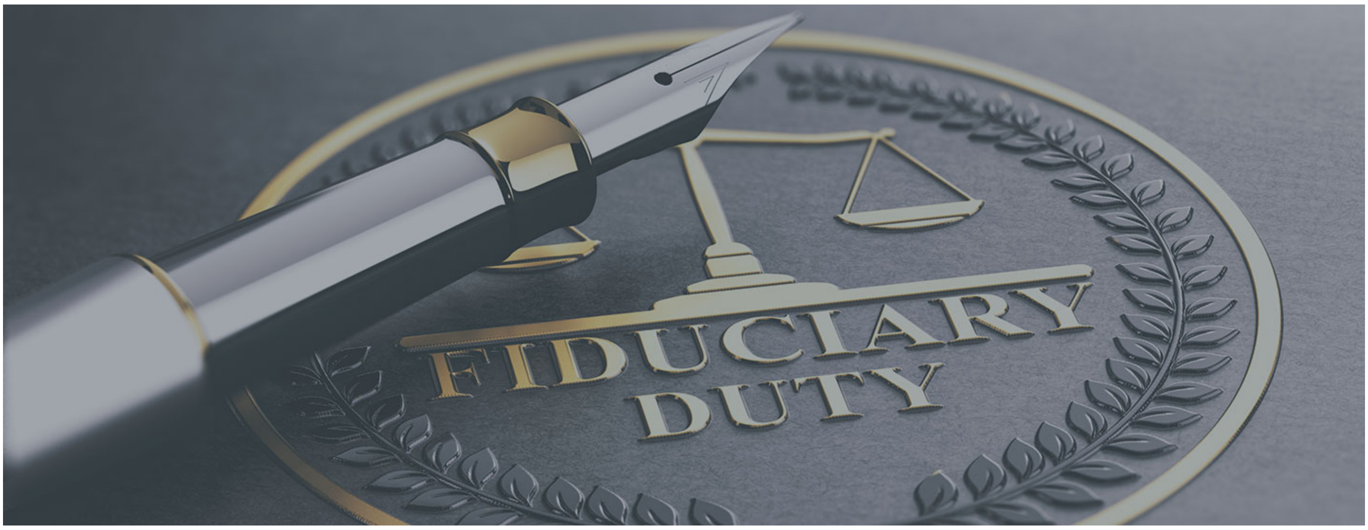

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Fiduciary Update | February 2020

In this installment of Fiduciary Update, CAPTRUST's own Drew McCorkle covers the important, albeit limited, fiduciary impact of the SECURE Act and takes a look at the increase in employer stock cases dismissed in the initial stages. McCorkle includes lawsuits challenging benefit calculations, recent fiduciary missteps in managing participant plan data, and a government-placed lien on the 401(k) account of an embezzling corporate CFO.

SECURE Act: Fiduciary Impact

As widely reported, the SECURE Act (Setting Every Community Up for Retirement Enhancement Act of 2019) was signed into law with broad incremental impact on retirement plans. However, few of the Act's provisions have direct fiduciary impact.

One of the notable fiduciary provisions for single employer retirement plans is a new fiduciary safe harbor for the provision of a "guaranteed retirement income contract," or annuity, in a 401(k) or other defined contribution plan. The new provision streamlines the due diligence required in the selection of an insurance company to provide guaranteed income to participants. To date, few plan fiduciaries include annuity products in their plans. The cost and complexity of these products as well as fiduciary risk and lack of participant demand are frequently noted as reasons.

Plan fiduciaries that have been reluctant to include guaranteed income products in their plans because of fiduciary concerns may want to revisit the issue and familiarize themselves with the new safe harbor.

Supreme Court Vacates Employer Stock Case

The Supreme Court has vacated one of the few recent employer stock cases to make it through the initial pleading stage of litigation. The court's 2015 decision in *Fifth Third Bank v. Dudenhoeffer* established a challenging pleading requirement for cases alleging a breach of fiduciary duty by continuing to hold employer stock in a retirement plan when non-public knowledge revealed that the stock price was likely to drop. Since that decision, virtually all of these cases have been dismissed in the initial pleading stage. The case of *IBM v. Jander* was an exception. The U.S. Court of Appeals for the Second Circuit found a path through the tough pleading standard. When the Supreme Court accepted *IBM v. Jander*, there was speculation that it might revisit—and perhaps relax—the strict *Dudenhoeffer* pleading standard.

Instead, the Supreme Court evaluated the parties' positions and concluded that they were making arguments that had not been addressed by the Court of Appeals. Because the Supreme Court does not make initial decisions, it vacated the decision of the Second Circuit and sent the case back for further consideration by that court. So, in addition to not providing its input on the pleading standard approved by the Second Circuit, the Supreme Court also vacated that decision. At least for now, the strict *Dudenhoeffe*r pleading standard remains in place.

Update on Pension Lawsuits

As previously reported, a series of lawsuits have been filed alleging that pension plans paid improperly low benefits to some pensioners and their survivors by using incorrect actuarial assumptions. At least nine such suits have been filed. Generally, these cases allege that outdated mortality assumptions or interest rates used to calculate joint and survivor or early retirement benefits resulted in understated benefits in violation of ERISA. These cases allege that the incorrectly calculated benefit violated ERSIA's anti-forfeiture provision or they violate ERISA's actuarial equivalence requirement—or both.

Motions to dismiss cases based on violation of the actuarial equivalence requirement have been denied. We reported on *Smith v. U.S. Bancorp* (D. MN 2019), which was decided for the plaintiffs and will proceed. The court delved into the actuarial equivalence of the benefits paid to joint retirees and beneficiaries versus their normal retirement benefit and found that the claims were sufficient for the case to proceed.

However, in *DuBuske v. PepsiCo* (S.D. NY 2019), which was based on ERISA's anti-forfeiture provision, the case was dismissed. The court found that the anti-forfeiture requirement applies only to normal retirement benefits that accrue upon reaching normal retirement age. The claims against PepsiCo did not challenge normal retirement benefits, and the case was dismissed.

More recently, in *Belknap v. Partners Healthcare System* (D. Mass 2020) the court addressed both the actuarial equivalence and anti-forfeiture claims, dismissing the anti-forfeiture claims and permitting the actuarial equivalence claims to proceed. A clear trend in the outcomes of theses cases has not emerged.

New Suit: Failure to Protect Participant Data

A new suit filed by participants in Shell Oil Company's 401(k) plan goes beyond the usual claims of overpayment for recordkeeping services and failure to remove underperforming investments. In addition to those claims, fiduciaries of Shell's plan were sued for failing to take reasonable steps to protect confidential participant data, allowing Fidelity to use that data to sell "non-plan retail financial products and services." Fidelity was also sued for misappropriation of confidential participant data for non-plan purposes. *Harmon v. Shell Oil Company* (S.D. TX 2020).

This lawsuit echoes one of the terms included in some of the fiduciary lawsuit settlements against major universities last year, which stipulated that plan data will not be used by plan service providers to cross-sell unrelated services to plan participants. In those settlements, the plan sponsors were required to direct the plan recordkeeper to not use any data gathered in plan servicing operations to sell unrelated services to plan participants.

This type of claim may surface more going forward, and future rulings on this topic could be meaningful to plan sponsors and service providers. However, it is important to note that, other than for those plan sponsors involved in specific settlements, at this point no new legal precedents address responsibilities in this area for plan fiduciaries.

Lapsed Life Insurance Takeaways

An employee was diagnosed with cancer. Life insurance through his employer provided that coverage would continue for 12 months past his active employment. Demonstrating their awareness of the employee's situation, the employer and life insurance company corresponded about the employee and the need to notify him of conversion rights. In a letter notifying the employee of his employment termination, the employer said the insurance company would contact him about life insurance conversion and portability options. However, neither the employer nor the insurance company contacted him.

The employee died approximately 18 months after he stopped working. After his death, the employee's widow was told that the life insurance had lapsed, and no benefit would be paid. The widow sued both the employer and insurance company. The employer filed a motion to have the case dismissed, which the court denied, noting the following key elements that are good takeaways:

- Generally, there is not a duty to inform an employee of life insurance conversion or portability rights upon termination. However, a participant's or employer's actions can create responsibilities to the employee.
- When the employer became aware of the employee's terminal illness, that triggered additional responsibilities to provide information to the employee.
- The employer's letter stating that the employee would be contacted to let him know about insurance conversion options triggered affirmative responsibilities.

Harris v. Life Insurance Company of North America (N.D. CA 2019).

Spouse Not Entitled to Part of Husband's 401(k)

A corporate CFO pleaded guilty to embezzlement and money laundering involving nearly $4 million over more than a 10-year period while he worked for two different companies. He reportedly made a number of payments to a tax consulting firm he owned. However, no services were provided, and the payments were embezzled. The CFO was ordered to repay the nearly $4 million in restitution.

As part of its work to recover the restitution amount, the U.S. government garnished the CFO's 401(k) plan account worth nearly $400,000. When the CFO left his employment—to serve eight years in prison—he would have a separation from service and be entitled to withdraw his 401(k) plan balance. The government placed a lien on the 401(k) account so that when it is distributed, it will go the government.

The ex-CFO and his wife objected on the grounds that under state law the wife has a vested interest in the 401(k) account by virtue of her marriage to the ex-CFO. The court was unpersuaded. The plan's assets were governed by ERISA, and the couple was still married. Because there was not a divorce and a Qualified Domestic Relations Order in place when the lien was placed, ERISA applied, and the 401(k) account was subject to the government's garnishment. *Unites States v. Abell* (D. MA 2020).

Tidbits

No Jury Trial in ERISA Cases. Fidelity has been sued for an alleged breach of fiduciary duty in using its own mutual funds in its own retirement plan. In the suit, plan participants requested a jury trial. In most ERISA cases in which a jury trial is requested, judges cite a few cases noting that a jury trial is not available and strike the jury demand. However, in *Moitoso v. FMR, Inc.* (D. Mass. 2019), the court undertook a detailed analysis and, consistent with other cases, concluded that a jury trial was not available. However, in an unusual twist, the judge said he would empanel a non-binding jury to advise him, because "citizen juries play a vital role in our democracy and…to preserve the plaintiffs' rights."

DOL Source for Nonqualified Plan Filings. Top-hat plans are nonqualified plans for a select group of highly compensated or management employees. DOL regulations permit avoidance of ERISA's reporting and disclosure rules for these plans if they make a onetime filing. This relief is provided because these plans are exclusively for sophisticated participants who do not require ERISA's protections. The onetime filing must be made within 120 days of adoption of the plan. Beginning in 2019 these filings were required to be made online. Prior top-hat plan statements are now available online so plan sponsors can verify that the filing has been made. The search tool is on the Department of Labor's website.

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