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United States Supreme Court: Cases to Watch in 2020

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Speakers:

Justice Rives Kistler, Oregon Supreme Court (Ret.)
Fletcher Alford, Gordon & Rees
Kevin Liu, Gordon & Rees

Moderator:

Jordan Altura, Gordon & Rees

1. *Intel Corp. Investment Policy Comm. v. Sulyma*, No. 18-1116

- On certiorari from decision of the Ninth Circuit reversing summary judgment
- Putative class action for breach of fiduciary duty in the management of defined contribution plans (401k and retirement)
- Post-2008, significant portion of funds invested in “alternative investments” – e.g., hedge funds and private equities, allegedly to increase diversity and dampen volatility of public equity markets
- P. alleged these alternative investments were under performing and charged excessive fees
- Specifics not disclosed in written statements but available on website P. visited 68 times in 2 years
- 29 USC 1113: SOL is 6 years from date of breach or 3 years from date P. has “actual knowledge” of breach.

Intel Corp. Investment Policy Comm. v. Sulyma (continued)

- Dist. Ct. granted MSJ for D. on ground of SOL because undisputed that suit filed more than 3 years after he received the paper statements and visited website.
- Ninth Cir. reversed: Actual, not constructive, knowledge required; and P's depo testimony that he did not remember whether he reviewed specific portions of website creates disputed issue of fact re. "actual knowledge"
- Split from Sixth Cir.

2. *Retirement Plans Comm. of IBM v. Jander*, No. 18-1165

- On Cert from 2nd. Cir.
- Issue: Does fiduciary of ESOP plan who is also a corporate insider have duty to act on non-public information?
- Tension between securities laws/regulations governing insider trading and fiduciary duties of plan administrator to act in best interests of fund
- Question as initially presented to USSC was a pleading issue: What must a plaintiff allege when suing a plan administrator for breach of fiduciary duty based on alleged failure to act on inside information?
- *Fifth Third Bancorp. V. Dudenhoeffer* (2014) 573 U.S. 409: P. must "plausibly allege" an alternative action D. could have taken that is consistent with securities laws and that a prudent fiduciary would not have viewed as likely to harm the plan more than to help it
- Briefs of D. and of the Government argued the merits: Fiduciary has no duty to act on inside information

Retirement Plans Comm. of IBM v. Jander (continued)

- Per Curiam opinion issued Jan. 14: remanded to 2nd Cir. to consider the merits issues raised in briefs of D. and Government
- Concurrence by Kagan and Ginsburg: 1) 2nd Cir. should feel free to not address the merits issue, as not properly preserved in Dist. Ct.; and 2) Position of D. and Government appears inconsistent with *Dudenhoefer*.
- Concurrence by Gorsuch: 2nd Cir. should reach the issue, and argument is not foreclosed by *Dudenhoefer*.

3. *Thole v. U.S. Bank*, No. 17-1712

- On Cert from the 8th Cir.
- Argued Jan. 13
- Issues:
  - 1) Does ERISA authorize participants in a defined benefit plan to bring suit seeking removal of allegedly self-dealing fiduciary and restoration of plan funds despite fact that participants cannot allege they are at imminent risk of losing their defined benefits?
  - 2) Is there Art. III standing in such circumstances?
- Plaintiffs allege that in 2007, U.S. Bank transferred 100% of plan funds into equities, contrary to basic principles of diversification.
- Plaintiffs further allege that U.S. Bank invested 40% of those funds into a mutual fund of its wholly-owned subsidiary.
- 2008 crash resulted in alleged loss of almost $750 million in fund value.

Thole v. U.S. Bank (continued)

- P's sued seeing removal of fiduciaries and restoration of plan funds
- After suit filed, fiduciaries contributed enough money back into fund to bring it into compliance with ERISA's minimum funding rules; but still allegedly hundreds of millions less than would have been in fund absent the allegedly improper investments.
- 8th Cir. held no standing because no concrete, particularized injury.
- P's argue that under both traditional trust law and ERISA itself, they should be permitted to sue both in a representational capacity for the financial harm to the plan itself as well as for equitable relief to remove the allegedly self-dealing fiduciary
- D argues no standing and no right of action under ERISA because the plaintiffs themselves will get nothing even if they prevail; only the lawyers will benefit (seeking $31 million in fees)

4. *Rutledge v. Pharmaceutical Care Management Ass'n.*, No. 18-540

- On Cert from the 8th Cir.
- Set for oral argument April 2020
- Pharmacy Benefit Managers ("PBMs") are TPAs/claims processors hired by ERISA plans, private insurance companies, and other medical payors to administer prescription drug benefits.
- Negotiate with pharmacies on behalf of medical payors to establish maximum allowable costs ("MACs") of prescription drugs.
- Due to substantial bargaining power of PBMs, Petitioner alleges PBMs often reimburse pharmacies at rates below the pharmacies' wholesale costs, and allegedly have driven hundreds of rural and independent pharmacies out of business.
- 36 states, including Petitioner Arkansas, have enacted statutes regulating PBMs.

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Rutledge v. Pharmaceutical Care Management Ass'n. (continued)

- Key provisions of Arkansas statute:
  - 1) Specifies standards for PBM reimbursement;
  - 2) Prohibits the imposition of MACs that are below the pharmacies' wholesale costs.
  - 3) Creates a procedure for pharmacies to appeal reimbursement rates.
- ISSUE: Is Arkansas statute preempted by ERISA?
- ERISA broadly preempts all state laws that "relate to" employee benefit plans.

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Rutledge v. Pharmaceutical Care Management Ass'n. (continued)

- Caselaw has defined two classes of preempted state laws:
  - 1) Those that either explicitly reference ERISA plans, or act exclusively or essentially on ERISA plans;
  - 2) Those that have an "impermissible connection with" ERISA plans, in light of ERISA's objective of national uniformity
- Eighth Cir. found key provisions of Arkansas statute preempted by ERISA, because the rates at which ERISA plans or their intermediaries reimburse pharmacies and other medical care providers is central to plan administration.
- Petitioner argues no preemption because the Arkansas statute applies equally to all PBMs, irrespective of whether they are acting on behalf of ERISA plans or otherwise, and because there is prior precedent that states are free to regulate rates for medical services

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5. *Trump v. Mazars USA LLP/Trump v. Deutsche Bank*, No. 19-715

- On Cert from the D.C. Circuit
- Oral argument set for March 31, 2020
- When Democrats regained control of the House in 2018 elections, various House committees issued subpoenas for the financial and business records of President Trump, his family members, and his various businesses:
  - Mazars is an accounting firm that prepared certain Trump financial statements that Trump's former lawyer Michael Cohen testified were falsified for the purposes of obtaining loans and evading taxes.
  - Deutsche Bank and Capital One are long time banks for various Trump entities.
- First time in US history that Congress has attempted to subpoena financial records of a sitting president.

Trump v. Mazars USA LLP/Trump v. Deutsche Bank (continued)

- Trump, represented by lead counsel (and conservative radio talk show host Jay Sekulow), sued the subpoena recipients and the House Committees seeking to enjoin the subpoenas.
- The subpoena recipients have taken no official position.
- ISSUE: Whether the subpoenas violate the separation of powers between the legislative and executive branches?
  - 1) Do the subpoenas serve a legitimate legislative purpose; or are they a law enforcement tactic reserved for the executive branch?
  - 2) Do the subpoenas unduly interfere with the President's discharge of his duties?
- District Courts in both cases refused to enjoin the subpoenas, and the DC Circuit affirmed: Although the public statements of some members of Congress reference investigation of possible criminality, it is also

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Trump v. Mazars USA LLP/Trump v. Deutsche Bank (continued)

- possible the subpoenas are relevant to inform Congress in its consideration of possible future legislation requiring presidents to make financial disclosures.
- Dissent by Judge Rao (Trump appointee and former Trump administration official): Predominant purpose of subpoenas is to investigate alleged criminality, a function reserved for the executive branch. Congress' sole avenue for investigating sitting President for possible criminality is the impeachment process. Risk of interfering with President's discharge of his duties.

6. *Ford Motor Co. Cases*

- Series of consolidated cases on Cert from state Supreme Courts of Montana and Minnesota
- Oral argument set for April 27, 2020
- Personal jurisdiction is the doctrine that the Due Process Clause of the US Constitution limits the power of a court to adjudicate the rights of a defendant. Defendant must have some connection with the forum states.
- General v. Specific jurisdiction.
  - Specific Jurisdiction: Lesser contacts required than for general jurisdiction, but plaintiff's cause of action must "arise out of or relate to" the defendant's activities in the forum. *Helicopteros Nacionales de Columbia, S.A. v. Hall* (1984) 466 U.S. 408.

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Ford Motor Co. Cases (continued)

- In the 36 years since *Helicopteros* was decided, there has been much debate and disagreement among the courts over what exactly is meant by "arise out of or relate to."
  - Some courts have held that defendant's conduct in the forum must have been a but-for cause of the plaintiff's injury.
  - Others say any connection is enough – need not be cause. In the consolidated cases, Ford's marketing and sales were deemed sufficient even though plaintiffs faulted the design of the vehicles and all of that design work was done in Michigan, not in Montana or Minnesota.
  - Oregon: But-for "plus." *Robinson v. Harley-Davidson Motor Co.* (2013) 316 P.3d 287

- Broad implications not just for product manufacturers but for all companies doing business in multiple states, and in particular in states where juries can be hostile to corporate defendants.

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7. *Moda Health Plan, Inc. v. US (and related appeals)*

- Argued Dec. 10, 2019
- Affordable Care Act ("ACA") created "health benefit exchanges" pursuant to which previously uninsured/high risk individuals or small groups could purchase health insurance as part of a larger risk pool.
- To encourage insurers to participant, and to help keep premiums as affordable as possible, the ACA provides various programs pursuant to which insurers can seek to recover some of their losses if expenses significantly exceed premiums.
- "Risk Corridors program." Plans whose allowable costs were less than the plans' target costs were required to "pay in" a portion of those savings. Plans whose allowable costs were in excess of target were to be "paid out" to reimburse them for a portion of the difference.
- Question soon arose as to what the funding source or sources would be for the "payments out."

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Moda Health Plan, Inc. v. US (and related appeals) (continued)

- GAO identified only two potential funding sources: The "payments in" and general CMS appropriations.
- After a number of insurers had already committed to participate in the exchanges, and had set premiums, Congress included an appropriations rider in HHS's annual appropriations bill prohibiting use of any of the CMS funds to cover "payments out" of the risk corridors.
- Within just several years' time, "payments in" fell billions of dollars short of what would have been needed to cover "payments out".
- Numerous insurers filed suit against the government for its failure to fund the payments out, calling it a "massive bait and switch."

Moda Health Plan, Inc. v. US (and related appeals) (continued)

- Issues:
  - 1) Was the subsequent appropriations rider prohibiting use of CMS funds to cover "payments out" a valid partial repeal of the ACA's risk corridor payment provisions?
  - 2) Did the government breach an implied contract with the participating insurers by failing to fund the "payment out" liabilities?
- Insurers argue that interpreting a later statute as impliedly repealing an earlier one is strongly disfavored and such an interpretation will not be adopted unless it is the only possible way to interpret the later statute. Here, the subsequent appropriations rider should not be interpreted as repealing the ACA's "payments out" provisions because the rider eliminated only one possible source of the funding for those payments. Principles of implied contract obligate the government to provide funding from other potential sources.

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Moda Health Plan, Inc. v. US (and related appeals) (continued)

- Government argues the ACA's exchange program created new opportunities for insurers but with those new opportunities came risks:
  - On its face, the ACA did not provide any funding source for the "payments out" other than the "payments in". Insurers thus took the risk that "payments in" might be insufficient to cover "payments out" and that Congress might not appropriate any funding to cover shortfalls.
  - In addition, legislative history suggests the risk corridors program was intended to be "revenue neutral" to the government.
  - Finally, statutes can't be construed as contractual commitments.
- The Federal Circuit (which hears all appeals from the Court of Federal Claims) ruled against the insurers in each of the consolidated appeals

8. *R.G &G.R. Harris Funeral Homes, Inv. v. EEOC* (and consolidated appeals)

- Argued October 8, 2019.
- Issues: Does Title VII's prohibition of discrimination in employment "because of sex" prohibit discrimination on the basis of: 1) transgender identity; or 2) homosexuality.
- Lower courts have split.
- With change in presidential administrations, the EEOC flip-flopped from supporting the transgender plaintiff's case to opposing it.
- Employers' arguments:
  - Title VII was intended to prohibit favoring one gender over another in the workplace.
  - Alleged discrimination against people of one biological sex who present themselves as members of the other sex does not favor one gender over the other. Funeral home directed testified he

R.G &G.R. Harris Funeral Homes, Inv. v. EEOC (and consolidated appeals) (continued)

- would have fired a biological female who insisted on presenting as a male, just as he fired the plaintiff (a biological male) for presenting as a female.
- EEOC and courts have long held that sex-specific dress codes and physical facilities do not violate Title VII (requirement that men wear neckties).
- Similarly, alleged discrimination on the basis of sexual orientation/homosexuality does not necessarily favor one gender over another.
- Up to Congress, not the Courts, to decide whether Title VII should be revised to add prohibitions on discrimination on the basis of gender identity or sexual preference. Because Congress has repeatedly declined to do so, Courts shouldn't substitute their judgment for the judgment of the Legislature, particularly on such

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R.G &G.R. Harris Funeral Homes, Inv. v. EEOC (and consolidated appeals) (continued)

  - sensitive and nuanced policy decisions with potentially far-reaching consequences.

- Employees' Arguments:
  - Transgender discrimination is necessarily sex discrimination because it is based on stereotypes that biological males should act/dress/look certain ways and biological females should act/dress/look in certain different ways.
  - Sexual orientation discrimination is necessarily discrimination based on sex. One is homosexual "because of sex."
  - Sexual orientation discrimination is also necessarily prohibited as associational discrimination and reflects unlawful gender stereotyping.

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9. *Espinoza v. Montana Department of Revenue*, No. 18-1195

- On certiorari to the Montana Supreme Court
- Argued January 22, 2020
- Montana provides a $150 tax credit for contributions to a scholarship fund to be used for scholarships to private schools, which turn out to be primarily sectarian.
- The Montana Constitution prohibits direct or indirect aid to sectarian schools, and the state Department of Revenue, which is charged with administering the scholarship fund, promulgated administrative rule that the scholarship funds could be used only for nonsectarian schools.
- The Montana Supreme Court held that its state constitutional protection was more protective than the federal Establishment Clause, invalidated the tax credit statute, and vacated the administrative rule.

Espinoza v. Montana Department of Revenue (continued)

- It follows that, as a matter of state law, no tax credit is available for contributions to scholarships for any private school -- sectarian or nonsectarian.
- The Free Exercise Clause prevents states from denying some benefits (paying for repairing playground surfaces, for example) to private sectarian schools that it makes available to private nonsectarian schools.
- Does the same rule apply when the benefit (scholarship funds) would be used to pay for religious instruction as opposed to non-religious expenses?
- If, as a result of state law, no tax credit is available for sectarian and sectarian schools, does that resolve the plaintiffs' Free Exercise claim, which is based on providing a benefit to nonsectarian schools that is not available to sectarian schools?

Espinoza v. Montana Department of Revenue (continued)

- Or can plaintiffs still challenge Montana's state constitutional provision preventing the state from aiding sectarian schools on the grounds that it was motivated by anti-Catholic sentiment, at least in its first incarnation.

10. *Little Sisters of the Poor v. Pennsylvania*, No. 19-431

- On certiorari to the Third Circuit.
- Set for argument in April 2020.
- The Affordable Care Act (ACA) requires preventive services for women's health, which includes insurance coverage for contraceptive coverage.
- The agency charged with administering the ACA issued rules exempting churches and houses of worship from that requirement and also providing an "accommodation" for nonprofit religious employers. The accommodation permits the employer to exempt contraceptive services from its plan but requires it to provide payments to a third party, which makes contraceptive coverage available.
- In 2017, the administration directed the agency to consider new regulations that addressed "conscience-based objections" to the preventative services mandate. The agency issued new rules without

Little Sisters of the Poor v. Pennsylvania (continued)

- notice and comment that made the accommodation voluntary. It later issued amended rules after notice and comment with the same result.
- On certiorari, the parties debate.
- Whether issuing the new (2017) rules without notice and comment violates the Administrative Procedures Act and whether the amended rules cured any defect.
- Whether the ACA's preventative services requirement permits any exception and, if it does not, whether the agency can craft a rule-based exception for voluntary accommodations on the Religious Freedom Restoration Act.

Questions?

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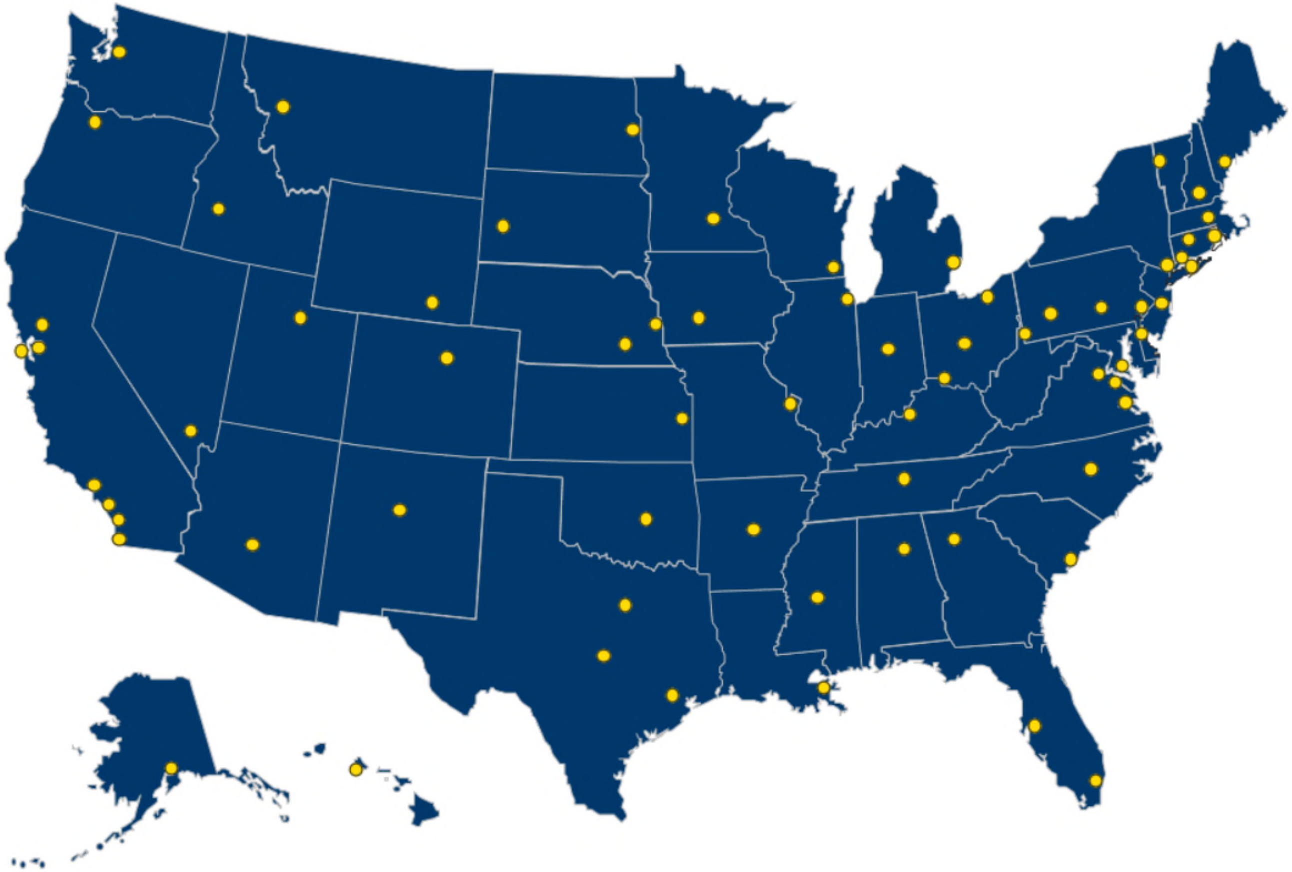

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