BNA Pension & Benefits Reporter™

May 13, 2014

Employer Stock

ERISA Attorneys Expect Dudenhoeffer Ruling to Be Light on Practical Guidance

BNA Snapshot

Employee Benefits Litigation Update Session at ABA Section of Taxation 2014 May Meeting

Key Topic: ERISA practitioners discuss presumption of prudence, church plan litigation and equitable remedies in ABA conference session.

Key Takeaway: U.S. Supreme Court's upcoming opinion in Dudenhoeffer is unlikely to include concrete, practical guidance for ERISA practitioners, attorneys say.

By Jacklyn Wille

May 9 — However the U.S. Supreme Court rules on the presumption of prudence protecting employer stock plan fiduciaries, practitioners shouldn't expect the court's opinion to provide much concrete guidance or a clear articulation of the standard adopted by the court, attorneys said during an American Bar Association Section of Taxation conference session.

Sara Pikofsky, a partner with Jones Day in Washington, said the court's anticipated opinion in *Fifth Third Bancorp v. Dudenhoeffer* was likely to follow the court's recent trend of issuing broad, open opinions lacking in concrete guidance for Employee Retirement Income Security Act attorneys and practitioners.

Pikofsky and other attorneys spoke at a May 9 session of the ABA Section of Taxation 2014 May Meeting titled Employee Benefits Litigation Update. The conference was held in Washington.

Dudenhoeffer Predictions

In the session, the panelists made a few predictions about what the Supreme Court may do when it issues its ruling in *Fifth Third Bancorp v. Dudenhoeffer*, U.S., No. 12-751, argued 4/2/14.

The *Dudenhoeffer* case asks the high court to weigh in on the presumption of prudence that many courts have used to protect fiduciaries of employer stock plans from liability when participants have brought lawsuits challenging large drops in stock value.

David A. Cohen of Evercore Trust Co. in Washington said that while the prudence standard articulated by the U.S. Court of Appeals for the Sixth Circuit in *Dudenhoeffer* is “much more liberal” than the standards used by other circuits, virtually every federal court to have considered the presumption has adopted it in some form.

Cohen declined to offer a prediction on the court's ultimate ruling. However, he said that the issue has divided practitioners, with the defense bar “fairly convinced” that the court will uphold the presumption in some form, while plaintiffs' attorneys think the court will strike down the presumption and adopt a general prudence standard.

The Supreme Court heard oral arguments in the *Dudenhoeffer* case on April 2 (64 PBD, 4/3/14; 41 BPR 790, 4/8/14).

One surprising facet of the arguments, Cohen said, was that “other than half a line of transcript,” the arguments included no mention of the major issue driving the circuit split—namely, whether the presumption can be applied at the motion-to-dismiss stage of litigation.

Pikofsky offered one prediction on the court's anticipated ruling: It will be “not particularly helpful and will lead to more debate,” in keeping with the trend running through the Supreme Court's recent ERISA decisions.

David A. Whaley, a partner with Dinsmore & Shohl LLP in Cincinnati, echoed Pikofsky's sentiments.

Whaley said he thought the case ultimately may be remanded back to the district court so that it could articulate the “magic words” that would provide guidance to practitioners.

“I think the most likely outcome is that we get more work,” said Susan Katz Hoffman, a shareholder with Littler Mendelson PC in Philadelphia.

DOL Attorney Discusses Presumption

In a later conference session devoted to employee stock ownership plans, Michael Schloss of the Department of Labor's Office of the Solicitor weighed in on the *Dudenhoeffer* case, as well.

Schloss, who emphasized that he was speaking on his own behalf and not on behalf of the department, said that *Dudenhoeffer* is the first time the Supreme Court has addressed the presumption of prudence and that practitioners “can't underestimate” the potential effects of the anticipated decision.

According to Schloss, the recent increase in litigation over the presumption has roots in the Enron Corp. scandal and the idea that fiduciaries shouldn't be encouraged to act in a way that perpetuates fraud.

Schloss said that fiduciaries who know that a stock is overvalued shouldn't be protected from liability if they continue to allow plan assets to be invested in that stock without taking corrective action.

Further, Schloss said that the whole structure of ESOPs and employer stock plans depends on the idea that participants are supposed to receive real value for their labor, and that this structure is undermined if fiduciaries allow plan assets to be invested in overvalued or worthless employer stock.

Church Plan Litigation

Panelists in the employee benefits litigation session also discussed a series of recent lawsuits challenging religiously affiliated employers' use of ERISA's church plan exemption for their retirement plans. The suits, filed by Cohen Milstein Sellers & Toll PLLC and Keller Rohrback LLP, make substantially identical claims against six different employers in six district courts.

Looking at the different district courts in which the suits have been filed, Pikofsky said that the goal of the litigation appeared to be either to get a “clean sweep” for the plaintiffs' position or to get a circuit split that ultimately could go before the Supreme Court.

Moreover, Pikofsky said that the nearly identical complaints have alleged violations of “basically every provision of ERISA.” However, because the complaints target large defined benefit pension plans that would be subject to funding requirements in the absence of the church plan exemption, each suit seeks damages of several hundreds of millions of dollars, Pikofsky said.

“It's not clear why nobody has done this before,” Pikofsky said.

These cases also highlight an “oddity” of the American economy, Whaley said. Specifically, Whaley called it odd that large health-care organizations that form such a significant part of the economy are tied to religious entities.

According to Pikofsky, two of the six cases have proceeded past the motion to dismiss stage, with judges in both cases agreeing that the plans in question didn't qualify as church plans exempt from ERISA (*Rollins v. Dignity Health*, 2013 BL 343403, 57 EBC 1346, N.D. Cal., No. C13-1450-TEH, 12/12/13 (244 PBD, 12/20/13; 40 BPR 2937, 12/31/13); *Kaplan v. Saint Peter's Healthcare Sys*., 2014 BL 88288D.N.J., No. 3:13-02941-MAS-TJB, 3/31/14 (64 PBD, 4/3/14; 41 BPR 793, 4/8/14)).

However, on the same day the panelists spoke, the U.S. District Court for the Eastern District of Michigan reached the opposite conclusion in granting a religiously affiliated employer's motion to dismiss in one of these cases (*Overall v. Ascension*, 2014 BL 129580, E.D. Mich., No. 2:13-cv-11396-AC-LJM, 5/9/14) (see related article in this issue).

In a move that Pikofsky called “very troubling” for the government, the judges in both *Rollins* and *Kaplan* declined to give

deference to private letter rulings from the Internal Revenue Service regarding the employers' reliance on the church plan exemption.

“This is going to be a long, twisted battle through different courts,” Pikofsky said.

Rochow and Disgorgement

Another case that caught the panelists' attention was the Sixth Circuit's recent ruling in *Rochow v. Life Ins. Co. of N. Am.*,2013 BL 336928, 737 F.3d 415, 57 EBC 1749, 6th Cir., No. 12-2074, 12/6/13 (235 PBD, 12/9/13; 40 BPR 2828, 12/10/13).

In *Rochow*, a split panel of Sixth Circuit judges affirmed a $3.8 million disgorgement award under ERISA's equitable remedies provision.

Although the Sixth Circuit has agreed to rehear the *Rochow* case before a full panel of judges and may ultimately reach a different conclusion in the case, Hoffman said the panel decision raised a number of interesting issues.

Specifically, Hoffman said that the unusually large size of the disgorgement award in *Rochow* depended in part on the fact that the insurance company held the disputed funds in the same account as its general operating funds. Hoffman questioned whether this factor might provide an incentive for insurers to hold any disputed funds in a separate account invested in bond funds, in order to reduce the amount of disgorgement a claimant could seek.

Hoffman also said that while the *Rochow* panel decision looked like a big win for participants, these kinds of big wins often have unintended consequences.

She analogized the *Rochow* case to disability benefit cases brought by plan participants suffering from fibromyalgia, chronic pain and other ailments for which little objective medical evidence exists. Hoffman said that because these types of cases have led to so many disputes and lawsuits, insurers have begun amending their plans to place time limits on benefits for these conditions.

“If you win too many of these things, you end up losing,” Hoffman said, noting that plan design is ultimately in the hands of plan sponsors and administrators.

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