The ERISA Edit: Seeing Double: AT&T and Aetna Face Duplicate Class Claims

Employee Benefits Alert
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Two More Lawsuits Filed Challenging PRT Annuity Provider Selections

As we reported last week, AT&T was recently sued by a group of retired former employees alleging the company violated its fiduciary duties and engaged in prohibited transactions under ERISA when it engaged in a pension risk transfer (PRT) that moved more than $8 billion in pension plan liabilities to group annuity contracts issued by Athene Annuity Life Insurance Company and its affiliates (collectively Athene) (the *Piercy* litigation). The company was sued again on March 15, 2024, in the same Massachusetts district court by a new group of plaintiffs alleging essentially the same violations related to the same PRT and seeking to represent the same 96,000 member class of retirees and their beneficiaries in order to obtain the same relief. *Schloss v. AT&T, Inc.*, No. 1:24-cv-10656 (D. Mass. March 15, 2024). As in the prior lawsuit, State Street Global Advisors Trust Co., which is alleged to have served as the independent fiduciary for the PRT, was named as a co-defendant. The plaintiffs allege fiduciary imprudence and disloyalty and prohibited transactions by the defendants and seek disgorgement of sums defendants allegedly received in connection with the PRT and the posting of security to assure plaintiffs' receipt of their full retirement benefits.

Like the plaintiffs in the *Piercy* litigation, the plaintiffs in *Schloss* fault the defendants for selecting Athene as the annuity provider for the PRT, claiming Athene's group annuity contracts were not the "safest annuity available" because of Athene's "use of complex investment structures under lax regulatory standards." In particular, the complaint alleges Athene's affiliations with offshore captive reinsurers, high-risk investments, private equity ownership, and credit risk combine to render its annuity contracts an imprudent and disloyal choice for the PRT. The complaint also alleges conflicted relationships between and among AT&T, State Street, and Athene. Like the *Piercy* complaint, the complaint in *Schloss* does not address the actual process employed by the defendants in selecting Athene, but simply states that "[d]efendants either did not solicit bids from a large number of providers or did not engage in an independent and reasoned decision-making process prior to selecting and transferring pension benefits to Athene." In *Schloss*, the plaintiffs additionally allege that AT&T's selection of State Street as the independent fiduciary for the PRT was imprudent given the latter's alleged relationship with Athene and its corporate parent, Apollo Global Management, and that AT&T failed to properly oversee and monitor other fiduciaries involved in the annuity provider selection process.

Two days before the *Schloss* case was filed, another complaint alleging similar violations and involving Athene was filed against Lockheed Martin Corporation (Lockheed Martin). *Konya v. Lockheed Martin Corp.*, No. 8:24-cv-00750-PJM (D. Md. Mar. 13, 2024). The plaintiffs, representing a putative class of 31,000, assert that Lockheed Martin, the sole defendant, violated its ERISA fiduciary responsibilities and engaged in prohibited transactions in selecting Athene as an annuity provider in connection with its de-risking over $9 billion in pension obligations.

The law firm Schlichter Bogard, LLP represents the plaintiffs in all three of these cases.

Aetna Denied Dismissal in Another Case Challenging Plan Infertility Policy under the ACA

On March 12, 2024, the U.S. District Court for the District of Connecticut largely denied a third-party administrator's (TPA) motion to dismiss a putative class action challenging the TPA's administration of an employer-sponsored health plan's infertility policy. The case, *Kulwicki v. Aetna Life Insurance Co.*, No. 3:22-cv-00229 (D. Conn. March 12, 2024), comes mere weeks after another putative class survived a similar motion to dismiss against the same TPA in the Northern District of California. As in *Berton v. Aetna, Inc.*, No. 23-cv-01849-HSG (N.D. Cal. Feb. 29, 2024), covered here, the plaintiff in *Kulwicki* argues that Aetna – the TPA of her health plan (the Plan) sponsored by her employer Wellstar Health System (Wellstar) – violated the anti-discrimination provisions of the Patient Protection and Affordable Care Act (ACA). Aetna moved to dismiss the case, arguing both that Kulwicki,

who is no longer a participant of the Plan, does not have standing and failed to join an indispensable party by not naming Wellstar or the Plan as defendants. The court granted the motion as to standing on Kulwicki's claim for declaratory judgment, stating that she had not alleged likelihood of future injury to qualify for prospective relief, but denied the motion as to the remainder of the claims. In a footnote, the court notes but does not address Aetna's additional argument that plaintiff's claims should have been brought under ERISA for denial of benefits, simply stating that plaintiff made clear she was not seeking benefits under the Plan.

According to the court's Order, Kulwicki's central contention is that the Plan's infertility policy, which requires a participant to demonstrate infertility before qualifying for certain treatments including intrauterine insemination (IUI), discriminates on the basis of sexual orientation by "denying non-heterosexual individuals the option to demonstrate infertility without incurring out-of-pocket costs under the Plan." The anti-discrimination provision upon with plaintiff relies, ACA Section 1557, 42 U.S.C. § 18116, prohibits discrimination on the basis of sex and other protected statuses. As was the case in the plan at issue in *Berton*, the infertility policy requires participants to demonstrate infertility in one of two ways: by representing that they have not conceived after a period of unprotected sexual intercourse or that they have undergone multiple unsuccessful rounds of donor insemination, a procedure which, the plaintiff asserts, requires "thousands of dollars in out-of-pocket costs." According to the plaintiff, because "non-heterosexual females" seeking IUI cannot demonstrate infertility through intercourse, they are forced to incur those costs and lack the choice "heterosexual females" have under the Plan.

Aetna contended that Kulwicki lacked standing, in part, because she is no longer a Plan participant. Aetna further argued that Kulwicki's injuries under the Plan were not traceable to Aetna as a TPA, because it did not have final authority over benefits determinations or the Plan terms — Wellstar did. The court rejected this argument as to plaintiff's claims for compensatory and punitive damages, relying on a 2017 case *Tovar v. Essential Health*, 857 F.3d 771 (8th Cir. 2017), in which the Eighth Circuit held that TPAs are not exempt from the anti-discrimination requirements of the ACA. In other words, the *Kulwicki* court agreed that Aetna had a duty, independent of the Plan terms, to abide by the anti-discrimination provisions. The court explained:

> Here, as in *Tovar*, Plaintiff's injury may be traceable to Defendant because it allegedly designed the Plan and administrated claims under it, and that injury is redressable through damages. That is, if Defendant is responsible for requiring Plaintiff and other similarly situated individuals to pay for IUI to establish infertility, then the monetary costs stemming from such decisions are traceable to Defendant, and Defendant can redress them by paying damages.

The court likewise rejected Aetna's arguments that Wellstar and the Plan were necessary and indispensable parties, without whom relief could not be fully awarded, because Aetna had no power to rewrite the terms of the Plan. Here, citing to and very closely echoing the court in *Berton*, the court denied defendant's motion on these grounds, finding, "Aetna can provide complete relief for its own violations of the ACA without involvement of any other (absent) party." The judge's decision hinged on the fact that plaintiff did not seek — and, indeed, could not seek as a non-participant — benefits under the Plan or modifications to the Plan. To the extent that Kulwicki's complaint did request such Plan-related relief in its request for declaratory judgment, those claims were dismissed for lack of standing.

This latest development demonstrates how section 1557 continues to be used as a distinct and independent vehicle to recover damages following a denial of benefits, separate from the remedial provisions of ERISA. It also shows how some district courts continue to disregard legal and practical distinctions between plan design and plan administration.

In the News

Joanne discussed the impact of the Employee Benefits Security Administration funding on mental health parity in the *Law360*

article "Decline in EBSA Funding May Hurt Mental Health Parity Efforts ."

Upcoming Speaking Engagements and Events

On April 12, Joanne and Anthony will serve as facilitators for the workshop "Case Law Updates" at the 2024 NOPLG Conference in Seattle, WA.

Joanne will speak at the American Bar Association's Joint Committee on Employee Benefits (JCEB) and the American College of Employee Benefits Counsel's "ERISA: Beyond the Basics" CLE program on May 7.

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