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2nd Circ. Won't Reopen Cornell Workers' ERISA Class Action

By **Patrick Hoff**

Law360 (November 14, 2023, 4:39 PM EST) -- The Second Circuit shot down attempts at reviving a sweeping class action accusing Cornell University of mismanaging its employees' retirement savings, ruling Tuesday that the workers leading the suit failed to show the school made careless decisions or unreasonable payments to plan administrators.

In a 52-page published opinion, a unanimous three-judge panel upheld the trial court's tossing of claims under the Employee Retirement Income Security Act, alleging that Cornell allowed the plan to pay high recordkeeping fees and administrative costs while offering poorly performing investment options.

The plan participants challenged the 2017 dismissal of their prohibited transaction claims, telling the Second Circuit that the district court erred in concluding that ERISA required them to allege that Cornell's payments to its service providers involved self-dealing. Instead, they argued that ERISA's Section 1106, which outlines prohibited transactions, should be read broadly to require Cornell to show the payments qualified for an exemption described under Section 1108.

But U.S. Circuit Judge Debra Ann Livingston wrote for the panel that only the Eighth and Ninth circuits have accepted this expansive reading, which three other circuits — the Third, Tenth and Seventh — "have rejected as absurd."

According to the opinion, Section 1106(a)(1)(c) explicitly says a fiduciary cannot have the plan pay a party for goods or services unless the transaction is permitted by Section 1108, which allows for reasonable payments needed to operate the plan. The appeals panel said this therefore makes it the workers' responsibility at the motion to dismiss stage to show why the exemption doesn't apply.

"To state a claim for a prohibited transaction ... it is not enough to allege that a fiduciary caused the plan to compensate a service provider for its services; rather, the complaint must plausibly allege that the services were unnecessary or involved unreasonable compensation," Judge Livingston wrote.

She added that this decision doesn't impact previous rulings that held it's the fiduciary's responsibility to show Section 1108's exemptions are ultimately applicable, but a plaintiff has to at least initially allege that the transaction was unnecessary or the payment excessive.

"While plaintiffs have alleged several forms of procedural deficiencies with regard to recordkeeping, their complaint does not plausibly allege that the compensation was itself unreasonable," Judge Livingston wrote.

The appeals court also refused to reverse the 2019 summary judgment decision on many of the remaining claims, including that Cornell violated its duty of prudence to plan participants by failing to keep recordkeeping fees in check, remove underperforming investment options and transition to lower-cost shares of certain assets.

According to Tuesday's opinion, it wasn't enough for participants to merely show that Cornell paid its plan administrators any recordkeeping fees to establish a prima facie case. The appeals panel said plan participants also had to show that a lower-cost alternative existed, but since the district court excluded their expert testimony for failing to explain why certain plans were comparable, they couldn't do so.

Additionally, the judges said the plan participants didn't provide any evidence suggesting that Cornell's process for evaluating its investment options fell short of industry standards at the time.

"While Cornell's oversight did improve with time, it had processes to review the plan's investment options at all points during the class period," Judge Livingston wrote.

The workers first sued in August 2016, claiming that the university, its retirement plan oversight committee, the committee's chair and investment advisory firm Captrust Financial Advisors violated ERISA by offering high-cost and poorly performing investment options. U.S. District Judge P. Kevin Castel in January 2019 certified a class of more than 28,000 Cornell workers, rejecting arguments that the plan participants leading the suit lacked standing because they only invested in 25 of the hundreds of available investment funds.

After the trial court granted summary judgment in September 2019 on all but one of the remaining claims in the suit, Cornell settled the final claim for $225,000 in September 2020.

Joel M. Malina, vice president for Cornell's university relations, said in a statement to Law360 on Tuesday that the Second Circuit's decision "affirms that the university fulfilled its fiduciary duty to plan participants."

"Since this lawsuit was filed in 2016, at every step Cornell has consistently shown its careful decision-making in the best interests of the 28,000 current and former plan participants in Cornell's 403(b) employee retirement plans," Malina said.

A representative for Captrust also told Law360 it's pleased that the Second Circuit agreed that the company and Cornell complied with its fiduciary duties.

Representatives for the workers did not immediately respond to requests for comment Tuesday.

Chief U.S. Circuit Judge Debra Ann Livingston, Senior U.S. Circuit Judge Amalya L. Kearse and U.S. Circuit Judge Michael H. Park sat on the panel for the Second Circuit.

The workers are represented by Jerome J. Schlichter, Heather Lea, Sean E. Soyars and Joel D. Rohlf of Schlichter Bogard & Denton LLP.

Cornell University is represented by Nancy G. Ross, Michael A. Scodro, Samuel P. Myler and Michelle N. Webster of Mayer Brown LLP.

CapFinancial Partners LLC is represented by Eric S. Mattson, Joseph R. Dosch and Caroline A. Wong of Sidley Austin LLP.

The case is Cunningham et al. v. Cornell University et al., case number 21-88, in the U.S. Court of Appeals for the Second Circuit.

--Additional reporting by Emily Brill, Kellie Mejdrich and Amanda Ottaway. Editing by Emma Brauer.
