ERISA Litigation Updates: What 2024 Told Us To Expect in 2025

Looking Back and Looking Ahead

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Seyfarth Shaw LLP

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Status of Mandatory Arbitration in ERISA Plans

Arbitration

- The question of the enforceability of arbitration clauses in ERISA plans continues to percolate
- Courts have generally found these arbitration clauses to be valid, but even in courts that allow for arbitration, it may not be allowed in all situations
- Multiple courts of appeals (including in 2024) have declined to enforce arbitration agreements that prevent plaintiffs from pursuing plan-wide relief due to “effective vindication doctrine”
- To the extent that an arbitration provision does not provide for severability, enforceability may be an all or nothing question

Recent Circuit Rulings Against Arbitration of ERISA Class Claims

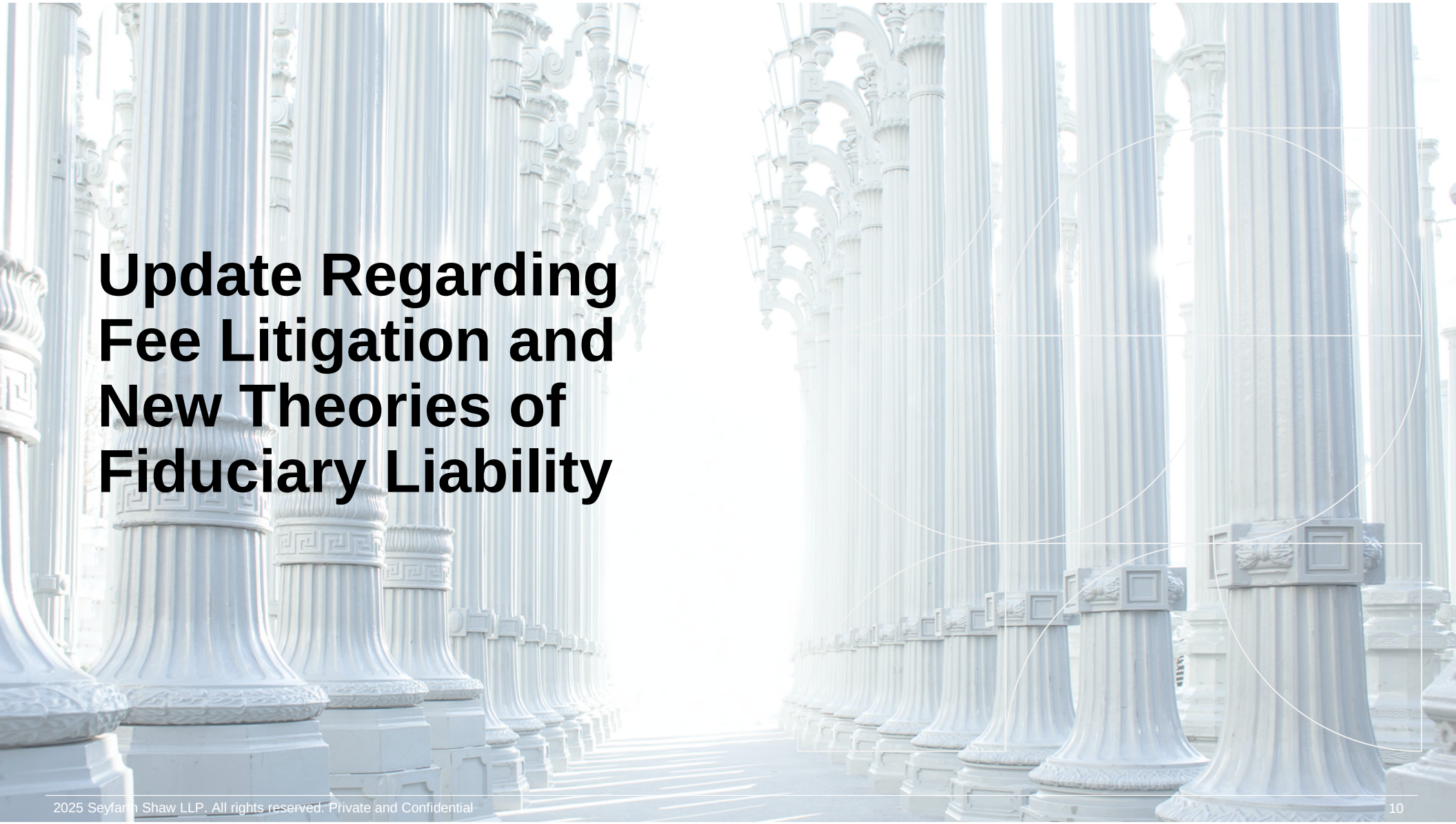
- *Parker, et al. v. Tenneco, Inc.*, 114 F. 4th 786 (6th Cir. 2024) (cert denied)
- *Cedeno v. Sasson*, 100 F.4th 386, 395 (2d Cir. 2024)
- *Henry ex rel. BSC Ventures Holdings, Inc. Emp. Stock Ownership Plan v. Wilmington Tr. NA*, 72 F.4th 499, 506 (3d Cir. 2023) (cert. denied)
- *Harrison v. Envision Mgmt. Holding, Inc. Bd. of Dirs*., 59 F.4th 1090, 1097–1100, 1107 (10th Cir. 2023) (cert. denied)
- *Smith v. Bd. of Dirs. of Triad Mfg., Inc*., 13 F.4th 613, 620–23 (7th Cir. 2021)
- Courts have all relied on "effective vindication doctrine" which holds that by agreeing to arbitrate, a party does not give up the right to vindicate statutory remedies
- ERISA plan arbitration provisions attempting to avoid quasi-class, plan-wide relief run afoul of this doctrine, the courts hold

Risks of Arbitration of ERISA Claims

- Even enforceable arbitration clauses are not without risk
  - Arbitration
    - Very limited review of arbitrator's decision
    - Under recent Supreme Court precedent, plans may be required motion to confirm an award in state court. *Hursh v. DST Systems, Inc.*, 54 F.4th 561 (8th Cir. 2022) (district court lacked jurisdiction to hear motion to confirm from participants in light of *Badgerow v. Walters*, 142 S. Ct. 1310, (2022)).
    - Arbitration clauses in service provider agreements may not cover claims against a plan
    - Supreme Court might invalidate anti-arbitration rulings, but it recently denied certiorari when presented with the question (*e.g.*, *Tenneco, Inc. v. Parker, U.S.*, No. 24-559)

Selecting an ERISA Forum - Considerations

- Plan forum selection clauses are not without risk
  - Although generally allowed, chosen venue may have unfavorable case law
    - Example: Jury trial in breach of fiduciary duty cases
    - Most courts hold no jury trial right, but the 2d Cir. has case law (*Pereira v. Farace*, 413 F.3d 330 (2d Cir. 2005), broadly interpreting *Great–West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002)) that certain courts have interpreted to allow a jury trial right when plan participants seek "make-whole" relief against a fiduciary. *E.g. Garthwait v. Eversource Energy Co*., No. 3:20-CV-00902 (JCH), 2022 WL 17484817, at *2 (D. Conn. Dec. 7, 2022)
    - This is true even though *CIGNA Corp. v. Amara*, 563 U.S. 421 (2011) held that such claims against fiduciaries are equitable claims for equitable relief
    - *See Spence v. American Airlines*, discussed below



Update Regarding Fee Litigation and New Theories of Fiduciary Liability

What's Going on With Fee Litigation

Continuing to see the trend of increased class action filings

50% more filings in the second half of 2024 than in first half of 2024

Increase in filings also saw increased suits against smaller plans

Also saw increase in number of settlements, year over year

But, decrease in average settlement size

Suggests trend of willingness to explore/accept early settlement before discovery expense

Forfeiture Litigation

- Beginning in September 2023, more than 30 cases have been filed related to the use of “forfeiture” assets in 401(k) plans
  - Forfeitures are typically the money left behind when an employee leaves the company before all of their benefits are vested
- Plan terms (under applicable regulations) often specify that forfeitures can be used to satisfy employer contribution requirements or offset plan expenses
- These lawsuits claim to challenge the decision, under those arrangements, to use forfeiture assets to reduce employer expenses, rather than defray costs to participants
- These cases highlight the practice of plaintiffs’ firms targeting historically “routine” plan practices, in hopes of identifying next “trend” in 401(k) litigation
  - Arguably, true nature of challenges is to settlor design decisions around how forfeitures can be used

Summary of Primary Forfeiture Case Arguments

- Cases remain mostly at early stages, but argument trends have emerged
- For Plaintiffs:
  - Try to boil claim down to alleging fiduciaries are using plan assets to benefit companies over participants
    - Claim violations of (1) ERISA's anti-inurement rule, (2) duty of loyalty, and (3) PT rules
- For Defendants:
  - Nuances in arguments in some cases, based on specific plan language
  - More broadly, defense arguments include: (1) use of forfeitures to reduce employer contributions is allowed under IRS regs; (2) decisions on how to fund benefits are not fiduciary; (3) cannot breach fiduciary duty by following lawful plan terms on permissible uses of forfeitures; (4) assets are simply re-distributed from forfeited accounts to other participants -- no assets return to company, so no anti-inurement issues; and (5) using forfeitures in place of new employer contributions is not a "transaction"

Forfeiture Claim Scorecard

- So far, motions to dismiss have been decided in 7 forfeiture cases
  - 2 denied; 5 granted
- Where denied, Courts found:
  - If plan gives discretion in how to use forfeitures, allegations of participant harm (i.e., higher fees) based on fiduciary choice to offset employer contributions plausibly stated claim
  - Similar reasoning re plausibility of allegations re company “benefit”
- Where granted, Courts found:
  - Plaintiffs’ theories were too broad, and rendered illegal practices clearly allowed under regs
  - Some decisions turn on plan language, and found significant a lack of discretion as to how forfeitures should be used (i.e., a requirement that they first be used to offset contributions)
    - But, others also rejected claims that would limit the discretion conferred in the plan
  - Because funds never left the plan, anti-inurement claims were implausible, and no “transaction” occurred for PT claims
- Too early to say for sure, but support is building for idea that review of plan language may be significant

Pension Risk Transfer Litigation

- Since March 2024, double-digit number of lawsuits filed asserting claims for breach of duty of prudence related to pension risk transfers
- All relate to transactions with State Street and annuity provider Athene, with the exception of a recent Verizon one involving Prudential/RGA
- All are current at initial pleading/motion to dismiss stage
- Plaintiffs in these cases acknowledge that PRTs are lawful, but allege Athene was an imprudently risky provider to select.
- Plaintiffs raise concerns about private equity control over Athene, use of captive, offshore reinsurers, and attacks on “risky” investment philosophies
- Reference to DOL IB 95-1: “safest available annuity provider”
- Cases are focused on transfers of retirees, not plan terminations; however, recent BMS case involved a plan termination
- Plaintiffs face some pleading hurdles, including as to standing
- If claims survive MTD, likely to see additional filings, including other annuity providers and additional transactions

Lewandowski v. Johnson & Johnson, et al. No. 24-cv-00671 (D.N.J.)

- In February 2024, Johnson & Johnson (J&J) and its benefit plan committee were sued in a putative class action alleging the company breached its fiduciary duty in its selection of its pharmacy benefit manager (PBM), its reliance on a biased consultant in the selection process, and its failure to negotiate more participant-friendly contract terms in implementing the services.
- The complaint alleged that J&J breached its fiduciary duties through a series of actions resulting in the plan (and its participants) overpaying for prescription drugs. The alleged breaches include:
  - (i) failure to adequately consider non-traditional PBMs,
  - (ii) failure to adequately negotiate favorable contract pricing, and
  - (iii) improperly relying on the PBM's specialty pharmacy (rather than a third-party vendor).

Lewandowski v. Johnson & Johnson, et al. No. 24-cv-00671 (D.N.J.)

- Though there are potentially distinguishing factors between the J&J plan and other welfare plans (particularly that the J&J plan is funded by a trust), this case may be the prelude to a coming wave of similar suits.
- The initial complaint sparked a motion to dismiss and an amended complaint. The motion to dismiss the amended complaint was filed on June 28, 2024 and is pending.
- On January 24, the Court issued a partial motion to dismiss without litigation

Lewandowski Motion to Dismiss ruling

- The Court dismissed the fiduciary breach allegations that fiduciary misconduct led to higher premiums, higher deductibles, higher coinsurance, higher copays, and lower wages or limited wage growth to higher premium. The Court held "Such an injury, at best, is speculative and hypothetical."
- The Court did find that Plaintiff's claim that she paid more for certain drugs than would be available under other plans on the market did state a cognizable injury, but that Plaintiff lacked standing to bring such a claim as each year in the putative class period she met her deductible and thus any refund would not pass to plaintiff but to her insurer.
- Finally, the Court allowed the penalty claim to survive a motion to dismiss as the record reflected that Defendant simply ignored the document request until after the lawsuit was filed.

Knudsen v. MetLife Grp., Inc., 117 F.4th 570 (3d Cir. 2024)

- Class action brought by health plan participants alleging administrator breached its fiduciary duty by not using rebates from drug manufacturers (received under contract with plan's PBM) to reduce participant expenses
- Third Circuit affirmed dismissal for lack of standing
  - Decision demonstrates some challenges health plan participants may face in proving claims
- Court held claims that participant costs increased because administrator retained rebates were "speculative"
  - Participants did not allege they did not receive all benefits on the terms set out in plan document
  - Plaintiffs also did not allege non-speculative claims that different treatment of the rebates would have reduced their premiums or out-of-pocket costs
  - Left open possibility for plaintiffs (or future claims) to try to more concretely plead plausible claim that they suffered concrete harm

ERISA Document Requests and Penalty Claims

- ERISA § 104(b)(4) requires that, within 30 days of request, plan administrator provide participant with (1) SPD; (2) annual report; (3) any terminal report; (4) CBA (if applicable); (5) trust agreement; (6) contract; or (7) “other instruments under which the plan is established or operated”
- Three cases in 2024 offered guidance on requests and penalties:
  - N.D. Cal (Jan. 31, 2024) (declining to award penalties on failure to provide ASA with TPA, as not required under statute; limiting penalties on required docs to $15/day, based on COVID-related delay in finding request)
    - Distinguishing docs re plan operations from those that determine eligibility and benefits
  - D. Mont. (June 4, 2024) (in suit for denied inpatient mental health benefits, awarding maximum $110/day penalty for failure to provide requested standards for determining necessity)
    - “It does not matter whether Defendants’ refusal was based on a good faith misreading of the law or a bad faith intention; statutory penalties are appropriate”
  - 10th Cir. (Oct 1. 2024) (affirming penalties for failure to provide ASA; reversing as to skilled nursing criteria used in claims decision; but affirming initial $100/day penalty)

ESG Investing Litigation Risks

Spence v. American Airlines, Inc., et al. (N.D. Tex. 1/10/2025)

- Class action challenging inclusion in 40(k) plan of “ESG” investments.
- Suit challenged the use of ESG principles in proxy voting by Blackrock, which managed the plan’s core index portfolios.
- Plaintiff alleged this proxy voting activity “covertly converted index funds into ESG funds”
- Plaintiff alleged ERISA breach of fiduciary duty claims based on violation of the duty of prudence and the duty of loyalty
- The Court denied summary judgment and held a four-day bench trial.
- The Court entered findings of fact and conclusions of law:
  - No breach of duty of prudence, but
  - Breach of duty of loyalty
- No ruling yet on remedies

Spence – Core Fact Findings

- Plan delegated proxy voting to investment managers and in Blackrock's case, required voting to conform to Blackrock's policy
- The policy always focused on long-term economic interests of the asserts under management, though ESG considerations were added later
- IMA and IPS required Blackrock to report on its proxy voting and certify compliance with its policy
- Plan advisors and fiduciaries did not get certifications from Blackrock, did not discuss proxy voting with them, and did not meaningfully discuss it at all until after suit was filed
- According to the Court, Blackrock engaged in "extensive" "ESG activism," and American shared ESG goals and internal communications looked favorably on Blackrock's actions

Prudence Ruling

- Prudence depends on industry standards and is based on process, not result
- Expert testimony showed what American did was in line with industry practice
- Plaintiff's claim essentially sought to shift industry practice, but that objective can't be squared with the prudence duty
- American used Aon to conduct extensive due diligence on managers and did not blindly rely on its advice
- Notwithstanding all this, per the Court, the entire industry is "incestuous" making it largely impossible to show imprudence despite what the Court plainly viewed as improper practices

Loyalty Ruling

- Employer failed to keep its corporate interests separate from fiduciary duties, allowed “cross-pollination of interests and influence”
- “Because of corporate goals and as a complement to them” failed to sufficiently monitor “non-pecuniary ESG investing”
- Court focused on fact that Blackrock was largest investment manager, one of the biggest shareholders, and a major holder of corporate debt
- Court criticized staff’s acknowledgement of “significant relationship” and suggested that was why compliance with proxy voting standards was not monitored

What's the Significance of *Spence*?

- Clearly driven in part by a particular judge's hostility to the "ESG investing" and it is unclear if other judges would reach the same conclusion;
- Decision improperly conflates the realities of the market with conflict of interest; strong fundamental policy reasons why this decision is wrong
- Unclear what the Court really means by "ESG"; the Court tries to give examples, but likely this buzzword can be attached to many practices
- Process remains important; it would have been harder for the Court to rule in the face of strong process evidence
- Unclear if there is any viable damage model

Evolving Pleading and Standing Standards

Pleading Standard for Fee Claims

- *Hughes v. Nw. University*, 142 S. Ct. 737 (2022)
  - Participants in two 403(b) defined contribution plans alleged that they were charged excessive record-keeping fees and high investment option fees
  - The District Court granted a motion to dismiss and the decision was upheld by the 7th Circuit Court of Appeals
  - Supreme Court rejected that 7th Circuit law, clarifying that fiduciary has duty to assess prudence of each investment option, not just lineup as a whole
  - On remand from the Supreme Court, the 7th Circuit allowed two claims to proceed:
    - Recordkeeping & Share Class
    - For recordkeeping, Plaintiffs must plausibly allege fiduciary actions outside range of reasonable actions
    - For share class, Plaintiffs must show that comparator share class was plausibly available

Inconsistent Results in Courts Promote More Filings

Burdens of Pleadings and Proof

- Courts inconsistent on scrutiny of benchmarks at pleading stage
  - Applies both to comparator funds for investment claims, and to bases to claim "unreasonable" RK&A fees
- Split authority on burden re causation

Standing

- *Thole* held that, without win changing the plaintiff's benefit, the plaintiff lacks standing
- Mixed results applying that logic in DC plan context
  - Courts inconsistent on whether plaintiffs need to have invested in any/all funds they seek to challenge

Jury Trials

- Many plaintiffs continue to include jury demands, and resist efforts to strike
- So far, only courts in 2nd Circuit have accepted arguments for trial
- But others have at least allowed for possible advisory juries

Challenges to Health Plan Fee Litigations

- Standing
  - Plaintiffs may need to show benefits were at risk on fiduciary breach claims
- Stating a claim
  - Difficulty in finding suitable benchmark/ “meaningful comparator”
  - Separating plan design and fiduciary functions
- Class certification
  - Treatment under health plans likely lacks uniformity found in retirement plans; increased individualization in circumstances/impact on benefits could make certification more challenging

The Supreme Court's 2025 ERISA Docket

Prohibited Transactions

- *Cunningham v. Cornell University*, 86 F.4th 961 (2d Cir. 2023)
  - Complaint alleged that defendants caused the plan to pay recordkeepers more than reasonable compensation, and alleged a prohibited transaction
    - District court dismissed, holding plaintiff failed to plead the lack of an applicable exemption
    - Second circuit affirmed
  - The 2nd Circuit held that "to plead a violation of [Section 406(a)(1)(C)], a complaint must plausibly allege that a fiduciary has caused the plan to engage in a transaction that constitutes the 'furnishing of . . . services . . . between the plan and a party in interest' *where that transaction was unnecessary or involved unreasonable compensation*."
    - Holding was rooted in text of ERISA, and conclusion that the statute incorporates the exemptions into the recitation of what is "prohibited," such that they are an element of claims, not affirmative defenses
- *Cunningham* better aligns pleading burdens for prohibited transaction and post-Hughes fiduciary breach claims
  - Protects against risk of frivolous PT lawsuits using discovery to explore other potential claims
- Supreme Court granted cert petition in *Cunningham* on October 4, 2024; oral argument held January 22, 2025

Prohibited Transactions

- *Cunningham v. Cornell University* oral argument held on January 22:
  - Supreme Court granted cert on this issue: "Whether a plaintiff can state a claim by alleging that a plan fiduciary engaged in a transaction constituting a furnishing of goods, services, or facilities between the plan and a party in interest, as proscribed by § 1106(a)(1)(C), or whether a plaintiff must plead and prove additional elements and facts not contained in § 1106(a)(1)(C)'s text."
    - **What is the injury**? Is there standing if the pleading alleges a transaction which has not resulted in any harm? (Thomas, J.)
    - **What are the consequences of interpreting ERISA so that every transaction with a party in interest constitutes a transaction prohibited by ERISA?** (Kavanaugh, J.) Petitioners argued there are already guardrails in place to prevent frivolous litigation.
    - **Which party has the burden of alleging the reasonableness and necessity of the fees?** Petitioners argued should be on plan fiduciary which has the best access to the information. Respondent argued that the plaintiff should bear the burden---allowing otherwise "automatically opens the door to expensive discovery."

United States v. Skrmetti (Docket No. 23-477)

- Whether under the 14th Amendment, state law (Tennessee) can bar gender affirming care procedures in minors while still allowing the procedures to treat conditions other than gender dysphoria.
- Bans are opposed by every major medical association in the United States
- 23 bans are presently in place
- The district court enjoined the law. The Sixth Circuit reversed injunction under a "rational basis" review"
- Before the Supreme Court are two arguments under the Equal Protection Clause of the Fourteenth Amendment:
  - The law discriminates by sex and discriminates based on transgender status
  - Thus the law can only stand if it passes musters under heightened scrutiny (which plaintiffs argue it cannot survive)
- Views of Gorsuch and Barrett unclear

United States v. Skrmetti (Docket No. 23-477)

- Striking down the law would allow for transgender children to receive medical care in their home states
- A split decision, that finds no sex-discrimination but a violation of parental rights, would likely lead to continued legislation on medical care by Courts akin to parental-rights laws pre-Dobbs for abortion access for minors.
- A broad ruling that legislatures can outlaw well accepted medical procedures without running afoul of the Constitution would likely open the door to more public health restrictions on coverage for women and further efforts to foreclose gender affirming care coverage in adults or attempt to outlaw such coverages in insured health plans.
  - Such a ruling would in many ways be an heir to the ruling in Hobby Lobby
- Impact of new administration

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