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High Court Could Give ERISA Litigation A Shot In The Arm

By **Ben James**

Law360, New York (May 15, 2014, 6:00 PM ET) -- If the U.S. Supreme Court sides with plaintiffs in two employment benefits cases currently on the high court's docket, there could be an uptick in Employment Retirement Income Security Act lawsuits over retiree health care benefits and pension plan losses stemming from workers' investments in their employers' stock, lawyers said.

The high court **recently agreed to hear** M&G Polymers USA LLC's challenge to the Sixth Circuit's stance on how to interpret collective bargaining agreements that don't explicitly address the duration of retiree health benefits, and in April heard **oral arguments** in a Fifth Third Bancorp appeal that deals with the "presumption of prudence" in an ERISA case over worker losses from pension plan investments in their employer's stock.

Though the cases involve different issues and how the court will rule in still anyone's guess, attorneys said that plaintiff-friendly rulings in the M&G and Fifth Third cases would likely inspire a rise in ERISA litigation.

"It certainly will make it easier for plaintiffs to raise claims under ERISA if both of those cases break in their favor," said Timothy Verrall, an Ogletree Deakins Nash Smoak & Stewart PC shareholder.

The recently argued Fifth Third case turns on a Sixth Circuit decision that revived a proposed class action against the bank holding company and said the presumption of prudence shouldn't apply at the motion to dismiss stage.

Fiduciaries of employee stock ownership plans like the one at issue in the Fifth Third case should be afforded the presumption that their decision to invest in employer stock was prudent unless extraordinary circumstances, like the impending collapse of the company, are present, Fifth Third said in its January high court brief.

Appeals courts have been using a deferential standard of review to assess decisions by ESOP fiduciaries to invest in employer securities since a 1995 Third Circuit ruling called Moench v. Robertson, Fifth Third said. Failing to give deference to ESOP fiduciaries would run counter to congressional intent to encourage employee ownership, the company added.

Whether the high court limits itself to whether the presumption applies at the pleading stage or goes further and strikes down the presumption entirely, a ruling in the plaintiffs' favor will be a green light for more litigation, attorneys said.

"It could open the floodgates," said Ed Cerasia, a founding partner at Cerasia & Del Rey-

Cone LLP, who noted that many circuits have not only applied the presumption, but brought it to bear early in lawsuits.

"It may prompt plaintiffs to file these cases, knowing that they'll get past the motion to dismiss stage," he said.

McDermott Will & Emery LLP partner Nancy Ross said she was skeptical about the prospects for a "litigation device" like the presumption of prudence to spur an increase in litigation.

But she agreed that the perception that getting stock-drop cases like the Fifth Third suit dismissed had become more difficult could cause some lawyers to lodge cases they might not otherwise have brought, in the hopes of extracting a settlement.

"I suppose that you could have some members of the plaintiffs bar who might view that as an opportunity to file lawsuits, regardless of the merits," she said of a potential plaintiff-friendly ruling in Fifth Third.

A ruling high court against Fifth Third will encourage ERISA litigation, said Verrall, but how much depends on the breadth of the decision.

"If the presumption survives but applies at a later state, that's going to be an incentive to pursue these cases more vigorously, and if the presumption gets rejected completely, that will be an even larger incentive to bring these kind of cases," said Verrall.

The M&G case, which the high court agreed to hear on May 5, also centers on a Sixth Circuit decision, and that circuit's retiree-friendly "Yard-Man" inference, adopted in a 1983 decision.

Yard-Man stands for the proposition that any retirement benefits obtained through a collective bargaining agreement are presumed to vest, said M&G's petition for high court review, which is challenging a decision that said a class of retirees where entitled to free health care benefits for life.

The Sixth Circuit sees silence or ambiguity in a collective bargaining agreement as creating an inference or presumption in favor of lifetime health benefits, the Feb. 20 petition said, adding that overall the circuits are badly split on how to handle contractual silence on the duration of retiree health benefits.

While the case tees up the issue of how to handle collective bargaining agreements that are silent, the ultimate ruling could have implications for bargaining pacts that are ambiguous on the questions of retiree health benefits vesting, lawyers said.

"It depends how the court comes out, but I could see a ruling that impacts both silent and ambiguous agreements," Cerasia said. "You always hope that the Supreme Court can give guidance that applies beyond one case."

Lawyers said that the Sixth Circuit was an outlier in terms of its retiree-friendly Yard-Man stance. While the M&G ruling will hopefully mean nationwide uniformity on the question of whether a collective bargaining pact that doesn't address the duration of retiree health benefits can translate to lifetime benefits, a ruling that adopted the Sixth Circuit's outlook would be a big departure from the law of the land in other circuits.

Such a ruling could support potentially costly ERISA claims against employers that have taken measures to cut costs by eliminating or raising required contributions for retiree health benefits and thought they were on legally solid ground because their union contracts didn't make explicit promises, said Verrall.

And while the M&G case is a matter of contract interpretation under the Labor Management Relations Act, even a narrow ruling in the plaintiffs favor could be cited by nonunion plaintiffs in ERISA suits as persuasive authority, he pointed out.

"It would give plaintiffs something else to argue about that they don't currently argue about," Verrall said.

--Editing by Sarah Golin and Katherine Rautenberg.