AFL-CIO Union Lawyers Alliance
2024 Advanced ERISA Seminar

Pension Litigation Update

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Segal

Agenda

1. **Withdrawal Liability Litigation**
2. **Actuarial Equivalence Litigation**
3. ***Yellow Corporation* Bankruptcy Litigation**
4. **Defined Contribution Plan Litigation**

Withdrawal Liability Litigation

As Soon As Practicable

Allied Painting & Decorating, Inc. v. Int'l Painters, 107 F.4th 190 (3d. Cir. 2024)

- Third Circuit concludes that the District Court properly vacated the Arbitrator's Award because sending the bill 12 years after the employer's withdrawal, the pension fund did not send the employer bill "as soon as practicable" pursuant to 29 U.S.C.S. § 1399(b)(1). As a result, the fund could not recover the claimed withdrawal liability.
- ERISA § 4219(b)(1), 29 U.S.C.S. § 1399(b)(1), requires prompt delivery of notice and payment demand as a predicate to suing; where the fund has not sent notice and demanded payment "as soon as practicable" after the employer's withdrawal, the fund has not satisfied its requirements under § 1399(b)(1).

Withdrawal Liability Litigation

Well-Plead Complaint

Bd. of Trs. of the Constr. Laborers Pension Trust v. MCEC, Inc., 2024 U.S. Dist. LEXIS 39716

- Court dismisses Fund Complaint after concluding that its complaint was not timely filed within 3 years of its knowledge of the employer's withdrawal
  - Plaintiff's complaint (filed in 2021) failed to cite factual authority supporting allegations that "[t]he Trustees determined in 2018, through an independent review of publicly available records, that Defendant had more likely than not resumed covered work without renewing its contribution obligation during calendar year 2015."
  - Plaintiff argued it lacked knowledge of the precise date Defendant resumed work because Defendant has refused to provide documentation that would allow the Trustees to establish the precise date. The court was unconvinced, stating that Plaintiff did not cite any legal authority to establish Defendant was obligated to provide Plaintiff with such documentation

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

Employees' Ret. Plan of Nat'l Educ. Ass'n v. Clark Cnty. Educ. Ass'n, 664 F. Supp. 3d 24, 39-41 (D.D.C. 2023)

- Relying on *Energy West* to invalidate a 5% interest rate that "reflected the return of 'low risk' fixed-income investments", even though "a majority of the Plan's assets were not invested in fixed income."
  - The court notes that *Energy West* does not "hold that an actuary's estimate must encompass the expected return of *all* of the plan's assets."

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

Nat'l Ret. Fund v. Domestic Linen Control Grp., No. 23-CV-5955 (AS), 2024 WL 3607316, at *1 (S.D.N.Y. July 31, 2024)

MPPAA requires that a plan utilize "actuarial assumptions and methods" that in combination "offer the actuary's best estimate of anticipated experience under the plan." 29 U.S.C. § 1393(a)(1).

- This Court agrees with every other court to consider the issue that the interest rates used for calculating withdrawal liability and minimum funding are not legally required to be identical.

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

Colorado Fire Sprinkler, Inc. v. Nat'l Automatic Sprinkler Indus. Pension Fund, No. 21-CV-02707, 2024 WL 1300271, at *2 (D. Colo. Mar. 26, 2024)

- Following ***Sofco Erectors, Inc. v. Trustees of Ohio Operating Engineers Pension Fund***, 15 F.4th 407 (6th Cir. 2021) the court found the use of the Segal Blend was improper under the circumstances and evidence in this case, but declined to apply *Energy West*'s holding that the interest rates used must be "sufficiently similar".

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

***Pension, Hospitalization & Benefit Plan of Elec. Indus. v. ConvergeOne Dedicated Servs., LLC*, No**. 23-CV-8938, 2024 WL 1676176, at *5 (S.D.N.Y. Apr. 16, 2024)

- Relying on *Sofco*, the court found the use of the Segal Blend was improper in this case "based on the plan's characteristics", concluding "the actuary violated ERISA by using an interest rate that the actuary acknowledged was not entirely based on the Pension Plan's expected return on assets."

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC, 92 F.4th 316 (DC Cir. 2024)

- M&K Employee Solutions, LLC - Alsip ("Alsip"), M&K Employee Solutions, LLC - Joliet ("Joliet"), and M&K Employee Solutions, LLC - Summit ("Summit") (collectively "M&K") and Ohio Magnetics, Inc. ("Ohio") were formerly contributing employers to the IAM National Pension Fund ("the Fund") and all withdrew during the 2018 plan year. The Fund assessed withdrawal liability for each entity based on actuarial assumptions by Cheiron, Inc. ("Cheiron"), an actuarial consulting firm.
- In November 2017, Cheiron, using a discount rate of 7.5%, valued the Fund's 2016 Plan Year UVBs at $448,099,164.
- On January 24, 2018, after a meeting with the Fund's Board of Trustees to review assumptions and methods used in making actuarial valuation calculations, Cheiron changed various methods and assumptions used to calculate withdrawal liability for employers withdrawing from the Fund during the 2018 Plan Year. Cheiron selected a discount rate assumption of 6.5%, a decrease from the previous 7.5%, and an administrative expense load of 4%.

Withdrawal Liability Litigation

Validity of Using Different Interest Rate Assumptions for Calculating Withdrawal Liability and Minimum Funding

Trs. of the IAM Nat'l Pension Fund v. M&K Emp. Sols., LLC, 92 F.4th 316 (DC Cir. 2024)

- The DC Circuit concluded that it would be contrary to 29 U.S.C. § 1393(a)(1)'s requirement that an actuary use its "best estimate" of the plan's anticipated experience as of the measurement date to require an actuary to determine what assumptions to use before the close of business on the measurement date. *See* 29 U.S.C. § 1393(a)(1).
- The DC Circuit expressly rejected the Second Circuit's decision in *National Retirement Fund on Behalf of Legacy Plan of National Retirement Fund v. Metz Culinary Management, Inc.*, 946 F.3d 146 (2d Cir. 2020), which provided, absent a change by a Fund's actuary before the Measurement Date, the existing assumptions and methods remain in effect.
- The DC Circuit upheld Cheiron's determination of the Fund's actuarial assumptions.
- A petition for cert is pending with the Supreme Court.

Actuarial Equivalence Litigation

Class Action Lawsuits Alleging Unreasonable Actuarial Assumptions

- More than 30 class actions filed since 2018 challenge “outdated” mortality assumptions
  - Plaintiffs allege the plans are using actuarial equivalence assumptions (interest rates and mortality tables) that are not reasonable because they are outdated
  - Plaintiffs allege their benefits were less than actuarially equivalent to a single life annuity, resulting in benefit underpayments
  - Plaintiffs allege both the use of such assumptions and the resulting underpayments violate ERISA
  - All of these cases were filed by the same handful of law firms
  - Claims relating to the actuarial equivalence of early retirement benefits do not appear to be consistently successful; focus seems to be shifting to QJSA and QPSA

Actuarial Equivalence Litigation

Class Action Lawsuits Alleging Unreasonable Actuarial Assumptions

- Single employer collectively bargained plan was named as codefendant in at least one case
  - *Brown v. UPS* (N.D. Ga.)
- June 2023: a multiemployer plan was sued under similar allegations
  - *Paieri v. Western Conference of Teamsters Pension Trust* (W.D. Wash)
  - Plaintiffs allege that the plan failed to provide joint and survivor annuities and preretirement survivor annuities that were actuarially equivalent to the single life annuity
  - Plaintiffs also made allegations related to changes in the suspension of benefits rules
  - Motion to dismiss denied
  - Court has not yet ruled on class certification
  - Trial is scheduled for November 12, 2024

Actuarial Equivalence Litigation

State of the Cases

Most cases pending in preliminary stages; no plaintiff yet successful on the merits

Status	# of cases	Comments
Ongoing – no activity or status unknown	3	
Ongoing – motion to dismiss pending	2	
Dismissed	**5**	**Some on procedural grounds, others on substantive grounds**
Ongoing – motion to dismiss denied	8	Some granted in part, denied in part
Class certification denied	3	
Class certification granted	4	
Settled	**12**	**Some settlements have been substantial**
Ongoing – motion for summary judgment pending	3	
Summary judgment in favor plan	**1**	***Belknap v. Partners Healthcare* (D. Mass.)**
Ongoing – in trial	**1**	***Cockerill v. Corteva* (E.D. Penn.)**

Actuarial Equivalence Litigation

State of the Cases

Several cases have resolved in favor of the plans on motions to dismiss and motions for summary judgment

- ERISA does not require that assumptions used to calculate annuities be reasonable and no requirement that plans regularly update their mortality tables. *Bellknap v. Partners Healthcare* (D. Mass.); *Reichert v. Kellogg* (E.D. Mich.); *Drummond v. Southern Company* (N.D. Ga.)
- Anti-forfeiture rule protects normal retirement benefit, not early retirement benefit. *Dubuske v. Pepsico* (S.D.N.Y.)
- Retirees failed to show that the allegedly unreasonable assumptions caused them injury *Eliason v. AT&T* (N.D. Cal.)
- Retirees failed to exhaust administrative remedies. *Brown v. UPS* (N.D. Ga.)
- Retirees' claims were barred by statute of limitations. *Knight v. IBM* (S.D.N.Y.)

Actuarial Equivalence Litigation

DOL Amicus Brief Filed in IBM case

DOL says fiduciary claim not time barred

- In *Knight v. IBM* (S.D.N.Y.), District Court dismissed the IBM Plan participants' claim that the use of the UP-1984 Mortality Table resulted in a violation of ERISA's fiduciary standards as having not been brought timely
- IBM Plan participants appeal to the Second Circuit Court of Appeals to overturn the dismissal
- DOL amicus brief supports IBM Plan participants, arguing:
  - District Court should have followed the U.S. Supreme Court decision in *Intel Corp. Investment Policy Committee v. Sulyma* (2020) which requires that actual knowledge requires proof of disclosure plus proof of awareness
  - Can be shown through deposition testimony, evidence action was taken in response to information, etc.
  - Because case was dismissed prior to discovery no proof of actual awareness of use of actuarial table was presented
- The DOL's amicus brief argues a procedural point and does not address the substantive claim that the Plan's use of the UP-1984 Mortality Table was unreasonable
- Courts may be reluctant to dismiss fiduciary claims as time barred at the pleading state such that those cases likely may progress to discovery

Yellow Corporation Bankruptcy Litigation

Bankruptcy Stay Blocks Arbitration

In re Yellow Corp., 2024 Bankr. LEXIS 745 (March 27, 2024)

- On or about July 28, 2023, Yellow ceased all covered operations resulting in a complete withdrawal from the Fund. Shortly thereafter, Yellow filed for Chapter 11 bankruptcy on August 7, 2023.
- Creditor multiemployer pension plans argued that MPPAA's statutory framework required arbitration of Yellow's objections to their claims.
- Pension funds' motions for relief from stay to compel arbitration were denied because the funds pointed to no authority for the court to compel the debtors to initiate an arbitration and MPPAA's arbitration provisions should be treated as creating a presumption in favor of granting stay relief to permit arbitration.

Yellow Corporation Bankruptcy Litigation

Court Upholds American Rescue Plan

***In re Yellow Corp.*,** Case No. 23-11069 (US Bankruptcy Ct., D. Delaware, Sept. 9, 2024)

- Under the American Rescue Plan Act Congress authorized the Pension Benefit Guaranty Corporation to provide billions of dollars in "special financial assistance" to financially troubled pension plans.
- The federal funds could be used only to "make benefit payments and pay plan expenses.
- A number of multiemployer pension plans filed proofs of claim for withdrawal liability, which total $7.8 billion.
- Debtors argued thar federal funds awarded to the plans under the American Rescue Plan Act should count as "plan assets" for the purposes of calculating the plans' "unfunded vested benefits" and thus for determining (and potentially reducing or eliminating) the debtors' withdrawal liability.
- PBGC promulgated the two regulations at issue here (among other regulations). The "Phase-In Regulation" directs plans to phase in the special financial assistance gradually, over a number of years, for purposes of the calculation of withdrawal liability. The "No-Receivables Regulation" restricts multiemployer plans from recognizing, as an asset, special financial assistance that they have been awarded before the funds are actually paid to the plan.
- The Court upheld the PBGC regulations and the SFA funds would not be used for purposes of calculating withdrawal liability.

Defined Contribution Plan Litigation

Increased Fee Litigation in the Wake of *Northwestern*

- In *Hughes v. Northwestern* (2022), the U.S. Supreme Court articulated fiduciaries' continuous duty to monitor plan investments; offering participants a diverse menu of options is not sufficient to avoid a breach
- Since then, hundreds of cases have been filed against plan sponsors alleging breaches of fiduciary duties based on:
  - Excessive administrative and recordkeeping fees
  - Offering overly expensive investment options or share classes
  - Offering underperforming funds
  - Failure to monitor investments and fees
  - Failure to disclose fees
  - Prohibited transactions, self-dealing, conflicts of interest

Defined Contribution Plan Litigation

Increased Fee Litigation in the Wake of *Northwestern*

- Some plan sponsors have been successful in getting the lawsuits dismissed, based on various grounds, including:
  - Claims were based on faulty performance comparisons
  - Complaint based on conclusory allegations; not enough facts to support plaintiffs' claims
  - Lack of standing because investments performed well or because plaintiffs did not invest in funds at issue
  - Higher than average does not mean the cost was excessive; plans are allowed to consider factors other than cost
  - Short-term performance does not indicate deficient decision making
  - Failure to exhaust the plan's internal appeals process

Defined Contribution Plan Litigation

Increased Fee Litigation in the Wake of *Northwestern*

- Some of the dismissals have been appealed to the Circuit Courts, with mixed results
  - Third, Fifth and Ninth Circuits - overturned dismissals and revived plaintiffs' cases
  - Sixth, Eighth and Tenth Circuits – upheld the dismissals
  - Seventh Circuit – upheld dismissal in *Albert v. Oshkosh* (7th Cir.) but allowed claims to proceed against Northwestern
    - Some district courts are following the reasoning of *Oshkosh* and finding that a simple price comparison without comparing services is insufficient to state a claim for fiduciary breach

Defined Contribution Plan Litigation

Increased Fee Litigation in the Wake of *Northwestern*

- Most courts have been reluctant to dismiss the allegations in the early states of litigation, allowing most claims to go forward
  - *McLachlan v International Union of Elevator Constructors* (E.D. Pa.): case against a multiemployer 401(k) fund alleging excessive recordkeeping fees, investment manager fees and target date fund fees survived the fund's motion to dismiss
  - Case settled for $5 million

Defined Contribution Plan Litigation

Increased Fee Litigation in the Wake of *Northwestern*

- Parties have negotiated settlements to these fee lawsuits for millions of dollars
  - Examples: DST Systems Inc., $125M; General Electric Co., $61M; Verizon, $30M; Takeda Pharmaceuticals, $22M; Advanced Diagnostic, $19M; New York Life, $19M
- A few cases have gone to trial, most ruling in the plans' favor
  - Following trials, courts found in favor of Prime Healthcare Services Inc., B Braun Medical Inc., Milliman Inc., Molina Healthcare Inc. and Wood Group US Holdings Inc.
  - However, in *Vellali v. Yale University* (D. Conn.), the jury held the university liable for letting its retirement plan charge excessive fees but then declined to award damages because the failure caused no harm; case has been appealed to the Second Circuit
- Plaintiffs' relative success following *Northwestern* continues to encourage additional lawsuits and increase plaintiffs' bargaining power in the settlement context

Defined Contribution Plan Litigation

Litigation Against BlackRock Target Date Funds

- In August 2022, a slew of complaints were filed by a single plaintiffs' law firm against 11 plans with investments in BlackRock target date funds, arguing that the fiduciaries breached their ERISA duties when they improperly considered only the funds' low fees and not their ability to generate return
  - The complaints are all very similar, and BlackRock has not been named as a defendant
  - This category of complaint comes after years of lawsuits alleging fiduciaries overpaid for fund administrative fees
- Most of the defendant plans have scored victories on motions to dismiss
  - Courts have dismissed proposed class actions against eight of the defendants
  - Plaintiffs initially appealed some of these dismissals, and then later dropped those appeals
  - A motion to dismiss is still pending from one of the defendants

Defined Contribution Plan Litigation

Litigation Against BlackRock Target Date Funds

- Two cases survived motions to dismiss and are moving forward – *Trauernicht v. Genworth Financial Inc.* (E.D. Va.) and *Kistler v. Stanley Black & Decker Inc.* (D. Conn.)
  - The courts in both cases found that the imprudence allegations were plausible, but surviving a motion to dismiss does not mean the plaintiffs will ultimately prevail
  - In *Genworth*, the court is allowing plaintiffs to present expert witness testimony regarding alleged underperformance of the funds and damages calculations
  - The plan is appealing certification of the fund class
  - These cases have caused renewed concern about litigation risk

Thank You

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