Emerging Trends in ERISA Litigation – Midyear Update 2023

October 24, 2023

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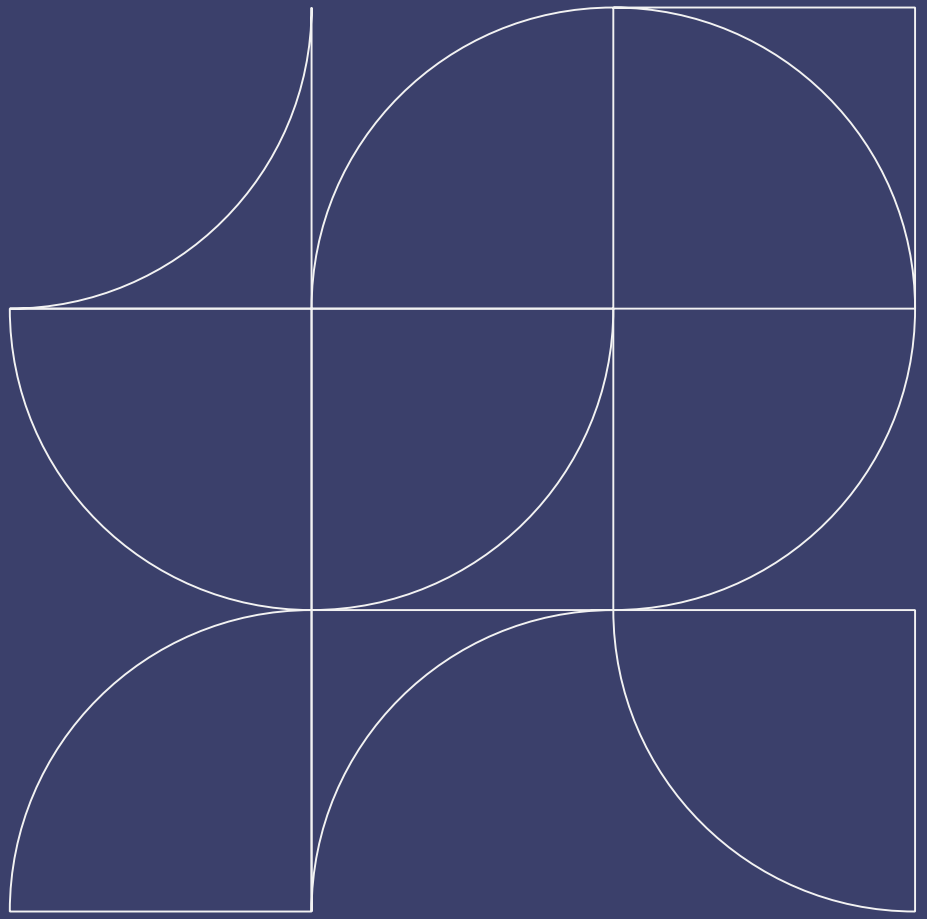
ERISA 401(k) Fee Litigation



Typical Claims

- *Hughes v. Nw. University,* 142 S. Ct. 737 (2022)
  - Participants in two 403(b) defined contribution plans alleged that they were charged excessive record-keeping fees and high investment option fees
  - The District Court granted a motion to dismiss and the decision was upheld by the 7th Circuit Court of Appeals
  - Both Courts relied in part on then-governing 7th Circuit law reviewing the prudence of plan investment lineups holistically, as well as relying on participants' choice in selecting investments

Post-Supreme Court Decision in Hughes

– *Hughes v. Nw. University,* 63 F.4th 615 (7th Cir. 2023)

- On remand from the Supreme Court, the 7th Circuit allowed two claims to proceed:
  - Recordkeeping
  - Share Class
- Recordkeeping:
  - The Court of Appeals held that Plaintiffs plausibly alleged the availability of a single-recordkeeper at a lower fee
  - This is a context-specific standard and requires some amount of precise pleading
  - *Dudenhoeffer* standard does not apply in this context (plaintiffs need not show that another recordkeeper would have offered a lower fee or that consolidation was actually available)
  - The pleading standard is plausibly alleging actions by fiduciary that were not within range of reasonable actions

Post-Supreme Court Decision in Hughes

– *Hughes v. Nw. University,* 63 F.4th 615 (7th Cir. 2023)

- Share Class
  - Plaintiffs need not show that comparator share class was actually available
  - They just need to show that it was plausibly available
  - Court thinks that this holding aligns it with other post-*Hughes* cases in other circuits

Post-Supreme Court Decision in Hughes

- *Matney v. Barrick Gold of N. Am.*, 80 F.4th 1136 (10th Cir. 2023)
  - Decided 9/6/23
  - Affirming dismissal of fiduciary breach claims based on recordkeeping fees and costs of investments
  - Key holdings:
    - To raise inference of imprudence through price disparity, a plaintiff has the burden to allege a "meaningful benchmark."
      - For investment fees: comparator similar investment strategies, similar investment objectives, or similar risk profiles to the plan's funds
      - For recordkeeping: services offered for the price charged.
      - Lack of an RFP is insufficient by itself to raise an inference of imprudence

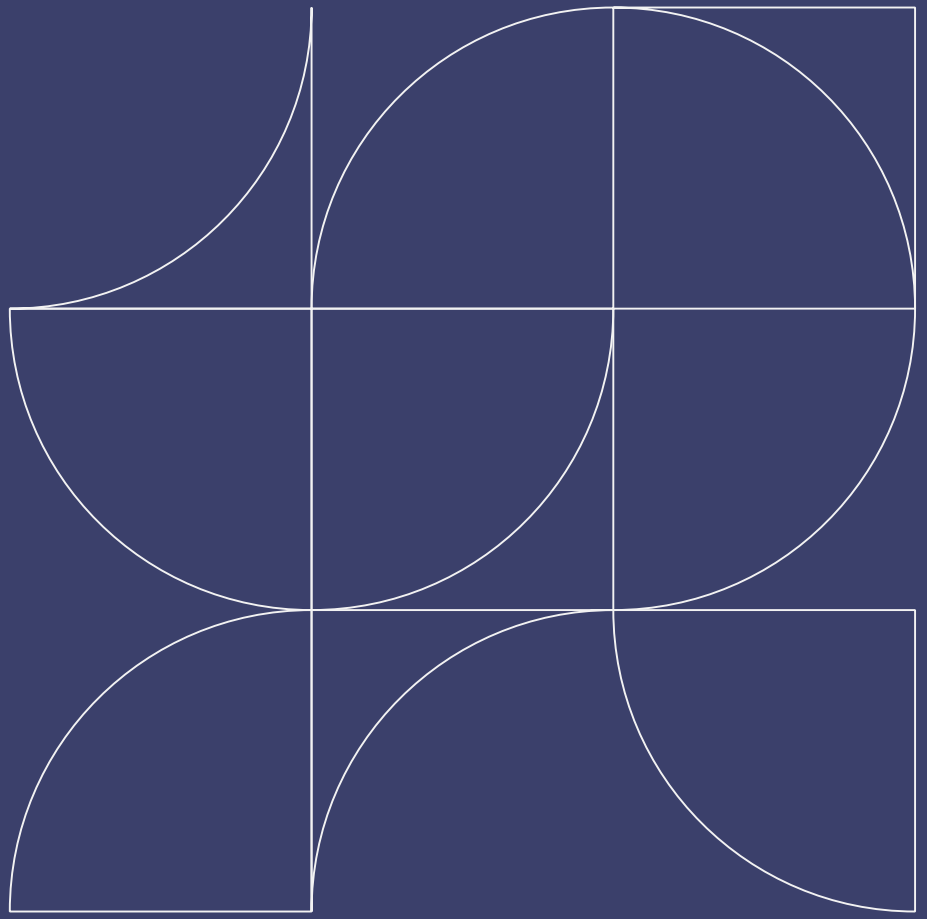
Hughes – Aftermath

- *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. 2022) (*Hughes* decision was limited only to the investment prudence point that it addressed directly, while leaving other precedent untouched)
- *Smith v. CommonSpirit Health*, 37 F. 4th 1160 (6th Cir. 2022) (affirming dismissal of fiduciary breach and fees claims, with only a brief reference to *Hughes*)
- *Forman v. TriHealth Inc.* 40 F. 4th 443 (6th Cir. 2022) (vacating dismissal as to claims attacking retail shares, noting that *Hughes* does not allow holistic evaluation of all investments to determine prudence)
- *Davis v. Salesforce.com*, 2022 WL 1055557 (9th Cir. Apr. 8, 2022) (unpublished) (reversing dismissal of fiduciary breach claims without reference to *Hughes*)
- *Kong v. Trader Joe's Co.*, 2022 WL 1125667 (9th Cir. Apr. 15, 2022) (unpublished) (reversing dismissal of fiduciary breach claims with passing reference to *Hughes*)
- *Matousek v. MidAmerican Energy Co.*, 51 F.4th 274 (8th Cir. 2022) (affirming dismissal of fiduciary breach claims with general citations to *Hughes*, and other consistent prior case law)

Key Takeaways Post *Hughes*

- 401(k) Plan fee litigation is not going away anytime soon
- Courts appear to be heeding the Supreme Court admonishment in *Hughes* that context matters for claims as to breach of fiduciary duty.
- *Hughes* makes motions to dismiss somewhat more difficult on balance
  - The facts alleged in the complaint (particularly regarding putative comparators) will likely play an even bigger role than they did pre-*Hughes*
  - Success at the motion-to-dismiss stage may hinge on how closely a court is willing to scrutinize alleged facts about a plan and putative comparators
  - How close of a comparison is needed may be one of the main areas of law to develop in this context.

Cross-Selling Claims



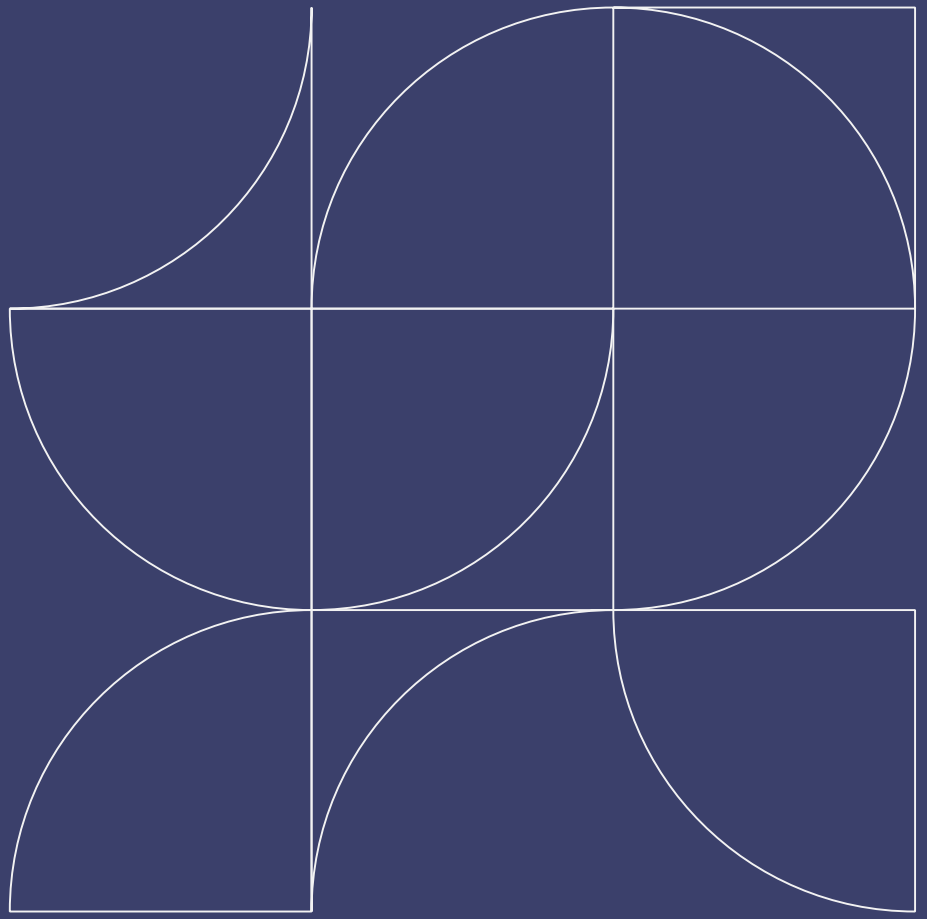
Cross-selling claims

- *Reetz v. Aon Hewitt Inv. Consulting, Inc*., 74 F.4th 171 (4th Cir. 2023):
  - Decision affirming bench trial win in favor of defendant on claims for breach of duty of prudence and duty of loyalty
  - Aon was retained to provide investment advice to the Lowe's plan and investment advisor sought to cross-sell other offerings
  - Key holding on cross-selling:
    - Aon was only a fiduciary for the purposes of providing investment advice
    - Cross-selling other services was not a fiduciary action because fiduciary status is not an all-or-nothing proposition, and the other services were not within the scope of Aon's fiduciary duties
  - Additionally, no breach of loyalty on investment advice because even if plan recommendations incidentally benefited the investment advisor, that did not motivate the recommendations
  - Dissent: cross-selling can breach duty of loyalty where it is done to enhance advisor's position and is thus not solely in the interest of the plan

Cross-selling claims

- Key takeaways:
  - Caution is in order when cross-selling
    - Even though the 4th Circuit majority affirmed the District Court, the boundaries between fiduciary and non-fiduciary conduct are not always clear
    - Important to note that required a bench trial to prevail rather than winning on summary judgment

Prohibited Transactions



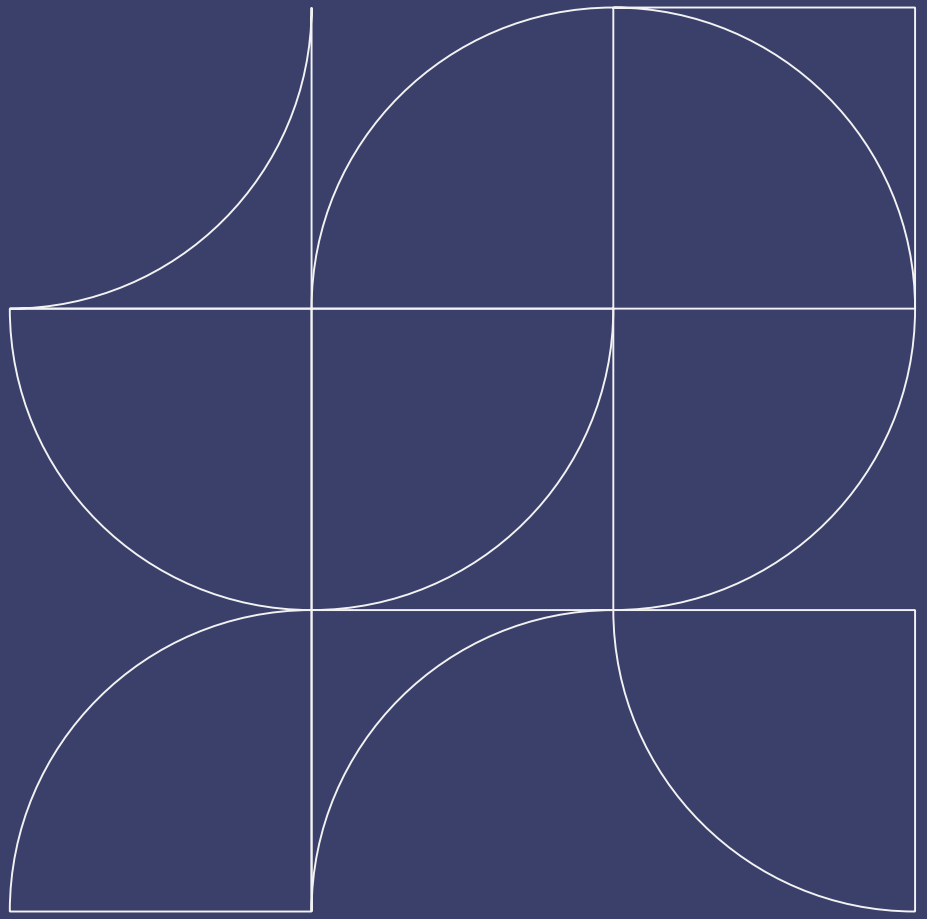
Prohibited Transactions

- *Bugielski v. AT&T Servs, Inc*., 76 F.4th 894 (9th Cir. 2023)
  - The 9th Circuit recently took a very broad view of prohibited transactions
    - The AT&T plan at issue has used the same recordkeeper since 2005
    - In the mid-2010s, AT&T and the recordkeeper amended their contract to allow the recordkeeper to receive compensation from "additional services from new vendors"
    - The Court of Appeals held that this was a prohibited transaction under 29 U.S.C. § 1106(a)(1)(c) (furnishing of services) because the recordkeeper was already a party in interest
    - It further held the record was not clear as to whether the recordkeeper received only "reasonable compensation"
      - The District Court only analyzed compensation received from the plan in granting summary judgment for the defendants
      - The Court of Appeals held that the compensation received from the vendors was also relevant to the analysis and remanded for that to occur

Prohibited Transactions

- *Bugielski v. AT&T Servs, Inc*., 76 F.4th 894 (9th Cir. 2023) – Key Takeaways
  - The holding here suggests that any contract entered into after a service provider is originally hired gives rise to almost a *per se* prohibited transaction claim
  - Because courts have held that the prohibited transaction exceptions in 29 U.S.C. § 1108 are affirmative defenses, the pleading standard to get past a motion to dismiss could be very low (simply alleging that an existing service provider renegotiated its contract
    - This holding is in some tension with the 9th Circuit's decision in *Santomenno v. Transamerica Life Ins. Co*., 883 F.3d 833 (9th Cir. 2018) (holding that negotiating a service provider contract is not a fiduciary action).
    - It also presents something of a catch-22 from the point of view of the plaintiff-side bar:
      - If there is no RFP/new contract for a service provider, there is a possible prudence claim
      - If there is a new contract, that's a possible prohibited transaction
  - A petition for rehearing en banc is currently pending

Cash Balance Litigation



Cash Balance Litigation

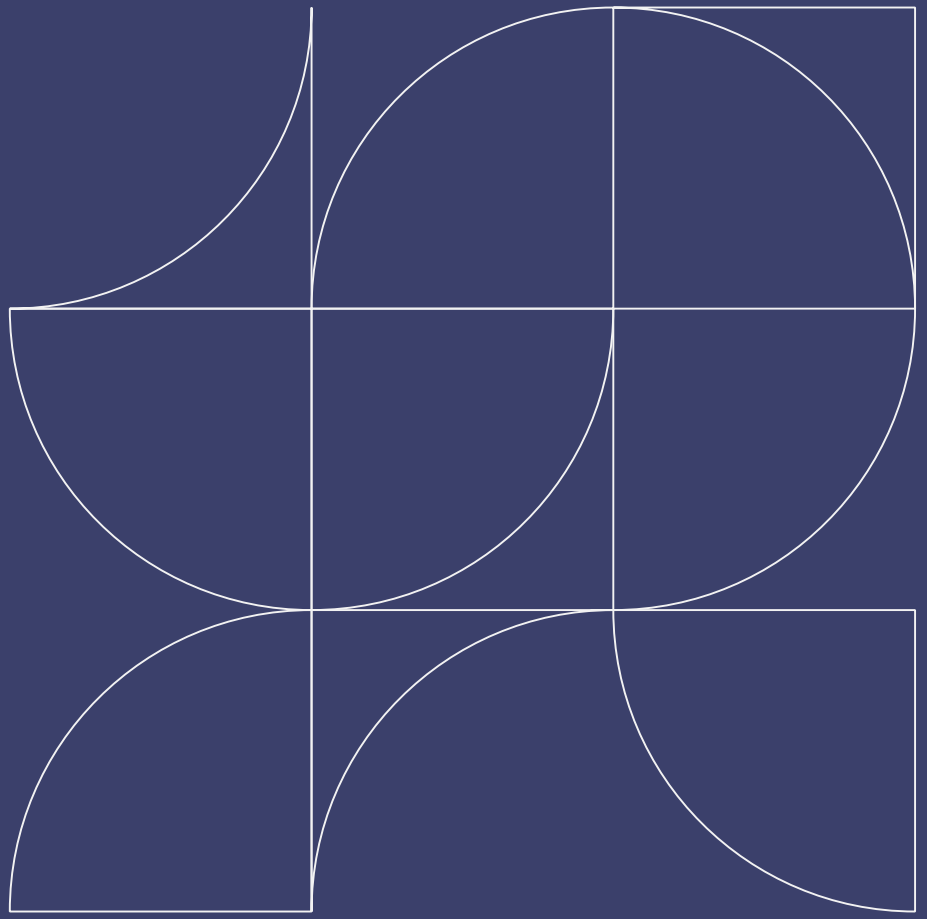
– *McCutcheon v. Colgate-Palmolive Co.*, 62 F.4th 674 (2d Cir. 2023)

– Decided Mar. 13, 2023, Plaintiff Rebecca McCutcheon brought a putative class action under ERISA alleging the plan sponsor wrongfully calculated and underpaid accrued retirement benefits

– Holdings:

- plan sponsor's calculation of residual annuities by subtracting the value of participant's actual lump-sum payment, converted into a hypothetical annuity payable at age 65, resulted in an impermissible forfeiture of benefits
- in calculating residual annuities, plan sponsor was required to use the Pension Benefit Guarantee Corporation (PBGC) interest rate as a discount rate, and the 20-year Treasury-bill interest rate plus 1% when calculating the value of a PRA annuity, and
- as a matter of first impression, plan sponsor's use of a pre-retirement mortality discount when calculating present value of lump-sum distributions violated ERISA and Internal Revenue Code

Article III Standing



Article III Standing

- *Chavez v. Plan Benefit Services, Inc.,* No. 22-50368, 2023 WL 5160393 (5th Cir. Aug. 11, 2023)
  - Fifth Circuit considered how to address addresses constitutional standing issue in context of determining whether to certify class.
    - Fifth Circuit noted there was a circuit split regarding how to address constitutional standing and the Rule 23 inquiry due to the notion that there cannot be a "disjuncture" between the harm that the plaintiff suffered and the relief she seeks.
      - Under the first approach, the "Class Certification Approach," courts determine that the class representative has standing to pursue her own claims, move on from the standing inquiry and approach the disjuncture as an issue of class certification.
        - this is followed by the Sixth Circuit, the First, Third, and Ninth

Article III Standing

- *Chavez v. Plan Benefit Services, Inc.*, No. 22-50368, 2023 WL 5160393 (5th Cir. Aug. 11, 2023)
  - Under the second, the "Standing Approach," courts find that the class representative lacks standing to pursue the class members' claims because she did not suffer their injuries
    - this is followed by the Second, and Eleventh Circuits.
  - Fifth Circuit noted the U.S. Supreme Court has not declared which approach is correct, and proceeded to perform both analyses, and found that neither approach bars the plaintiffs from Rule 23 consideration

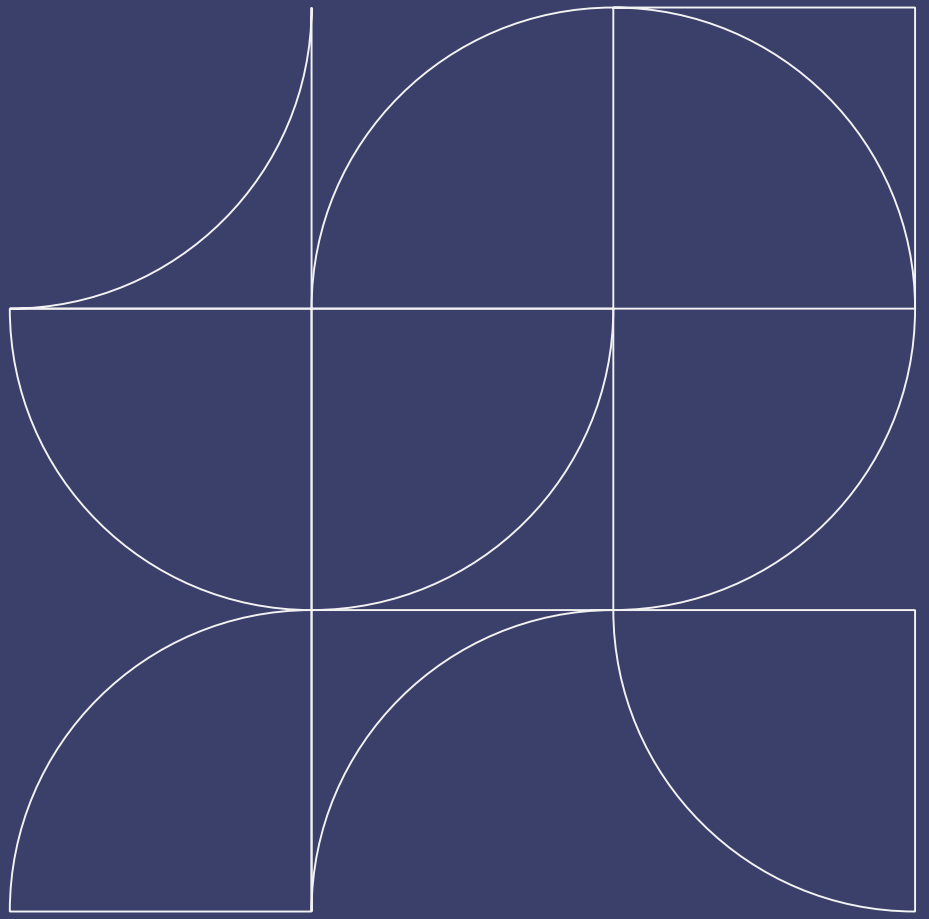
Article III Standing

- *Shafer v. Zimmerman Transfer, Inc.*, No. 22-2275, 2023 WL 3857343 (8th Cir. June 7, 2023)
  - The Eighth Circuit recently considered whether a plan participant has standing to sue a health plan's former third party administrator (TPA)
  - The TPA Benefit Plan Administrators of Eau Claire argued that the plaintiff lacked standing because the TPA was no longer the TPA of the at issue Plan, so the Plaintiff Shafer's injury—the denial of her benefits—was no longer redressable by the BPA.
  - The Eighth Circuit considered § 1132(e) and found that this section provides no jurisdictional limitation on who can be sued under § 1132.
  - The Court found that while a participant might not be able to enforce a money judgment against a former TPA, it does not mean she lacks standing. The Court thus held that Shafer had standing to sue the BPA.

Article III Standing

- *Winsor v. Sequoia Benefits & Ins. Servs., LLC*, No. 21-16992, 2023 WL 2397497 (9th Cir. Mar. 8, 2023)
  - The Ninth Circuit affirmed the district court's decision to dismiss the Plaintiff's putative class action for lack of Article III standing.
  - The Court noted it was the plaintiff's burden to establish each of the three elements of Article III Standing
    - injury in fact that is concrete, particularized, and actual or imminent;
    - that the injury was likely caused by the defendant; and
    - that the injury would likely be redressed by judicial relief.
  - The Ninth Circuit reasoned that the Plaintiffs did not support their claim that they experienced an out-of-pocket injury of paying higher contributions because of Defendant's actions because the Plaintiffs did not allege that RingCentral has changed or would change employee contribution rates based on Defendant's conduct or that the employee contribution rates were tied to overall premiums.

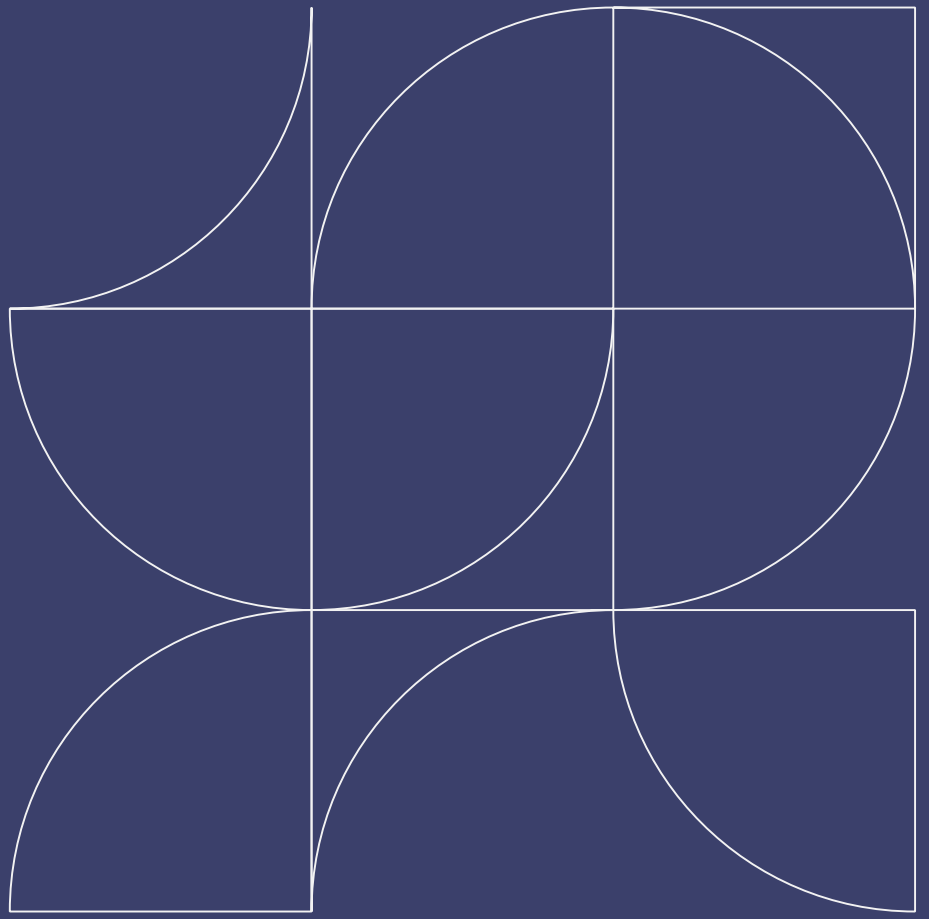
Administrative Exhaustion



Administrative Exhaustion

- *Yates v. Symetra Life Ins. Co*., No. 22-1093, 2023 WL 2174840 (8th Cir. Feb. 23, 2023)
  - In *Yates*, the Eighth Circuit addressed whether an ERISA plan participant was required to exhaust administrative remedies where the written Plan document does not provide for or describe any appeal review procedures.
  - The Court held that an ERISA plan participant was not required to exhaust administrative remedies before filing suit when the written plan documents were silent on any review process or administrative remedies. The Court found this was required in prior cases because those cases were premised on the remedies expressly prescribed by the written plan documents.
  - The Court based its decision on one the central goals of ERISA--for plan beneficiaries to learn their rights and obligations by examining their written plan documents.
  - The court also found that courts are to enforce the terms of written plan documents—the court should not impose a requirement on Yates that is not in the plan.
  - Finally, the court found its conclusion aligns with ERISA's implementation regulations.

Arbitration/Venue



Arbitration

- The question of the enforceability of arbitration clauses in ERISA plans continues to percolate through the courts of appeals.
- Courts have generally found these arbitration clauses to be valid, but even in courts that allow for arbitration, it may not be allowed in all situations.
- For example, courts have declined to enforce arbitration agreements that do not cover ERISA benefit claims.
- Multiple courts of appeals (including in 2023) have declined to enforce arbitration agreements that prevent plaintiffs from pursuing plan-wide relief.
- To the extent that an arbitration provision does not provide for severability, enforceability may be an all or nothing question.

Arbitration

- The Supreme Court recently (on October 9) declined to hear a case regarding a circuit split over whether an individual arbitration clause in a benefit plan document can be enforced to cut off class litigation.
- *Harrison v. Envision Mgmt. Holding, Inc. Bd. Of Directors*, 59 F.4th 1090 (10th Cir. Feb. 9, 2023)
  - Holding: breach of fiduciary duty claims are not subject to plan's mandatory arbitration provision because it prevented plan participants from "effectively vindicating" certain statutory rights under ERISA
  - Case arose from a 2017 ESOP
  - *Harrison* aligns with decisions from the Second, Third, Sixth, and Seventh, while the Ninth circuit allowed arbitration in a similar case in 2019
- *See also Henry v. Wilmington Trust NA et al*., 72 F.4th 499 (3d Cir. 2023) (class action waiver in ESOP Plan arbitration provision is unenforceable)

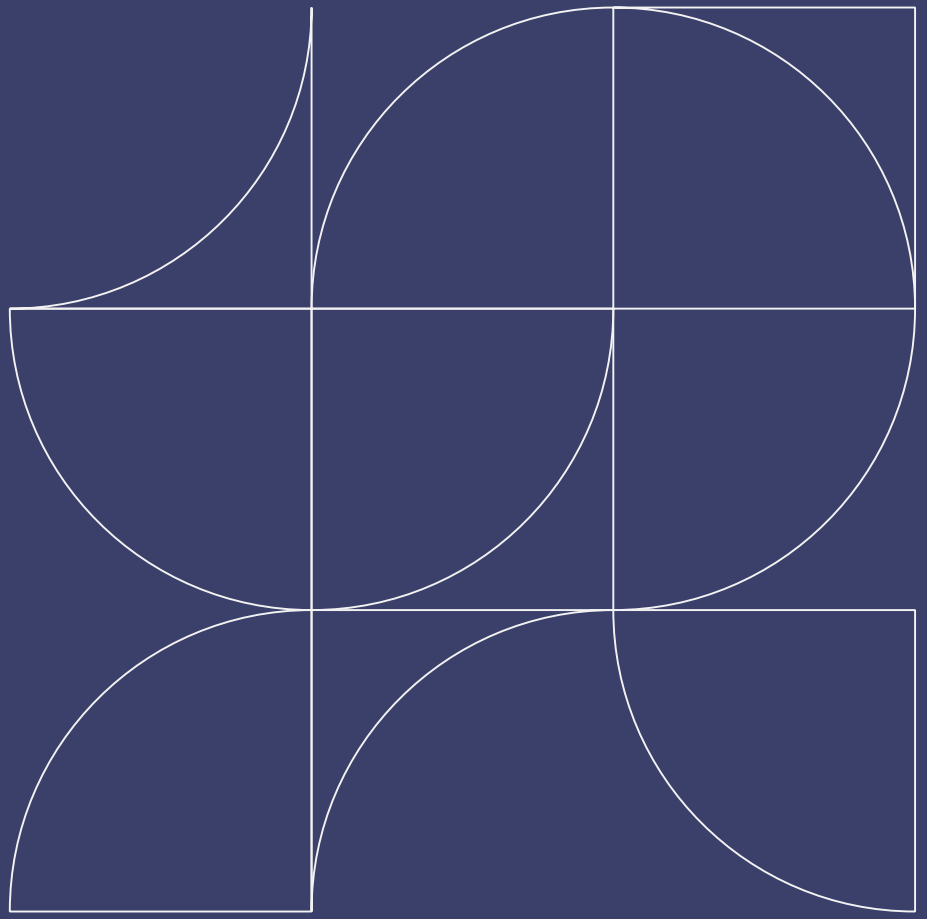
Selecting an ERISA Forum - Risks

- Even enforceable arbitration clauses are not without risk
  - Arbitration
    - Very limited review of arbitrator's decision
    - Under recent Supreme Court precedent, plans might be required to file even a motion to confirm an award in state court. *Hursh v. DST Systems, Inc.*, 54 F.4th 561 (8th Cir. 2022) (district court lacked jurisdiction to hear motion to confirm from participants in light of *Badgerow v. Walters*, 142 S. Ct. 1310, (2022)).
    - Arbitration clauses in service provider agreements may not cover claims against a plan
    - Supreme Court might invalidate these, but it recently denied certiorari when presented with the question

Venue

- Plan forum selection clauses are not without risk
  - Although generally allowed, chosen venue may have unfavorable case law
    - Example: Jury trial in breach of fiduciary duty cases
    - Most courts hold no jury trial right, but the 2d Cir. has case law (*Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), broadly interpreting *Great–West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002)) that certain courts have interpreted to allow a jury trial right when plan participants seek "make-whole" relief against a fiduciary. *E.g. Garthwait v. Eversource Energy Co*., No. 3:20-CV-00902 (JCH), 2022 WL 17484817, at *2 (D. Conn. Dec. 7, 2022)
    - This is true even though *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) held that such claims against fiduciaries are equitable claims for equitable relief.

Emergence of Jury Trials



Jury Trials in ERISA Matters

- The question of jury trials under ERISA has recently been percolating
- Background:
  - The vast majority of courts have held that ERISA cases do not allow for jury trials.
  - The statute does not provide one
  - ERISA is descended from equity, so there's no constitutional right
  - Exceptions:
    - As mentioned earlier, certain courts in the 2nd Circuit have followed circuit precedent interpreting pre-*Amara* case law to allow for jury trials where plaintiff seek monetary relief, including seeking to hold fiduciaries personally liable
    - If a Plaintiff raises ERISA and non-ERISA claims, the non-ERISA claims may have a jury trial right

Jury Trials in ERISA Matters

- Recent Developments
  - A 401(k) class action was tried to a jury in the spring
  - In July, the 3rd Circuit decided a mixed ERISA/non-ERISA case

- Key issue: overlap of jury/non-jury claims
  - *Kairys v. Southern Pines*, 75 F.4th 153 (3d Cir. 2023) – retaliation case under ERISA section 510 (no jury trial right), tried alongside other discrimination theories where the plaintiff was entitled to a jury
  - Jury found in favor of defendant on most theories, and reached an advisory verdict in favor of defendant on ERISA claim
  - The Court took further briefing on the ERISA claim and ultimately found for the plaintiff.
  - The Court of Appeals affirmed because the jury did not make any factual findings that would have foreclosed relief under ERISA.

Jury Trials in ERISA Matters

- Considerations for Plans and Fiduciaries
  - Jurisdiction matters
    - Consider whether the Plan has a forum selection clause
  - If there is a jury, understand how the jury's decisions will bind the Court
  - Explanation of complicated concepts can be a much higher stakes endeavor given the deference granted to jury verdicts

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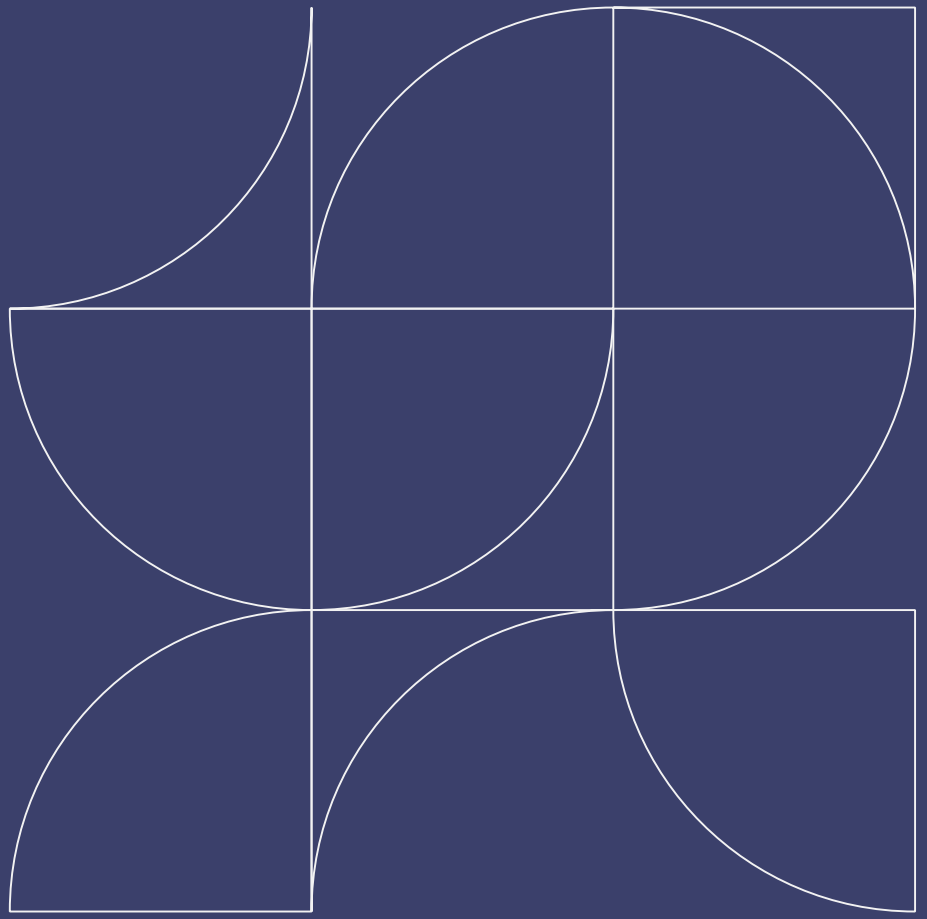
ERISA Health and Welfare Plan Litigation



ERISA Health and Welfare Plan Litigation

- *Wit v. United Behav. Health*, No. 20-17363, 2023 WL 5356640 (9th Cir. Aug. 22, 2023)
  - Third Time's a Charm
    - on March 22, 2022, the Ninth Circuit issued an unpublished memorandum in this matter. After the plaintiffs filed a petition for rehearing, with amicus support, on January 26, 2023, the Ninth Circuit issued a published opinion in *Wit v. United Behav. Health*, 58 F.4th 1080 (9th Cir. 2023), opinion vacated and superseded on reh'g, 2023 WL 5356640 (9th Cir. Aug. 22, 2023).
    - On August 22, 2023, the Ninth Circuit panel granted the Plaintiffs' motion for panel rehearing and vacated and replaced the January 26, 2023 opinion. The most recent *Wit* opinion considered whether the district court erred when it excused unnamed class members from demonstrating compliance with the ERISA plans' administrative exhaustion requirement.
    - In the January 26 opinion, the Ninth Circuit found that the district court erred when it excused unnamed class members from demonstrating compliance with plan's exhaustion requirements.

ERISA Health and Welfare Plan Litigation

- *Wit v. United Behav. Health*, No. 20-17363, 2023 WL 5356640 (9th Cir. Aug. 22, 2023)
  - Third Time's a Charm
    - the court explained that when an ERISA plan explicitly mandates exhaustion of administrative procedures before suit, with no exceptions, application of judicially created exhaustion exceptions would conflict with written terms of the plan.
    - In recent Wit opinion, the Ninth Circuit remanded for the district court to determine in the first instance the threshold issue of whether the exhaustion requirement applies to the fiduciary breach claim under Section 502(a)(3), and if so, whether the requirement was satisfied by the unnamed class members or should be excused.
    - The court noted that exhaustion is not required for statutory breach of fiduciary duty claims, but exhaustion is required if the statutory claim is "a disguised claim for benefits."
    - The court did not decide this issue but held that the class members were excused from exhausting their claims because the named plaintiffs exhausted their remedies which put United on notice of the class members' facial challenges and arguments.
    - The Ninth Circuit remanded to the district court to determine whether Plaintiffs' breach of fiduciary duty claim was a disguised claim for benefits subject to the exhaustion requirement.

ERISA Health and Welfare Plan Litigation – Mental Health Parity Act

- ERISA requires that most plans provide equivalent benefits for mental health as those provided for medical and surgical care 29 U.S.C. § 1185a
- 2022 saw continued litigation regarding both plan language that appears to treat mental health benefits differently, as well as benefit decisions that appear to do so in practice
- Welfare plan fiduciaries should be cognizant of mental health provisions of plans and ensure that these provisions are applied in an equivalent manner to provisions for medical and surgical care
- Mental Health Parity Act
  - requires group health plans and insurers to cover treatments for mental health and substance use disorders in a manner that is equitable to the plans' coverage of medical and surgical treatments

ERISA Health and Welfare Plan Litigation

- Recently, the DOL and HHS released their second report to Congress on plans' compliance with MHPAEA, as well as proposed regulations.
  - the proposed regulations would amend existing regulations under MHPAEA and would add additional requirements for group health plans and insurers that apply nonquantitative treatment limitations (NQTLs) to mental health and substance use disorder benefits.
    - the new proposed regulations expand on how to comply with each of the six content requirements—they highlight types of required data, records, certifications, and documentation that must be presented to substantiate the content included in the NQTL analysis
    - the proposed regulations also require a plan to collect and evaluate relevant outcomes data to determine if an NQTL for benefits is operationally more restrictive.
- Fee Litigation
  - recent press releases target certain companies; high reports by clients of "phishing" for clients on LinkedIn, etc.
  - expect claims similar to those made in fee litigation

thank you

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