# RECENT DEVELOPMENTS IN EMPLOYEE BENEFITS LAW

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## I. INTRODUCTION

This article surveys recent developments in employee benefits law from Fall 2018 through Fall 2019. In particular, this survey reviews six decisions issued by United States Circuit Courts of Appeals during this time frame. Last year, the Circuit Courts provided important analysis regarding various topics, including the "actual knowledge" standard under § 413(2), the pleading standard of employer "stock drop" lawsuits, cross-plan offsetting of overpayments, fee investment litigation, and mandatory arbitration provisions. This article surveys key cases from the last year on these topics.

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## II. SURVEY OF CASE LAW

### A. *Ninth Circuit*

#### 1. Actual Knowledge Standard

On November 28, 2018, in *Sulyma v. Intel Corp. Investment Policy Committee*, the United States Court of Appeals for the Ninth Circuit provided guidance regarding ERISA's "actual knowledge" standard for determining the limitations period under ERISA § 413(2), 29 U.S.C. § 1113(2).[1]

Plaintiff is a former employee and participant in Intel Corporation's retirement plans. He filed this lawsuit challenging certain investments in the plans. Defendants moved to dismiss the lawsuit as untimely. Under ERISA § 413(2), 29 U.S.C. § 1113(2), lawsuits commenced "three years after the earliest date on which the plaintiff had actual knowledge" of the fiduciary breach at issue are time-barred. The United States District Court for Northern District of California converted the motion to dismiss into a motion for summary judgment, and then concluded that the lawsuit was untimely based on the three-year "actual knowledge" limitations period under ERISA § 413(2), 29 U.S.C. § 1113(2).

On appeal, the United States Court of Appeals for the Ninth Circuit reversed and remanded. The Ninth Circuit began by noting that "ERISA does not define 'knowledge' or 'actual knowledge.'"[2] However, "when Congress first enacted ERISA in 1974, section 1113 contained two kinds of knowledge requirement, actual knowledge and constructive knowledge."[3] In 1987, the constructive knowledge requirement was repealed. After noting this congressional history, the Ninth Circuit next reviewed its prior interpretations of ERISA § 413, 29 U.S.C. § 1113. Upon reviewing its prior caselaw, the Ninth Circuit determined that "'actual knowledge of the breach' does not mean that a plaintiff has knowledge that the underlying action violated ERISA," but also "does not merely mean that a plaintiff has knowledge that the underlying action occurred."[4] "'Actual knowledge' 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 legal knowledge, which only a lawyer would normally possess."[5]

The Ninth Circuit sought to provide guidance on "the question of what this extra 'something' must entail," concluding that "the defendant must show that the plaintiff was actually aware of the nature of the alleged

1. 909 F.3d 1069 (9th Cr. 2018).
2. 909 F.3d 1069, 1073 (9th Cir. 2018).
3. *Id.*
4. *Id.* at 1075.
5. *Id.*

breach more than three years before the plaintiff's action is filed."[6] However, "[t]he exact knowledge required will . . . vary depending on the plaintiff's claim."[7] Toward that end, the Ninth Court noted that for a fiduciary breach claim, "the plaintiff must be aware that the defendant has acted and that those acts were imprudent."[8] But for a prohibited transaction claim, "knowledge of the transaction is all that is necessary."[9] The Ninth Circuit further emphasized that the three-year limitations period in ERISA § 413(2), 29 U.S.C. § 1113(2) requires "actual knowledge, rather than constructive knowledge."[10]

The Ninth Circuit next applied this actual knowledge standard to the facts of the case. The Ninth Circuit agreed that the evidence demonstrated that plaintiff "had sufficient information available to him to know about the allegedly imprudent investments" more than three years before the lawsuit.[11] However, because he filed a claim for breach of fiduciary duty, plaintiff "was required to have actual knowledge both that those investments occurred, and that they were imprudent."[12] Plaintiff had testified that he unaware of details regarding the investments and disclosure documents. The Ninth Circuit concluded that this testimony created a dispute of material fact that precluded summary judgment in favor of defendants. Accordingly, the Ninth Circuit reversed and remanded.

The Supreme Court granted defendants' petition for a writ of certiorari. The issue before the Supreme Court is:

> Whether the three-year limitations period in Section 413(2) of the Employee Retirement Income Security Act, which runs from "the earliest date on which the plaintiff had actual knowledge of the breach or violation," bars suit when all the relevant information was disclosed to the plaintiff by the defendants more than three years before the plaintiff filed the complaint, but the plaintiff chose not to read or could not recall having read the information.

On December 4, 2019, the Supreme Court heard oral argument in this case and a decision is forthcoming.

2. Mandatory Arbitration

On August 20, 2019, in *Dorman v. Charles Schwab Corp.*, the United States Court of Appeals for the Ninth Circuit addressed the question of whether ERISA claims can be subject to mandatory arbitration.[13] In reaching its

6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*
10. *Id.* at 1076.
11. *Id.* at 1077.
12. *Id.*
13. 923 F.3d 320 (3d Cir. 2019).

conclusion that the arbitration agreement in the Schwab Retirement Savings and Investment Plan was enforceable, the court overruled existing Ninth Circuit precedent.

In the decision, the panel first considered whether *Amaro v. Continental Can Co*.[14]—a 1984 decision—was still good law despite intervening Supreme Court case law.[15] In *Amaro*, the Ninth Circuit held that exhaustion of arbitration procedures for contractual grievances is not required prior to bringing a statutory claim under ERISA.[16] The panel then considered the Ninth Circuit's 2018 decision in *Munro v. University of Southern California*,[17] which noted that there was "considerable force" to the University of Southern California's position that *Amaro*, and the proposition that ERISA claims are inarbitrable as a matter of law, was "clearly irreconcilable" with intervening Supreme Court decisions.[18]

Unlike the panel in *Munro*, the Ninth Circuit in *Dorman* squarely addressed whether *Amaro* remained good law. In ultimately determining that *Amaro* should be overturned, the panel looked to *American Express Co. v. Italian Colors Restaurant*,[19] where the Supreme Court held that federal statutory claims are generally arbitrable and that arbitrators can competently interpret and apply federal statutes. Considering intervening Supreme Court case law, including American Express Co., the three-judge panel determined that *Amaro* has been effectively overruled and is no longer binding precedent.[20]

After overturning *Amaro*, the Ninth Circuit wrote a separate, unpublished decision holding that the district court erred by refusing to compel arbitration of the ERISA breach of fiduciary duty claims since they fall squarely within the ambit of the Plan.[21] In overturning the district court, the panel reasoned that the arbitration clause was enforceable because "the Plan did consent in the Plan document to arbitrate all ERISA claims" and reasoning that "[w]hen an individual participant agrees to arbitrate, he does not give up any substantive rights that belong to other plan participants."[22] The court reversed and remanded "with instructions for the district court to order arbitration of individual claims limited to seeking relief for the impaired value of the plan assets in the individual's own account resulting from the alleged fiduciary breaches."[23]

14. 724 F.2d 747 (9th Cir. 1984).
15. 934 F.3d 1107, 1109 (9th Cir. 2019).
16. *Id*. at 1111.
17. 896 F.3d 1088, 1094 (9th Cir. 2018), *cert. denied*, 139 S. Ct. 1239 (2019).
18. *Id*.
19. 570 U.S. 228 (2013).
20. *Dorman*, 934 F.3d at 1112.
21. Dorman v. Charles Schwab Corp., 780 F. App'x 510 (9th Cir. 2019).
22. *Id*. at 514.
23. *Id*.

B. *Second Circuit*

On December 10, 2018, in *Jander v. Retirement Plans Committee*, the United States Court of Appeals for the Second Circuit reversed and remanded the dismissal of an employer "stock drop" lawsuit filed against fiduciaries of IBM's employee stock option plan ("ESOP").[24]

Plaintiffs are participants in IBM's retirement plan who invested in the ESOP. Plaintiffs alleged that the IBM defendants breached their fiduciary duties by failing to disclose that IBM's stock was overvalued and by continuing to allow investments in IBM stock despite their alleged "knowledge of undisclosed troubles relating to IBM's microelectronics business."[25]

The United States District Court for the Southern District of New York "found lacking the allegations concerning the three alternatives available to the Plan defendants, determining that each might have caused more harm than good" under the Supreme Court's standard set forth in *Fifth Third Bancorp v. Dudenhoeffer*, 573 U.S. 409 (2014).[26] Accordingly, the district court dismissed the lawsuit.

On appeal, the United States Court of Appeals for the Second Circuit reversed and remanded. The Second Circuit began its analysis by summarizing the Supreme Court's *Dudenhoeffer* pleading standard for employer "stock drop" lawsuits. In *Dudenhoeffer*, the Supreme Court held that, to plead a duty of prudence claim against ESOP fiduciaries based on non-public information, plaintiffs must "plausibly allege an alternative action that the defendant could have taken that would have been consistent with the securities laws and that a prudent fiduciary in the same circumstances would not have viewed as more likely to harm the fund than to help it."[27] As acknowledged by the Second Circuit, "courts have struggled with how to apply the Court's decision."[28] In the present case, the parties offered competing interpretations of *Dudenhoeffer* and the Supreme Court's subsequent decision in *Amgen Inc. v. Harris*, 136 S. Ct. 758 (2016). Ultimately, the Second Circuit held that it was unnecessary to resolve the parties' competing interpretations "because we find that the plaintiffs have plausibly alleged an ERISA violation even under a more restrictive interpretation of recent Supreme Court rulings."[29]

Plaintiffs proposed just one alternative action on appeal: that the IBM fiduciaries should have made an "early corrective disclosure of the microelectronics division's impairment, conducted alongside the regular SEC

24. 910 F.3d 620 (2d Cir. 2018)
25. *Id.* at 623.
26. *Id.* at 624.
27. *Id.* at 626.
28. *Id.* at 627.
29. *Id.* at 622.

reporting process."[30] The Second Circuit held that several allegations in the complaint "plausibly establish that a prudent fiduciary in the Plan defendants' position could not have concluded that corrective disclosure would do more harm than good."[31]

To start, plaintiffs alleged that defendants "knew that IBM stock was artificially inflated through accounting violations" and that "disclosures could have been included within IBM's quarterly SEC filings and disclosed to the ESOP's beneficiaries at the same time in the Plan defendants' fiduciary capacity."[32] Plaintiffs also alleged that the failure to disclose caused "reputational damage" that increased with time.[33] Finally, plaintiffs alleged that "disclosure of the truth regarding IBM's microelectronics business was inevitable, because IBM was likely to sell the business and would be unable to hide its overvaluation from the public at that point."[34] In finding the foregoing allegations sufficient to state a plausible claim, the Second Circuit also noted that "early disclosure would be no more harmful than the inevitable stock drop that would occur following a later disclosure."[35]

The Supreme Court granted the IBM defendants' petition for a writ of certiorari. The issue before the Supreme Court is:

> Whether *Fifth Third Bancorp v. Dudenhoeffer's* "more harm than good" pleading standard can be satisfied by generalized allegations that the harm of an inevitable disclosure of an alleged fraud generally increases over time.[36]

On November 6, 2019, the Supreme Court heard oral argument in this case and a decision is forthcoming.

### C. *Eighth Circuit*

On January 15, 2019, in *Peterson v. UnitedHealth Group, Inc.*, the United States Court of Appeals for the Eighth Circuit affirmed partial summary judgment in favor of plaintiff out-of-network medical providers on the basis that the relevant plan documents did not authorize the plan administrator defendants to engage in cross-plan offsetting.[37]

In this case, out-of-network medical providers sued various UnitedHealth defendants for intentionally failing to pay for certain services provided to beneficiaries of UnitedHealth plans in order to offset overpayments to the same medical providers from other UnitedHealth plans (i.e., "cross-plan offsetting"). The United States District Court for the District

30. *Id.*at 628.
31. *Id.*
32. *Id.* at 628–29.
33. *Id.* at 629.
34. *Id.* at 630.
35. *Id.* at 631.
36. *See* Retirement Plans Committee of IBM v. Jander, 139 S. Ct. 2667 (2019).
37. 913 F.3d 769 (8th Cir. 2019).

of Minnesota entered partial summary judgment in favor of plaintiffs on the issue of liability. On appeal, the United States Court of Appeals for the Eighth Circuit affirmed.

At issue in this interlocutory appeal was whether the plan documents allowed the UnitedHealth defendants to engage in cross-plan offsetting to recover overpayments. To start, the Eighth Circuit noted that the plan documents granted UnitedHealth broad authority to interpret and implement the plan's terms. Consequently, the "ultimate question" was whether UnitedHealth's interpretation of the plan to allow cross-plan offsetting was "reasonable."[38]

In finding that UnitedHealth's interpretation of the plan was not reasonable, the Eighth Circuit noted two key points. First, the plan documents did not specifically authorize the cross-plan offsetting at issue. Instead, UnitedHealth sought to rely on "plan language granting it broad authority to administer the plan" in recouping the overpayments. The Eighth Circuit held that such an interpretation would "be akin to adopting a rule that anything not forbidden by the plan is permissible" and "undermine plan participants' and beneficiaries' ability to rely on plan documents to know what authority administrators do and do not have."[39]

Second, the Eighth Circuit note that "the practice of cross-plan offsetting is in some tension with the requirements of ERISA."[40] The Eighth Circuit declined to decide whether cross-plan offsetting actually violates ERISA, but found that "at the very least it approaches the line of what is permissible."[41] Specifically, the Eighth Circuit found "[c]ross-plan offsetting is in tension with [ERISA's] fiduciary dut[ies] because it arguably amounts to failing to pay a benefit owed to a beneficiary under one plan in order to recover money for the benefit of another plan."[42] Cross-plan offsetting may also constitute a transfer of money in violation of ERISA's "exclusive purpose" requirement.[43] Accordingly, the Eight Circuit held that, "[i]f such a practice was authorized by the plan documents, we would expect much clearer language to that effect."[44]

Given the above, the Eighth Circuit concluded that the UnitedHealth defendants' interpretation of the plan documents to authorize cross-plan offsetting was not reasonable. Accordingly, the Eighth Circuit affirmed the district court's grant of partial summary judgment to the plaintiffs.

38. *Id.* at 776.
39. *Id.*
40. *Id.*
41. *Id.*
42. *Id.* at 776–77.
43. *Id.* at 777.
44. *Id.* at 776.

UnitedHealth defendants sought Supreme Court review of the Eighth Circuit's decision. However, on October 21, 2019, the parties stipulated to the dismissal of the pending petition for a writ of certiorari to the Supreme Court.

### D. *Tenth Circuit*

On April 22, 2019, the United States Court of Appeals for the Tenth Circuit, in *Teets v. Great-West Life & Annuity Insurance Co.*,[45] affirmed the district court's grant of summary judgment which held that (1) Great-West was not an ERISA fiduciary and the claimant did not produce sufficient evidence to impose liability on the company as a non-fiduciary party in interest; (2) Great-West was not an ERISA fiduciary when it set the credited rate for the fund because plans could readily withdraw from the fund and as the company lacked control over a particular rate, it did not have control over setting its compensation; and (3) the claimant failed to show that the company was liable as a party interest because he did not show that the relief he sought was equitable.[46]

In this certified class action, the plaintiff alleged that Great-West, which manages an investment fund offered to employers as an investment option for their employees' retirement savings plan, breached a fiduciary duty to participants in the fund; or in the alternative, that Great-West was a non-fiduciary party in interest that benefitted from prohibited transactions with the plan's assets.[47] Specifically, the plaintiff accused Great-West of putting away millions of dollars over six years at participants' expense by setting an unfair rate for distributing the funds profits.[48]

The Tenth Circuit affirmed the district court's grant of summary judgment to Great-West on the basis that it was not a fiduciary and that the plaintiff had not demonstrated that Great-West was liable as a non-fiduciary. Specifically, the court concluded that "[b]ecause Mr. Teets has not provided evidence that contractual restrictions on withdrawal from the [Key Guaranteed Portfolio Fund ("KGPF")] actually constrained plans or participants, Great-West does not act as an ERISA fiduciary when it sets the KGPF's Credited Rate each quarter. As a result, it also lacks sufficient authority or control over its compensation to render it a fiduciary."[49] In short, the panel determined that money managers do not act as ERISA fiduciaries when they make decisions about reimbursement rates. The Supreme Court declined to grant the petition for a writ of certiorari filed in this case.

45. No. 18-1019, 2019 U.S. App. LEXIS 25671 (10th Cir. Apr. 22, 2019).
46. *Id.* at *1.
47. *Id.* at *33–34.
48. *Id.* at *10–11.
49. *Id.* at *59.

E. *Third Circuit*

On May 2, 2019, in *Sweda v. University of Pennsylvania*, the United States Court of Appeals for the Third Circuit overturned a district court's dismissal of a purported class action involving the University of Pennsylvania's retirement plan.[50] Plaintiffs are participants in the University's defined contribution plan and alleged that the plan fiduciaries breached their fiduciary duties by failing to properly manage the plan's investments.[51] The plaintiffs brought claims for breach of the duties of prudence and loyalty, claims based on alleged prohibited transactions under ERISA, and another claim alleging failure to monitor appointed fiduciaries.[52] The United States District Court for the Eastern District of Pennsylvania dismissed all claims for failing to state a claim for relief under the pleading standard set forth in *Bell Atlantic Corp. v. Twombly*[53] and the Third's Circuit's decision in *Renfro v. Unisys Corp*.[54]

On appeal, the Third Circuit affirmed the dismissal of the prohibited transaction claims, as it determined that an allegation that a fiduciary engaged in a prohibited transaction requires self-dealing or specific intent to benefit said fiduciary, rather than mere unreasonableness or recklessness, as was alleged here.[55] In doing so, the Third Circuit acknowledged a clear split with the Seventh Circuit, which previously held that ERISA Section 406(a) creates a *per se* rule against such transactions.[56]

Unlike the prohibited transaction claims, the Third Circuit reversed the district court's dismissal of the claims based on breach of the duties of prudence and loyalty. Following the Eighth Circuit, the panel found that *Twombly*'s antitrust pleading rule should not apply to fiduciary breach claims under ERISA.[57] The panel explained that requiring the plaintiffs to "rule out every possible" legal justification for the conduct in question was not consistent with the intent of ERISA to protect plan participants.[58] Applying this principle to the plaintiff's two fiduciary breach claims, the court concluded that the allegations stated a sufficient claim for relief.[59]

The panel was not unanimous. In her dissent, Senior Judge Roth noted that she would have dismissed all claims, noting the "unenviable position" fiduciaries of large plans face when sued, that any recovery by plan participants would not be meaningful, and that this decision is not distinguishable

50. 923 F.3d 320 (3d Cir. 2019).
51. *Id*. at 324.
52. *Id*. at 325.
53. 550 U.S. 544 (2007).
54. 671 F.3d 314 (2001).
55. 923 F.3d at 338.
56. *Id*. at 340.
57. *Id*. at 326.
58. *Id*.
59. *Id*. at 350.

from *Renfro*.[60] *Sweda* is one of numerous cases filed against similar university 403(b) plans, many of which continue to work their way through the courts.

## III. CONCLUSION

As evidenced by the above cases, the Circuit Courts issued a variety of important decisions across a range of ERISA topics in the last year. There were not any ERISA decisions from the Supreme Court during its 2018-2019 term. However, as detailed above, the Supreme Court has granted certiorari in *Sulyma v. Intel Corp. Investment Policy Committee* and *Jander v. Retirement Plans Committee of IBM*. In addition, the Supreme Court granted certiorari in *Thole v. U.S. Bank, National Association*. In *Thole*, the United States Court of Appeals for the Eighth Circuit held that plan participants in an overfunded pension plan did not have statutory standing to sue for breach of fiduciary duty or for a prohibited transaction under ERISA.[61] The Supreme Court granted certiorari on the following issues in *Thole*:

> (1) Whether an ERISA plan participant or beneficiary may seek injunctive relief against fiduciary misconduct under 29 U.S.C. § 1132(a)(3) without demonstrating individual financial loss or the imminent risk thereof; (2) whether an ERISA plan participant or beneficiary may seek restoration of plan losses caused by fiduciary breach under 29 U.S.C. § 1132(a)(2) without demonstrating individual financial loss or the imminent risk thereof; and (3) whether petitioners have demonstrated Article III standing.[62]

Given the important issues at stake, the forthcoming Supreme Court's opinions in these cases are likely to shape the landscape of ERISA litigation for many years to come.

60. *Id*. at 340 (Roth, J., dissenting).
61. 873 F.3d 617 (8th Cir. 2017).
62. *See* Thole v. U.S. Bank, N.A., 139 S. Ct. 2771 (June 28, 2019) (granting cert.).