of prudence, the plaintiff must plausibly allege an alternative action that the defendants could have taken consistent with securities laws and that a prudent fiduciary in the same circumstance would not have viewed as more likely to harm the fund than help it."

Takeaway—Investment advisers should be aware that outside of the Seventh Circuit, the extent to which the *Dudenhoeffer* pleading standard applies to private companies is an open issue. The Supreme Court's decision in the *IBM* case is unlikely to provide any additional guidance on this issue.

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Q & A

401(k) Plan Litigation Basics

Jeffrey A. Herman, Esq.

Hope for the best, but prepare for the worst. It is a good strategy for 401(k) plans. Litigation involving plan participants and service providers may be rare to nonexistent for most plans. But it can and does happen. And when it does, it is time consuming, expensive, and stressful. Make sure your company understands the basic rules that apply.

In this Q&A, I identify the basic standards that apply to 401(k) plan litigation, highlighting some of the important differences between litigation involving participants and beneficiaries on the one hand and litigation with a plan's service providers on the other. ***Jeffrey A. Herman*** *is an attorney with Greensfelder, Hemker & Gale, P.C. in St. Louis, Missouri. He can be reached at 314-241-9090 or* jherman@greensfelder.com.

Q What types of claims and lawsuits may be filed by plan participants and beneficiaries?

A Under Section 502(a) of the Employee Retirement Income Security Act of 1974 (ERISA) (29 U.S.C. § 1132(a)), plan participants and beneficiaries may sue to collect benefits, to enforce or declare other rights, to enjoin behavior that violates a plan or ERISA, for civil penalties (currently up to $110 per day for failing to provide plan documents after a written request), or for other appropriate equitable relief. If participants want to sue to collect benefits they believe they are entitled to, they must first exhaust the plan's administrative remedies, if the plan so requires. To be safe, every 401(k) plan should specifically include such an "exhaustion" requirement.

Available equitable relief might include reformation of the plan document (to fix a mistake or to be consistent with prior misrepresentations); a surcharge (monetary damages against a plan fiduciary); estoppel (holding the plan or a fiduciary to their promises or misrepresentations); and others. However, courts will generally not allow participants to assert a claim for equitable relief that is really a disguised claim for benefits. Some courts allow these types of claims to be pled in the alternative, but others do not.

All of these actions arise under ERISA itself. And because state law is generally preempted by ERISA, participants and beneficiaries do not have the ability to ask for relief authorized by state law, such as a state law breach of contract lawsuit or punitive damages.

Q What types of claims and lawsuits may be filed by or against a plan service provider?

A Generally, when a 401(k) plan has a contract with a service provider (*e.g.*, a third-party administrator or an investment manager), disputes under that agreement arise under state law (or possibly non-ERISA federal law), but not ERISA itself. For example, instead of an ERISA claim for benefits, a 401(k) plan would have to bring a standard breach of contract claim against a service provider. Claims for punitive damages and other remedies may also be available under state law (if not otherwise validly waived under the terms of the contract). But determining which state's laws apply may be difficult. Ideally, the contract should have a binding choice of law provision.

Service providers may be sued for an ERISA breach of fiduciary duty if the provider was acting in a fiduciary capacity. Under Section 409 of ERISA (29 U.S.C. § 1109), a plan fiduciary is personally liable to a plan for any losses caused by a breach of fiduciary duty. However, under Section 502(a)(2) of ERISA (29 U.S.C. § 1132(a)), lawsuits to recover a plan's losses must be brought by the Secretary of the U.S. Department of Labor, or by a participant, beneficiary, or fiduciary. The plan itself does not bring the lawsuit.

Q **What is the standard of review?**

A So long as a plan gives the plan administrator discretionary authority to make plan determinations, then the exercise of that discretion is subject to deferential review in benefit claims. Specifically, the administrator's plan interpretations and determinations are reviewed under the "abuse of discretion" standard. This means the administrator will be overruled only to the extent it acted unreasonably or capriciously. All ongoing 401(k) plans should already have the discretionary authority language (it would be shocking to find otherwise).

This standard is extremely favorable to 401(k) plans on claims for benefits. It is very difficult for participants and beneficiaries to overcome.

In contrast, the favorable standard of review that 401(k) plans may take advantage of in participant litigation is unavailable in litigation against a service provider (except to the extent it might involve the interpretation of the plan). There will be no presumption that the 401(k) plan administrator is correct. The parties will start off on more or less equal footing.

Q **What is the statute of limitations?**

A The amount of time a participant has to bring a lawsuit is somewhat complicated and depends on the type of claim. For breach of fiduciary duty lawsuits, Section 413 of ERISA (29 U.S.C. § 1113) requires any litigation to be filed by the earlier of either: (1) six years from the date of the breach or, if the breach involved an omission, the latest date the breach could have been cured; or (2) three years after the plaintiff obtained actual knowledge of the breach. But there is an important exception: if there was fraud or concealment of the breach, the participant will always have six years from the date the breach or violation was discovered.

For other claims from a participant or beneficiary, courts generally will apply reasonable limitation periods set forth in plan documents. If your 401(k) plan does not have a limitations period, strongly consider adding one. Otherwise, courts will borrow the corresponding statute of limitations from state law. For example, courts will apply a ten-year statute of limitations in Missouri to ERISA benefit claims, where the most analogous statute of limitations is ten years for breach of a written contract to pay money. For plans that operate in multiple states, however, it may get complicated determining which state's statute applies, which is another good reason to adopt a uniform limitations period in the plan document (and also to adopt a choice of law provision!).

In contrast, when it comes to litigation with service providers, other than claims that might be governed by non-ERISA federal law, state law statutes of limitations will apply. Again, the choice of law provision in the contract is important.

Q **Where may a lawsuit be filed?**

A Under Section 502(e) of ERISA (29 U.S.C. § 1132(e)), a lawsuit may be filed in any federal court in the district "where the plan is administered, where the breach took place, or where a defendant resides or may be found." For most types of lawsuits, the jurisdiction of federal courts is exclusive, meaning any claims that are inappropriately filed in state court may be removed to federal court. However, ERISA gives concurrent jurisdiction to state courts with respect to claims for benefits. So, technically, a participant may file his or her ERISA claim for benefits in any state court that may have personal jurisdiction over the parties.

But courts will enforce forum selection clauses contained in plan documents. Adding a forum selection clause to your 401(k) plan has the potential to reduce the burden of litigation on the plan. For example, suppose a retiree participating in a small Wyoming 401(k) plan moves to New York and successfully argues that a breach complained of took place in New York. The small Wyoming plan may be forced to litigate far away in one of the most expensive jurisdictions.

With respect to service providers, a forum selection clause in the contract will also likely be enforced by courts. That is why it is important for employers to try to limit the courts in which disputes may be brought. Federal courts may be an option if the suit includes an ERISA claim, or if the parties are diverse and the amount in controversy exceeds $75,000.

Q **Can 401(k) plans require arbitration?**

A Courts will enforce mandatory arbitration provisions contained in plan documents if both parties consented to arbitration and the dispute falls within the scope of the arbitration clause. And arbitration, depending on the circumstances (and the price of the arbitrator), may offer a superior, cost-effective alternative to federal litigation. But these types of provisions are subject to litigation and sometimes viewed unfavorably by employees. In addition, for expensive "bet the farm" litigation, some employers may prefer to be in federal court with several layers of appeals available rather than binding arbitration that is subject to limited review. An employer should carefully evaluate whether such a provision makes sense for its 401(k) plan.

Unlike plan documents, arbitration provisions in service provider contracts are much more common. Some provisions are mandatory, others are optional. Having a mandatory

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location in which any arbitration proceedings must be conducted is also common.

Q Can 401(k) plans bar class actions by participants and beneficiaries?

A A recent court decision upheld the ability of a plan provision to bar class-wide or collective lawsuits or arbitration proceedings. This forces participants and beneficiaries to bring their claims individually in arbitration. Plan sponsors may want to consider whether thousands of individual arbitrations are preferable to a class-action lawsuit.

Q Who pays the attorney's fees and costs?

A Section 502(g) of ERISA (29 U.S.C. § 1132(g)) includes a fee-shifting provision. It states that "the court in its discretion may allow a reasonable attorney's fee and costs of action to either party." In practice, courts rarely, if ever, award attorney's fees to a prevailing defendant in a lawsuit brought by a participant or beneficiary. The participants or beneficiaries, on the other hand, will typically obtain an award of attorney's fees and costs if they achieve some success on the merits of their claims. A plaintiff does not even have to prevail on the entire claim. This fee-shifting provision makes any ERISA claim with merit attractive to an attorney willing to take it on. And it is a large potential liability that 401(k) plans have to weigh when evaluating claims and settlement offers.

With respect to litigation against a service provider, absent a provision of state law or the agreement that shifts fees onto one or the other party, each party will be responsible for its own costs and fees. It will be important to review any indemnity provisions in the agreement, however, as those may also result in one party being held responsible for the other's attorney's fees and costs.

BENEFITS CORNER

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Prudential Mounts Vigorous Defense

A recent trend in ERISA fiduciary litigation involves allegations of self-dealing against financial institutions for offering their own proprietary funds as investment options in benefit plans they sponsor. These suits are accompanied by assertions that the proprietary funds had poor performance and excessive fees. Last November, a participant in Prudential's 401(k) plan brought that type of suit, alleging that the plan was "overpopulated" with Prudential proprietary funds that Prudential failed to monitor. It also alleged a lack of fee transparency. The overall result was "payment of grossly excessive fees to Prudential and significant losses" to plan participants.

In late January, Prudential responded with a motion to dismiss, arguing that "the mere fact that Prudential offers its 401(k) plan participants investment fund options managed by its affiliates" is not an ERISA violation. The response notes that the same Prudential funds are "typically offered" in large American and "global retirement plans" and that "it would be troublesome if Prudential's own plan did not offer such options to its employees." The selection of the proprietary funds was due to "careful arms-length decision-making designed to benefit plan participants" that included Prudential funds "alongside a variety of non-affiliated funds." The response denies "some nefarious motive." It adds that the plan offers 21 investment options, of which 11 are Prudential funds. It asserts that the Prudential funds are "low-cost," with most having expense ratios below .32 percent.

Prudential's response also confronts the plaintiff's allegations in other ways. It asserts that he lacks standing because he invested in only one of the proprietary funds and that the statute of limitations has run on the claims. It also asserts the claims of poor performance "are based on cherry-picked rolling return metrics designed to exaggerate brief periods of underperformance compared to inappropriate benchmarks." Finally, Prudential notes that "since 2016, the Plan's administrative expenses, including recordkeeping fees, are not paid by the Plan" and that the plaintiff "fails to provide any facts at all to support" his claims. It concludes that "his allegation is based on his disbelief of the actual information he admits to having."

Supreme Court Rejects Intel's Position

In *Intel Corporation Investment Policy Committee v. Sulyma* (No. 18-1116 Feb. 26, 2020), the Supreme Court declined to adopt Intel's interpretation of one of ERISA's deadlines regarding the timing of a lawsuit. In the underlying litigation, the plaintiffs alleged that certain investment funds offered by the plan did not originally include alternative investments in their investment mix but that the funds increased allocations to such investments over time,