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4 Benefits Appellate Arguments To Watch In October

By **Kellie Mejdrich**

Law360 (October 4, 2024, 5:53 PM EDT) -- The Fourth Circuit will consider a drugmaker's challenge to a West Virginia state law restricting access to the abortion drug mifepristone and Ohio pension funds are seeking to revive an investor class action at the Second Circuit, while the First and Ninth Circuits will take up executive compensation disputes.

Here are four appellate arguments in October involving employee benefits that attorneys may want to keep on their radar.

Welch's Execs' Benefit Fight at 1st. Circ.

Senior executives for grape juice cooperative Welch's will ask the First Circuit to revive their federal benefits lawsuit alleging they were shorted on benefits from a so-called top-hat deferred compensation plan, arguing a lower court wrongly entered judgment in favor of their employer in October 2023.

A three-judge panel has set oral arguments for Oct. 8 in the appeal from Welch Foods Inc. executives, who first sued in 2020 alleging they were shorted benefits from the Welch Foods Inc. A Cooperative and National Grape Cooperative Association Inc. Pension Plan for Non-Union Employees.

Former executives alleged Welch's board and compensation committee violated the Employee Retirement Income Security Act when they lowered retirees' pension obligations by $29 million by selecting a lower interest rate to use when determining the lifetime value of their benefits. Retirees alleged the 9.5% rate, which had been used since the plan's inception in 1997, shouldn't have been lowered to 4% in 2019 because the benefits were supposed to be guaranteed semi-annually for the life of a retiree and their spouse.

Retirees appealed to the First Circuit after U.S. District Judge George A. O'Toole Jr. granted Welch's motion for summary judgment in October 2023, concluding that the plan change was within Welch's authority and in compliance with ERISA.

In their appellant's brief filed in May, the group of former executives said the plan was intended to provide benefits for life to them and their spouses and that a Massachusetts district court applied the wrong standard of review to their claim when it determined the change wasn't arbitrary or capricious.

Executives point out in their brief that the First Circuit in its 2015 decision in Niebauer v. Crane & Co. declined to choose whether top-hat plan administrators' decisions are subject to de novo or

arbitrary and capricious standard of review, deciding instead that contract terms determined the standard in each case.

Welch's countered in its brief filed with the appellate court in July that pensioners were mistaken that deferred compensation benefits were intended to last their entire lifetimes and that the plan contained explicit language allowing the change in interest rates. The company also argues that under the arbitrary and capricious standard of review the court correctly applied, the decision was reasonable and was not based on any conflict of interest.

The case is Vivian Tseng et al. v. Welch Foods Inc. a Cooperative et al., case number 23-1945, in the U.S. Court of Appeals for the First Circuit.

Ex-Exec's Severance Dispute at 9th Circ.

A Ninth Circuit panel will also delve into executive compensation issues in dueling appeals from student loan companies and a former executive in a wrongful termination and severance compensation dispute.

A three-judge panel has set oral arguments for Oct. 10 in the appeals from Navient Corp. and Louis Beryl. Beryl first sued in California federal court in 2020, alleging Navient owed him additional stock units and severance benefits after terminating him without cause. Beryl was co-founder of another private student loan company, Earnest LLC, which Navient acquired. Earnest is also named as a defendant in the executive's suit.

Beryl alleged in his suit he was terminated within three months of being offered to lead Earnest as CEO following Navient's acquisition. But Navient and Earnest argued on appeal they had cause to fire Beryl in 2018 for underperformance and because he was "undermining Navient's plans for the company," according to the company's appellant brief filed in January. The companies also argue his stock units aren't subject to a multiplier provided to company CEOs because that is only afforded to the top executive at Navient, not Earnest.

Navient Corp. appeals and Beryl cross-appeals both bench trial and jury trial decisions in the suit. A jury ruled in favor of Beryl and awarded him $2.7 million in damages in 2022 after determining that Navient terminated him without cause, but the district court later reduced that total in July 2023. The district court also later ruled after a separate bench trial that Beryl was entitled to additional severance and insurance benefits under ERISA, which is also subject to the appeals.

Charles Fowler, a principal with McKool Smith's Austin, Texas, office whose practice focuses on appeals, called the appeal "an interesting case" and took note of the complicated posture of the case before the Ninth Circuit and the relatively low dollar amount of compensation at stake.

"It seems like they're fighting over just about everything," Fowler said. He added that the briefing suggested some "pretty meaty disputes" regarding how the contract and ERISA plan applied to one executive.

"There's got to be an emotional component driving something like this, when you've got a founder who is bought up by the big fish in the industry, and within a matter of months, is driven out of his own company," Fowler added.

The case is Louis Beryl v. Navient Corporation et al., case numbers 23-16080 and 23-16127, in the U.S.

Court of Appeals for the Ninth Circuit.

2nd Circ. Tackles Discovery Investors' Appeal

Investors led by two Ohio public pension funds will ask the Second Circuit to revive a securities class action accusing Discovery of not telling investors about the flagging performance of WarnerMedia's streaming service HBO Max prior to a $43 billion merger of the two media giants.

A three-judge panel has set arguments for Oct. 17 in the appeal from investors, who seek to reverse U.S. District Judge Valerie Caproni's decision from February dismissing the consolidated class action. Judge Caproni tossed the case after concluding the pension funds hadn't adequately alleged any actionable omissions by the public company related to the merger.

The case stems from a proposed class action initially filed in September 2022 by the Collinsville, Illinois, Police Pension Board claiming Discovery investors voted for the $43 billion merger without knowledge of HBO Max's real subscription numbers or how much money former WarnerMedia parent AT&T was putting into the service.

Judge Caproni said in her February dismissal order that investors didn't plead actionable omissions when they alleged the companies hid more specific details on subscribers that hadn't activated streaming accounts subject to the merger. A lack of detail about other projects such as its CNN+ venture didn't substantiate the suit either, Judge Caproni ruled.

But the Ohio pension funds argue on appeal that those omissions were materially misleading, including the fact investors weren't adequately informed about how 11 percent of the Warner Brothers and Discovery total subscriber base was made up of either nonpaying subscribers or those who only subscribed to non-core products.

Erin Weber, a partner in Winston & Strawn LLP's employee benefits and executive compensation practice group, said "this will be an important case for really all shareholders and all shareholder suits, which of course can oftentimes include big pension plans."

Weber pointed out how the Second Circuit will be considering the case after the U.S. Supreme Court in April vacated a Second Circuit decision to revive an investor suit in Macquarie Infrastructure Corp. et al. v. Moab Partners LP et al. Winston & Strawn represented the energy company, Macquarie, in that case.

The case is Ohio Public Employees Retirement et al. v. Discovery Inc. Warner Bros. et al., case number 24-646, in the U.S. Court of Appeals for the Second Circuit.

4th Circ. Hears Drug Co.'s W. Va. Abortion Law Challenge

The Fourth Circuit will decide whether to revive a drugmaker's challenge to a West Virginia state abortion law restricting access to mifepristone, after a West Virginia federal court largely tossed the case in August 2023.

A three-judge panel has scheduled oral arguments for Oct. 29 in the generic mifepristone manufacturer's appeal which asks the Fourth Circuit to elaborate on the scope of federal preemption for state laws restricting access to abortion drugs. The appeal also asks the Fourth Circuit to elaborate on how the U.S. Constitution's Supremacy Clause interacts with state-level restrictions on mifepristone.

GenBioPro argues on appeal that the Food and Drug Administration Amendments Act of 2007 — which, among other things, allows the agency to require risk evaluation and mitigation strategies for certain drugs, including mifepristone, while also ensuring that the strategies are not unduly burdensome on patients — preempts West Virginia's Unborn Child Protection Act. The drugmaker also argues the restrictions on mifepristone in the law are invalid under the Supremacy Clause.

In a sign of the stakes of the appeal, multiple groups have filed amicus briefs with the Fourth Circuit including the state of North Carolina and a group of history professors, among others.

The challenge to West Virginia's law restricting abortion arrives at the Fourth Circuit for consideration as benefits and health attorneys have been closely watching developments in another legal challenge involving mifepristone access brought against the federal government.

That lawsuit against the U.S. Food and Drug administration led by a conservative group called the Alliance for Hippocratic Medicine is back in district court after the U.S. Supreme Court intervened in the case in June. Justices found the group lacked standing and knocked out the district court's decision to vacate FDA approval for the drug, triggering a remand order from the Fifth Circuit in September.

The case is GenBioPro Inc. v. Raynes et al., case number 23-2194, in the U.S. Court of Appeals for the Fourth Circuit.

--Editing by Amy Rowe and Nick Petruncio.
