WINSTON & STRAWN LLP

NEPC WEBINAR

Governance Matters: Mid-Year Check-In

JUNE 25, 2025

Case Law & Policy Updates

- Prohibited Transaction Pleading Standard
  - *Cunningham v. Cornell University*
- Conflicts of Interest
  - *Spence v. American Airlines, Inc.*
  - *Snyder v. UnitedHealth Grp.*
- Forfeiture Litigation Update
- Trump Administration Policy Initiatives

Pleading Prohibited Transactions – *Cunningham v. Cornell University*

- Among a raft of routine allegations, plaintiffs claimed Cornell's agreements with recordkeepers were prohibited transactions.
- Previously, courts had divided over whether, in early litigation stages, complaining participants bear the burden to that recordkeeping agreements involve unnecessary services or unreasonable compensation.
- Based on the text of ERISA, the Supreme Court held, that plaintiffs do not bear that burden.
- Thus, to withstand an early motion to dismiss a prohibited transaction claim, all plaintiffs need to show is that the plan contracted with a service provider. For more information on the decision, see here.
- This decision is unlikely to stem the tide of litigation.

American Airlines Breached Duty of Loyalty in ESG Case

- In Spence v. American Airlines, Inc., Texas federal district court held that American and its Employee Benefits Committee (“EBC”) breached their duty of loyalty by allowing investment manager, BlackRock, to engage in environmental, social, and governance (“ESG”)-focused investing and proxy voting contrary to the best financial interests of plan participants.
  - BlackRock was one of American’s largest shareholders and corporate debtholders during period when American was experiencing financial difficulty.
  - The EBC delegated oversight of BlackRock to its internal Asset Management Group (the “AMG”) and external consultant Aon. AMG members also managed American’s corporate relationship with BlackRock.
  - Court found that:
    - EBC members were both aware of and discussed BlackRock’s ESG expectations and the potential consequences for American (as a consumer of fossil fuels) if it failed to meet those expectations.
    - American failed to prevent its corporate interest from “bleeding over” into fiduciary decisions, and that the “most obvious explanation” for the defendants’ failure to question BlackRock’s ESG activities was due either to American’s own corporate ESG commitments or a desire to appease BlackRock as a significant owner of American’s shares and debt financing.

UnitedHealth Group Settles for $69M in Conflict-of-Interest Suit

- In Snyder v. UnitedHealth Grp., participants sued plan fiduciaries over their retention of underperforming Wells Fargo target-date funds. Among other allegations, the complaint contended that fiduciaries put UnitedHealth's business interests and profits ahead of participants' interests, thereby breaching their duty of loyalty.
- The court found a genuine dispute of a material fact as to whether UnitedHealth's chief financial officer (CFO) and others intervened to keep the Wells Fargo target-date funds after the fiduciary committee initially decided to remove them and denied summary judgment.
  - The CFO allegedly directed an evaluation of UnitedHealth's business relationships with Wells Fargo and the other firms whose funds were candidates to replace the Wells Fargo target-date funds (a "balance of trade ledger").
  - Upon allegedly determining that Wells Fargo was a significant business partner, the decision to replace the Wells Fargo funds was reversed.

Plan Forfeitures Background

IRS RULE

DC plans may use forfeitures (within 12 months) to:

- Pay plan administrative expenses;
- Reduce employer contributions under the plan; or
- Increase benefits in participants' accounts in accordance with the plan's terms.

PLAINTIFFS

Typically allege that using forfeitures to reduce employer contributions rather than plan administrative expenses—even if permitted under the plan document:

- is a breach of fiduciary duty
- violates prohibitions against anti-inurement and self-dealing.

FIDUCIARIES

Typically respond:

- Existing and proposed IRS regulations permit using forfeitures in this manner
- Decisions relating to plan terms are settlor not fiduciary decisions.
- It is not a fiduciary breach to follow lawful plan terms permitting this use of forfeitures.

Court Decisions Mixed

BROADLY, COURTS HAVE FOUND:

- Plan terms drive outcome
- If the plan assigned the choice of how to use forfeitures to the plan administrator, such choice is fiduciary in nature.
  - Courts that grant a motion to dismiss tend to find that plaintiffs' claims are overbroad–a fiduciary does not have a duty to maximize participants' pecuniary benefit but only to ensure that all participants receive the benefits to which they are entitled under the plan. Plaintiffs' theory would override other plan provisions.
  - Courts that deny a motion to dismiss tend to find that a fiduciary's decision to apply forfeitures to reduce employer contributions is not in participants' best interest, lacks authorization in the plan document, or could have been impacted by conflict of interest.

Trump Administration Policy Initiatives

UNWINDING BIDEN-ERA CRYPTOCURRENCY GUIDANCE

- 2022 DOL guidance directed plan fiduciaries to exercise “extreme care” before offering cryptocurrency investments in 401(k) plans
- In May, DOL rescinded its 2022 guidance in favor of a “neutral” stance
- Plan fiduciaries must still “consider all relevant facts and circumstances”

SIGNALING CHANGES TO THE 2022 “ESG RULE”

- 2022 ESG Rule (i) provided flexibility for plan fiduciaries to consider the economic effects of ESG factors on investments and (ii) clarified that the fiduciary duty to manage plan assets includes proxy voting
- As part of a lawsuit in the Fifth Circuit challenging the 2022 ESG Rule, DOL stated that it would engage in new rulemaking, essentially abandoning its defense of the rule

ANNE BECKER

PARTNER

Winston & Strawn LLP
+1 (312) 558-9119
abecker@winston.com

JOSEPH S. ADAMS

CO-CHAIR, EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION PRACTICE

Winston & Strawn LLP
+1 (312) 558-3723
jsadams@winston.com

WINSTON
& STRAWN
LLP