA provides a cause of action for delinquent contributions, the Nevada law regarding collections from general contractors was found to operate separately.