ERISA Litigation - 2022 Retrospective and Anticipated 2023 Developments

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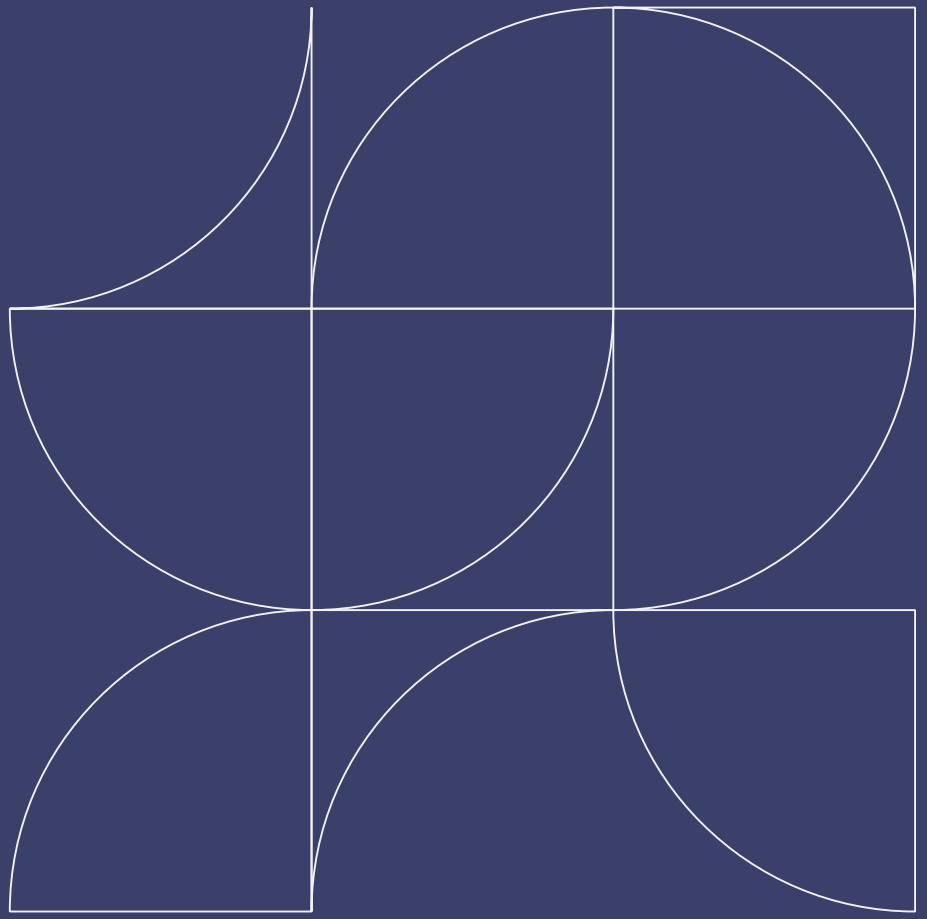
Defined Contribution Litigation After *Hughes*



Hughes – Background

- *Hughes,* 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

Hughes – Decision

- *Hughes et al. v. Northwestern University et al*, 142 S.Ct. 737 (2022).
  - The Supreme Court rejected the 7th Circuit standard
  - Instead, the Supreme Court held that a plan cannot rely on participants' ability to choose alternative investments to avoid claims that a particular investment is imprudent or has excessive fees. The Supreme Court vacated the 7th Circuit's decision in its entirety with instructions to reconsider under the proper standard.
  - Despite the total vacatur, the Supreme Court did not address all the issues at play in the vacated decision, including:
    - Recordkeeping fees (including revenue sharing)
    - Use of multiple recordkeepers
    - Prohibited transaction allegations
    - Attacks on prudent, but less popular investments

Hughes – Aftermath

- Because the Supreme Court vacated the 7th Circuit without discussing most issues in the case, lower courts still lack clear guidance on most issues
- To date, the Courts of Appeals deciding the issues appear to be taking the Supreme Court at its word, rather than reading the case more broadly, and have largely issued opinions in line with their own pre-*Hughes* precedent (both in favor of and against dismissal)

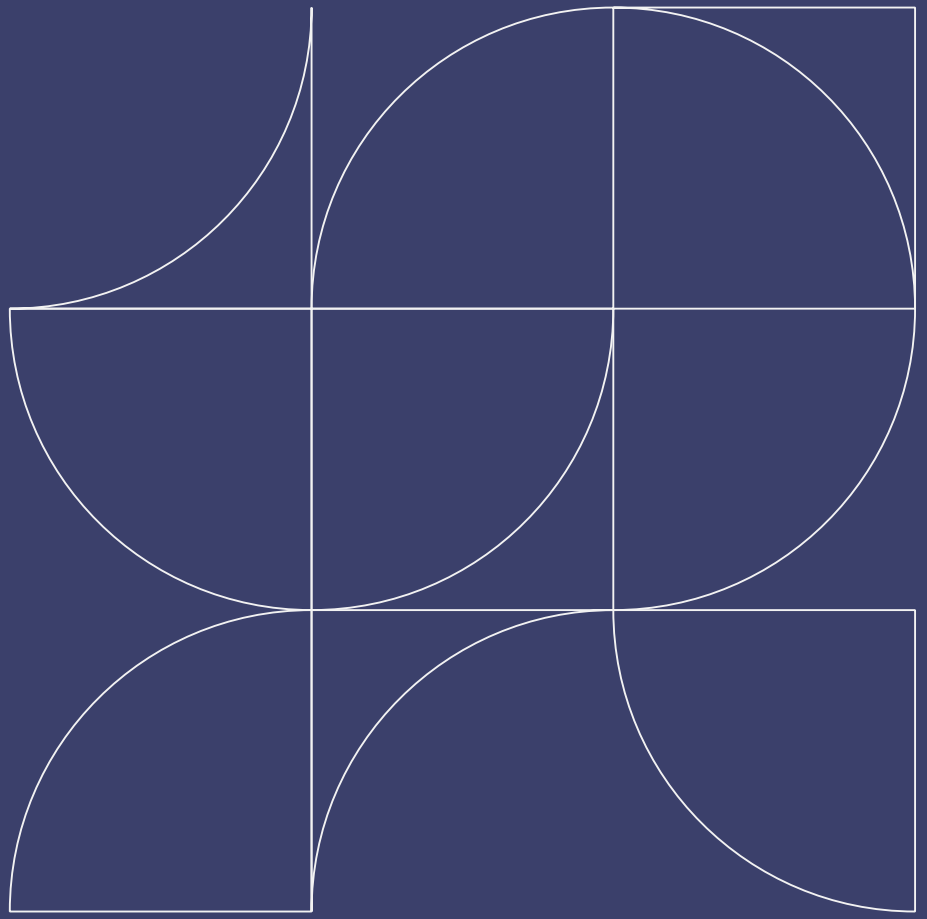
Hughes – Aftermath

- *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)

Hughes – Looking Forward

- Oral argument in *Divane* (as *Hughes* is known at the 7th Circuit) was held on November 29, 2022
- The argument was wide-ranging, both as to substantive standards for judging fiduciary conduct, as well as to open questions regarding pleading standards for fiduciary breach cases.
  - At one point Judge David Hamilton suggested a business judgment rule type standard
- Outcome of the case could have a significant impact on future claims alleging breaches of fiduciary duty with respect to defined contribution plans
- A return trip to the Supreme Court is not out of the question, though the Supreme Court has been reluctant to provide specific guidance in these cases (including largely punting here the last time around)

Ongoing Impact of *Dobbs*



Dobbs v. Jackson Women's Health Organization

- Holding:
- The Constitution does not grant a right to abortion;
- *Roe* and *Casey* are overruled; and
- Dobbs "returns" the "power to weigh these arguments [in favor and against abortion] to the people and their elected representatives."
- 4-1-3 Decision: Justice Alito wrote the majority opinion, with separate concurrences from Justices Thomas, Kavanaugh, and Roberts; and dissent by Justices Breyer, Sotomayor and Kagan

Dobbs v. Jackson Women's Health Organization

- New Standard: The "rational basis" review standard applies to laws regulating abortion.
- "A law regulating abortions like other health and welfare laws is entitled to a strong presumption of validity."
- Such laws "must be sustained if there is a rational basis on which the legislature could have thought that would serve legitimate state interests."
- A legitimate interest includes "respect for preservation of prenatal life at all stages of development."

Dobbs v. Jackson Women's Health Organization

- **Dissent:**
  - Argues the "rational basis" standard is "the lowest level of scrutiny known to the law" such that most laws concerning abortion will be held constitutional.
  - States that the *Dobbs* decision curtails "women's rights, and their status as free and equal citizens."
  - "And no one should be confident that this majority is done with its work. . . . All rights that have no history stretching back to the mid-19th century are insecure."
  - Criticizes as flippant and incorrect the majority's treatment of stare decisis.
  - Points out that the reasoning, that the ratifiers of the Fourteenth Amendment, did not understand reproductive rights, neglects to state that the ratifiers were all men.
  - Calls this decision a "loaded weapon" pointed at other rights.

Certain States Have Sought (or Will Seek) to Suppress Employer Support for Abortion Services

- Generally applicable aiding and abetting laws
  - Texas: “acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense” (Texas Penal Code 2-7.02);
  - All states have accessory liability laws covering people who assist criminal offenses
- Efforts to pass laws prohibiting employer payments for abortion–
  - Letter to Sidley Austin for “Texas House Freedom Caucus”:
    - “To the extent that Sidley is facilitating abortions performed in violation of article 4512.1, it is exposing itself and each of its partners to felony criminal prosecution and disbarment.”
    - Texas House Freedom Caucus intends legislation to:
    - “prohibit any employer in Texas from paying for elective abortions or reimbursing abortion-related expenses — regardless of where the abortion occurs, and regardless of the law in the jurisdiction where the abortion occurs.”

Dobbs – Potential Issues for Plan Abortion Coverage

- If plan currently covers abortion and related travel (or an employer wants to amend a plan to offer such coverage), employers should review potential risks, such as the state laws on the previous slide
- ERISA preemption may block certain state civil laws, but may not stretch broadly to eliminate risks in all circumstances

ERISA Preemption – Employer Travel Benefit

Preemption Applies	Preemption May Not Apply
Civil laws that “relate to” employee benefit plans	State insurance or banking laws
Regulations that force plans to adopt any particular scheme of substantive coverage	Regulations that merely increase costs or alter incentives
Criminal laws targeting employer benefit plans	Criminal laws of general applicability applied to plans or plan employees
Fringe benefit provided by ERISA-covered plan	Fringe benefit not subject to ERISA

ERISA Preemption – Open Issues

- Are criminal (or civil laws) referencing “insurance” preempted by ERISA?
- Does preemption apply to reimbursements in excess of IRS limits?
- Does venue selection clause ensure more favorable jurisdictional oversight?
- Consider application of “safe haven” laws (double-barreled defense)
  - No data sharing
  - No extradition
  - Creates right of action to counter-sue for damages and attorneys fees
  - Current states with some form of safe haven law:
    - California, Washington, Oregon, Minnesota, Massachusetts, Connecticut, District of Columbia, Delaware, Hawaii, Illinois, Maine, Maryland, Nevada, New Jersey, New York, Rhode Island, Vermont

Interstate Travel

- Interstate travel for abortion care will become a necessary and integral part of the post-Roe reality.
- No current state laws that specifically prohibit travel to another state for abortion care.
- No current state laws that specifically prohibit paying of expenses related to out-of-state abortion care.
- Attempts in several states to introduce legislation protecting the “unborn child” as a resident of the state
  - Georgia
  - Missouri
  - Oklahoma

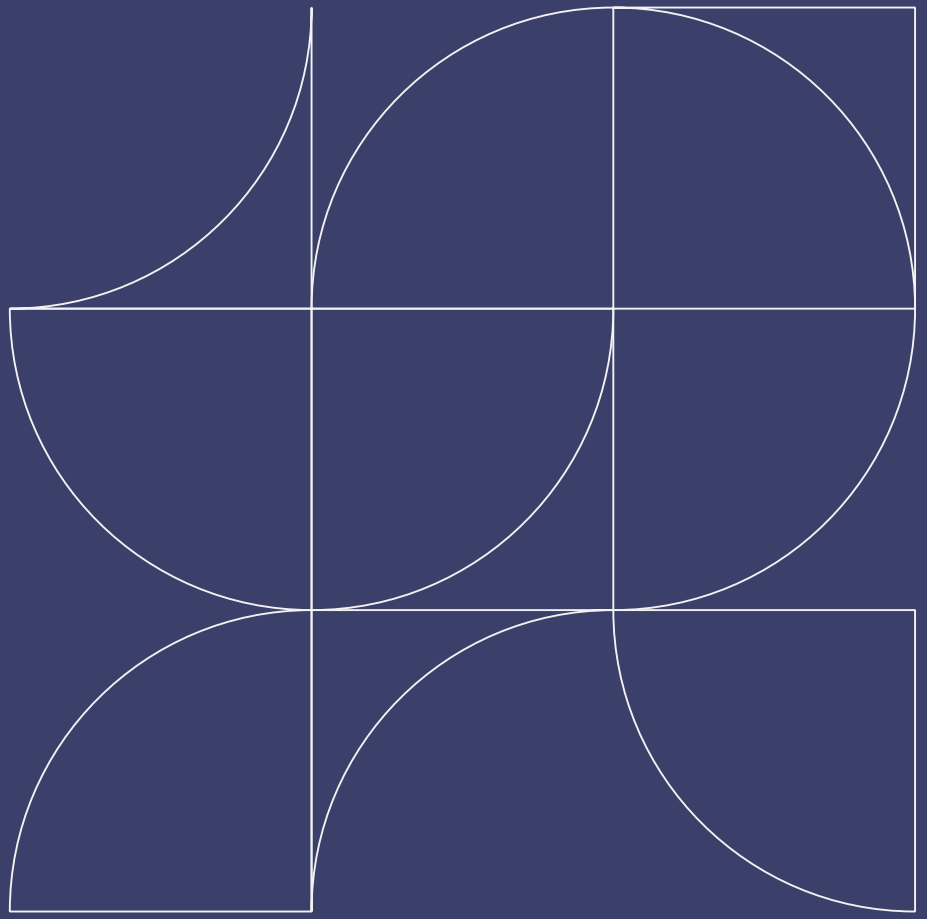
Federal Authority – Travel Restrictions

- *Bigelow v. Virginia* – 1975 Supreme Court decision reversing a criminal conviction of a publisher in Virginia.
  - Published advertisements in Virginia (where abortion was illegal) for abortion services in New York (where it was legal)
  - Supreme Court reversed conviction primarily on First Amendment grounds.
  - However, stated that Virginia could not "prevent its residents from traveling to New York to obtain [abortion] services, or as the State conceded [at oral argument], prosecute them for going there."
  - Court also held that a "State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State."
  - *State Farm Mut. Auto Ins. Co. Campbell*, 538 U.S. 408, 421 (2003) (Kennedy, J.) ("A state cannot punish a defendant for conduct that may have been lawful where it occurred.")
  - *BMW of North America v. Gore*, 517 U.S. 559, 571 (1996) (Stevens, J.) ("We think it follows from these principles of state sovereignty and comity that a State may not impose economic sanctions on violators of its laws with intent of changing the tortfeasors' lawful conduct in other states.")

State Authority – Travel Restrictions

- *Planned Parenthood of Kansas v. Nixon* – Missouri Supreme Court overturned a law that sought to prohibit individuals from "aiding" or "assisting" a minor's abortion without parental consent.
  - Preliminary issue involved the Commerce Clause and whether statute sought to only regulate activity in Missouri or beyond its borders.
  - Statute must be "narrowly construed" to apply to only in state conduct in order to avoid Commerce Clause application.
  - "Missouri simply does not have the authority to make lawful out-of-state conduct actionable [in Missouri], for its laws do not have extraterritorial effect."
  - Kavanaugh's concurrence in *Dobbs* echoed this holding: "For example, may a State bar a resident of that State from traveling to another State to obtain an abortion? In my view, the answer is no based on the constitutional right to travel."
  - For additional resources, see https://www.seyfarth.com/trends/reproductive-health-law.html

Selecting an ERISA Forum – Tips and Risks



Selecting an ERISA Forum

- ERISA (29 U.S.C. § 1132) allows claims in the following forums:
  - Where the plan is administered
  - Where the breach took place
  - Where a defendant resides or may be found
- Courts have allowed plans to include language limiting venue or requiring arbitration
  - Venue (in Federal Court)
    - *In re Becker*, 993 F.3d 731 (9th Cir. 2021); *In re Mathias*, 867 F.3d 727 (7th Cir. 2017); *Smith v. Aegon Companies Pension Plan*, 769 F.3d 922, 932 (6th Cir. 2014) (even outside the statutory venues)
    - *RJ v. Cigna Health & Life Ins. Co.*, No. 5:20-CV-02255-EJD, 2022 WL 4021890, at *10 (N.D. Cal. Sept. 2, 2022) (enforcing forum clause because transfer to Tennessee would not deny plaintiff day in court)

Selecting an ERISA Forum

- Plan arbitration clauses
  - Arbitration clauses are generally enforceable as to ERISA claims
    - *Smith v. Bd. of Dirs. of Triad Mfg., Inc*., 13 F.4th 613 (7th Cir. 2021); *Dorman v. Charles Schwab Corp.*, 934 F.3d 1107, 1110-11 (9th Cir. 2019); *Simon v. Pfizer Inc.*, 398 F.3d 765, 773 (6th Cir. 2005); *Williams v. Imhoff*, 203 F.3d 758, 767 (10th Cir. 2000); *Kramer v. Smith Barney*, 80 F.3d 1080, 1084 (5th Cir. 1996); *Pritzker v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 7 F.3d 1110, 1122 (3d Cir. 1993); *Bird v. Shearson Lehman/Am. Exp., Inc.*, 926 F.2d 116, 122 (2d Cir. 1991); *Arnulfo P. Sulit, Inc. v. Dean Witter Reynolds, Inc.*, 847 F.2d 475, 478–79 (8th Cir. 1988);
    - However, even in courts that allow for arbitration, it may not be allowed in all situations. *E.g. Hawkins v. Cintas Corp.*, 32 F.4th 625 (6th Cir. 2022) (no arbitration of 1132(a)(2) claims which were outside scope of agreement and plan had not agreed to arbitrate); *Triad*, 13 F.4th 613 (refusing to enforce a plan's arbitration provision that would have deprived the plaintiff of the ability to pursue plan-wide relief). *See also Cooper v. Ruane Cunnif & Goldfarb, Inc.*, 990 F.3d 173, 184-85 (2d Cir. 2021) (holding that an individual arbitration requirement cannot satisfy the representational nature of breach of fiduciary duty claims under ERISA).

Selecting an ERISA Forum

- Plan arbitration clauses
  - Recent oral argument at the 10th Circuit in *Harrison v. Envision Mgmt.* (No. 22-1098) January 17, 2023
    - Key portion of arbitration agreement: “Claimant may not seek or receive any remedy which has the purpose or effect of providing additional benefits or monetary or other relief to any Eligible Employee, Participant, or Beneficiary other than the Claimant”
      - For 1132(a)(2) claims, the remedy is “limited to (i) the alleged losses to the Claimant's individual Account … (ii) a prorated portion of any profits allegedly made by a fiduciary through the use of Plan assets … solely to Claimant's individual Account, and/or (iii) such other remedial or equitable relief as the arbitrator(s) deems proper so long as such remedial or equitable relief does not include or result in the provision of additional benefits or monetary relief to any [other person]
    - The district court invalidated the agreement as preventing vindication of rights. 593 F. Supp. 3d 1078 (D. Colo. 2022)

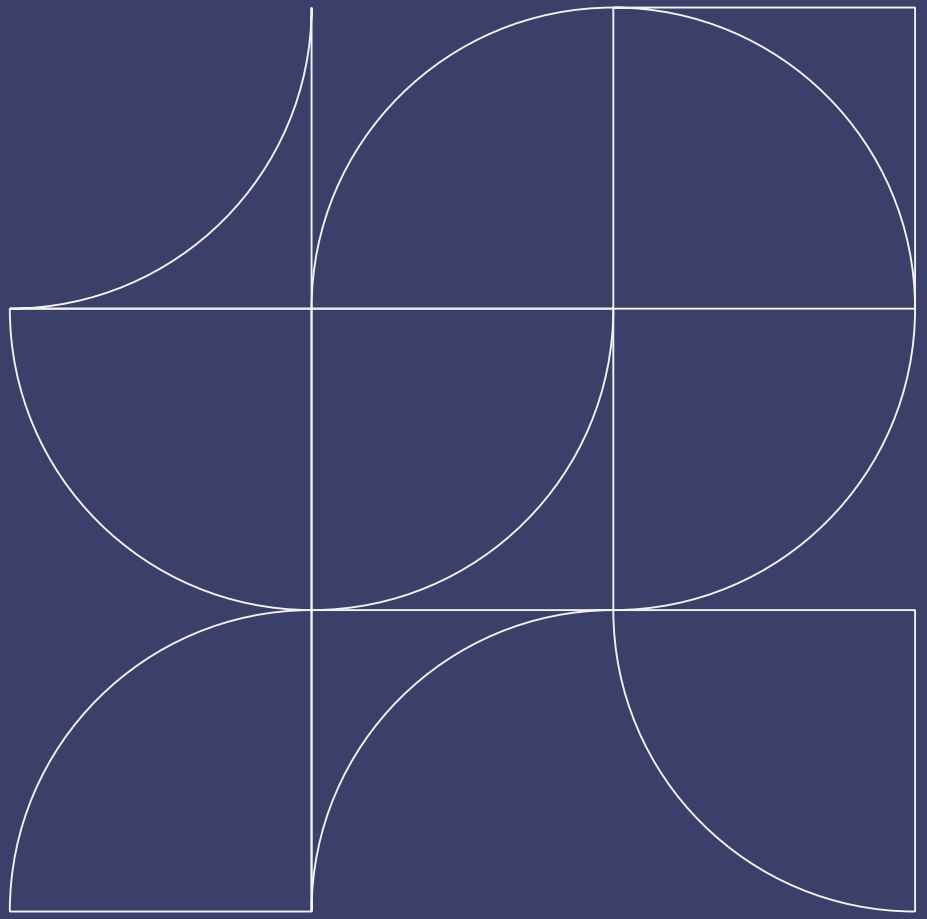
Selecting an ERISA Forum - Risks

- Plan venue clauses are not without risk
  - Venue
    - 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.

Selecting an ERISA Forum - Risks

- Plan venue 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

Importance of Clear Plan Records



Accuracy and Clarity of Plan Records

- Key thread running through benefit claim litigation
  - Plans run a significant risk of being tripped up by inaccurate or unclear plan records
  - These risks can persist for decades
  - Older errors (especially continuously compounding ones) can have the highest risk
    - Significant paper record against the plan
    - Potential reasonable and detrimental reliance by participants
  - Risks exist in both insured and self-insured plans

Accuracy and Clarity of Plan Records

- Examples
  - *Skelton v. Radisson Hotel Bloomington*, 33 F.4th 968, 971 (8th Cir. 2022)
    - Employer bought group life insurance policy and collected/remitted premiums in one check
    - An employee who was not eligible to purchase supplemental insurance was not only allowed to fill out enrollment forms, but premiums were deducted from her paycheck (even after she went out on disability leave)
    - Neither the insurance company nor the employer caught the errors and when the employee died, her husband's claim for insurance benefits was denied
    - The employer settled for $175,000 on the ERISA portion of the claim and the insurer was found liable for breach of fiduciary and had to pay $63,000 (the remainder of the would-be policy limits)

Accuracy and Clarity of Plan Records

- Examples
  - Plan or employer records that do not accurately show the employment status of a plan participant
    - Risks:
      - Improper delays in paying benefits
      - Erroneous payments to former participants not entitled to payment
  - Confusing plan documents that cross-reference outdated and/or contradictory terms for determining benefits
    - Risks:
      - Difficulty in determining the correct benefit outcome
      - Potential litigation and/or liability risk arising from this

Accuracy and Clarity of Plan Records

- Potential Avoidance Strategies
  - Regular audits of plan data, including crosschecking different databases
  - Care when converting paper files to digital files
  - Compiling a single plan restatement rather than reliance on disparate documents and cross-references
  - Careful attention to actions of recordkeepers, administrators, and insurance companies
- Remedies may incur upfront costs, but with significant savings down the line

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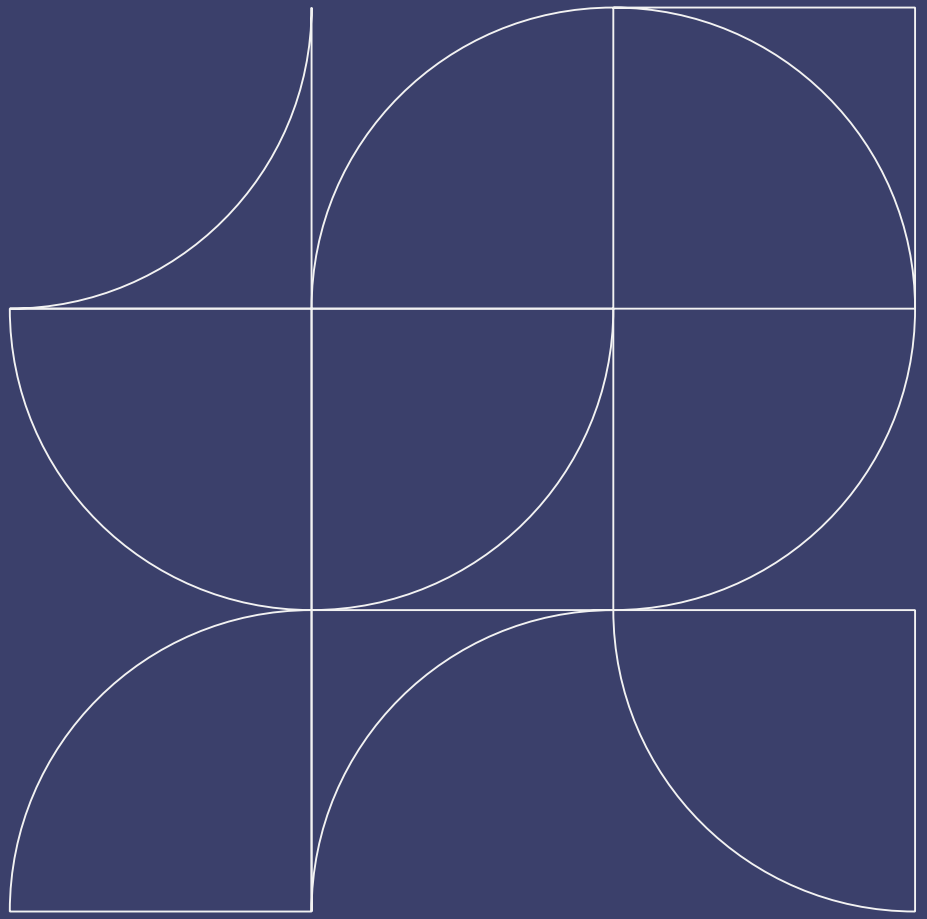
Withdrawal Liability – PBGC Rules



Calculating Withdrawal Liability

- ERISA provides that employers withdrawing from multiemployer pension plans must pay a share of the plan's unfunded vested benefits.
- In determining the proper interest rate for calculating the unfunded vested benefits, plans must use either:
  - Actuarial assumptions and methods that "offer the actuary's best estimate of anticipated experience under the plan" or
  - "Actuarial assumptions and methods set forth in the [PBGC's] regulations"
  - 29 U.S.C. § 1393(a)
- Despite the statutory language, certain plans have attempted to use the Pension Benefit Guarantee Corp.'s plan termination rate (often much lower than the rate used for expected plan growth).
  - This increases the amount of withdrawal liability due

Calculating Withdrawal Liability

– Key 2022 Developments

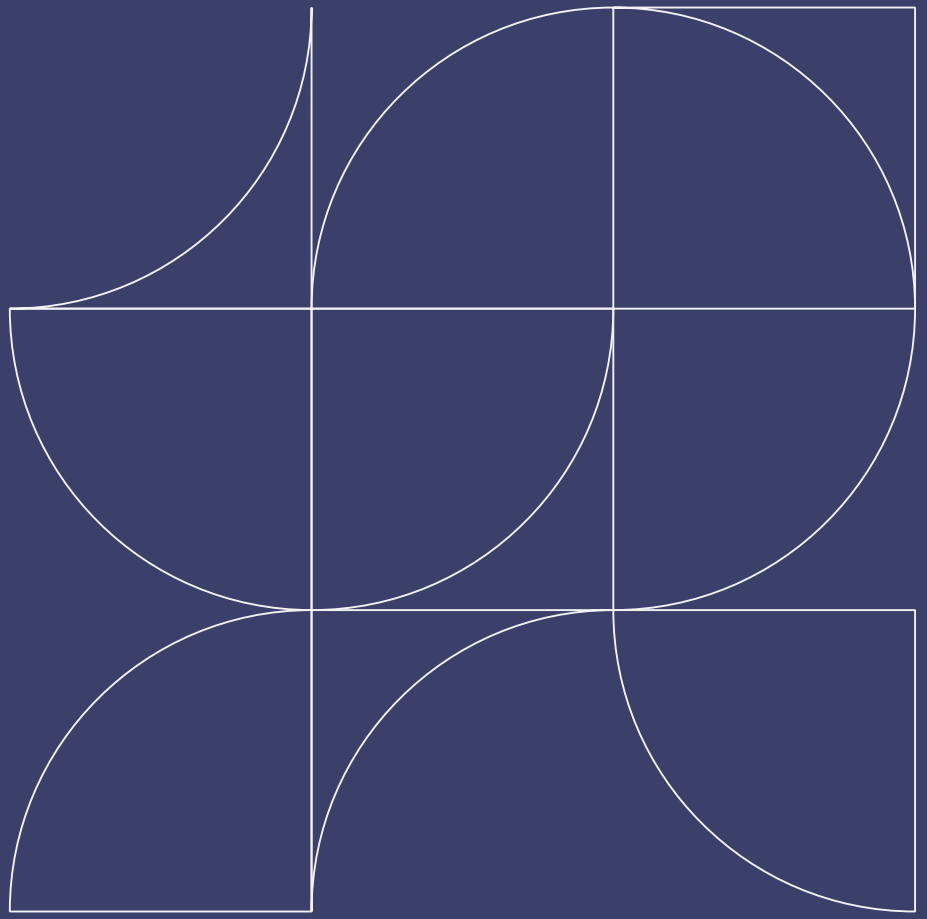
- Two Courts of Appeals reject plan use of the PBGC rate as inconsistent with the requirement that the withdrawal liability rate reflect the “best estimate” of plan experience.
- *United Mine Workers of Am. 1974 Pension Plan v. Energy W. Mining Co.*, 39 F.4th 730 (D.C. Cir. 2022) (using PBGC rate – under 3% – when plan funding assumption was 7.5% growth); *GCIU-Employer Retirement Fund v. MNG Enterprises, Inc*., 51 F.4th 1092 (9th Cir. 2022)

Calculating Withdrawal Liability

– Key 2022 Developments

- PBGC Proposed Regulation
  - Until now, there have been no PBGC regulations, so the “best estimate” subsection governed all withdrawal liability calculations
  - In October, the PBGC proposed (87 FR 62316) a new regulation, 29 C.F.R. Part 4213 that would allow plans to use the PBGC plan termination rates without respect to the best estimate language.
  - This could have a significant impact on the importance of case law rejecting actuarial reliance on the PBGC rate
- Final Rule for plans receiving American Rescue Plan Act payments
  - 29 C.F.R. § 4262.16(g) requires these plans to use the PBGC rate to determine withdrawal liability for at least 10 plan years

Other Key 2022 Developments



Other Key Developments – Mental Health Parity

- 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

Other Key Developments – Gender Affirming Care

- Ongoing litigation regarding states and Affordable Care Act gender provisions
  - *Fain v. Crouch*, No. CV 3:20-0740, 2022 WL 3051015, at *12 (S.D.W. Va. Aug. 2, 2022) (holding that ACA gender identity provisions applied to W. Va. Medicaid)
  - Oral argument tentatively calendared for week of March 7-10
- Litigation Risk to Plan Administrators
  - *C. P. by & through Pritchard v. Blue Cross Blue Shield of Illinois*, No. 3:20-CV-06145-RJB, 2022 WL 17788148, at *10 (W.D. Wash. Dec. 19, 2022) (granting summary judgment to a class of participants alleging that administrator violated the ACA when enforcing plan exclusions because ACA anti-discrimination directive trumped ERISA)
  - Broad power of ACA to alter otherwise appropriate Plan exclusions
- However, the ACA provisions prohibit discrimination; they don't require coverage for procedures that are generally excluded
  - *E.g.* medical necessity vs. cosmetic procedures

Other Key Developments – Other Notable Cases

- *Walsh v. Alight Sols. LLC*, 44 F.4th 716 (7th Cir. 2022) (holding that Department of Labor has broad investigative powers even over non-fiduciaries, even where recipient of subpoena asserted that it would need thousands of hours to comply)
- *Rozo v. Principal Life Ins. Co*., 48 F.4th 589 (8th Cir. 2022) (affirming judgment in favor of service provider that offered stable value fund because the provider "was not 'motivated by economic self-interest,' … and … did not either 'place its own interests ahead of those of the [participants],' … or 'over the plan's interest'" in setting rate of return)
- *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 590 (8th Cir. 2022) (affirming injunction blocking regulation as to non-discrimination on the basis of gender identity)
- *Haley v. Tchrs. Ins. & Annuity Ass'n of Am*., 54 F.4th 115 (2d Cir. 2022) (vacating class certification where district court determined that common legal questions predominated without considering impact of prohibited transaction exemptions on proof of putative class)

thank you

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