



Employee Benefits Update

March 2024

AT&T and Lockheed Martin Face Class Actions Over Pension Risk Transfers to Athene

Potentially signaling a new wave of litigation, AT&T Inc. and AT&T Services, Inc. (AT&T) were hit with a class-action lawsuit on March 11, 2024 filed in the United States District Court for the District of Massachusetts relating to the 2023 transfer of \$8 billion of their pension liabilities – covering approximately 96,000 participants in AT&T’s pension plan – to Athene Holding Ltd. (Athene). State Street Global Advisors Trust Company (State Street), which served as the independent fiduciary for the transaction, was also named as a defendant in the lawsuit.

Two days later, on March 13, 2024, former employees of Lockheed Martin Corporation (Lockheed Martin) filed a similar lawsuit in the United States District Court for the District of Maryland relating to two separate transfers of pension plan liabilities to Athene: a transfer in 2021 of \$4.9 billion of Lockheed Martin’s pension liabilities, covering 18,000 pension plan retirees and beneficiaries, and a transfer in 2022 of \$4.3 billion of pension liabilities, covering 13,600 pension plan retirees and beneficiaries. The transfers included liabilities from both Lockheed Martin’s hourly and salaried pension plans.

The lawsuits come at a time when plan sponsors, due to a range of factors including the relatively favorable interest rate environment, have an increased interest in de-risking activities, including transferring some or all of a pension plan’s liabilities to an insurer through the purchase of one or more group annuity contracts, known as a pension risk transfer or “PRT.” Additionally, the industry awaits an overdue report from the Department of Labor (DOL) to Congress on existing guidance on fiduciary duties under the Employee Retirement Income Security Act of 1974 (ERISA)

when selecting an annuity provider that may preview changes to that guidance. Together, the outcome of these cases and the report to Congress could have far-reaching implications for sponsors and plan fiduciaries engaging in PRTs. Additionally, the lawsuits could potentially set the stage for the First Circuit and the Fourth Circuit (of which the District of Massachusetts and the District of Maryland are part, respectively) to weigh in on the pleading standard for prohibited transactions claims under ERISA, which would add to the current circuit split on this issue.

Background

Defined benefit pension plans typically provide a guaranteed dollar amount of benefits to plan participants in the form of monthly annuity payments upon retirement (although plans may allow participants to elect an optional lump sum payment). Companies that sponsor a defined benefit plan (pension plan) are responsible for making all contributions required to ensure the plan has enough money to pay promised benefits and, unlike with respect to 401(k) and other defined contribution plans, assume the risk that assets will not be sufficient.

The law permits pension plan sponsors to transfer some or all of the pension plan liabilities to an insurance company through the purchase of group annuity contracts that satisfy certain legal requirements. Sponsors may decide to do a PRT (which may include terminating the plan altogether) for a number of reasons, including to eliminate the future risk that the plan assets will underperform, requiring significant company contributions, and to reduce volatility in company retirement contributions (by shifting future employer contributions to a defined contribution

plan). Sponsors may also engage in a PRT to decrease the administrative cost of an ongoing pension plan, including premiums due to the Pension Benefit Guaranty Corporation (PBGC).

IB 95-1

The decision to do a PRT, whether or not the plan is terminated, is made by the plan sponsor and is a “settlor” decision. By contrast, the implementation of the sponsor’s PRT decision, including selection of an annuity provider, is fiduciary and accordingly done by a plan fiduciary. Fiduciary, but not settlor, actions are subject to the fiduciary standards under ERISA, including the requirement to act prudently and solely in the interest of the plan participants and beneficiaries.

In 1995, the DOL issued Interpretive Bulletin 95-1 (IB 95-1), which provides guidance to fiduciaries in discharging the fiduciary’s duties under ERISA when selecting an annuity provider for a pension plan. IB 95-1 was issued as part of the response to the failure of Executive Life Insurance Company in 1991, after the insurer’s portfolio of junk bonds took a hit. Generally, IB 95-1 advises fiduciaries to select a “safest annuity available” unless under the circumstances it would be in the interest of participants and beneficiaries to select a different insurer.

IB 95-1 lists a number of factors that DOL states a fiduciary should consider when selecting an annuity provider, including the insurer’s investment portfolio; the size of the insurer compared to the proposed contract; the level of the insurer’s capital and surplus; the insurer’s exposure to liability; the structure of the contract; and the availability of additional protection through state guaranty associations. Many plan fiduciaries consider additional factors not listed in IB 95-1, including enterprise risk management; asset-liability management; profitability and financial strength; and administrative capabilities. DOL included a reminder in IB 95-1 that the fiduciary nature of the selection of any annuity provider requires the selecting fiduciaries to act solely in the interest of participants and beneficiaries and for the exclusive purpose of providing benefits to the participants and beneficiaries as well as defraying reasonable expenses of administering the plan, meaning of course a fiduciary should not select the lowest priced

annuity provider solely to maximize financial benefits for the plan sponsor. Although IB 95-1 does recognize cost and other considerations may lead to situations where it may be in the interest of participants and beneficiaries to vary from a safest annuity available, it notes that cost and such other considerations should not be used to justify putting benefits at risk by selecting an insurer that is not safe.

Review of IB 95-1

SECURE 2.0 directs DOL to review IB 95-1, in consultation with the ERISA Advisory Council, to determine whether amendments to the bulletin are “warranted” and report to Congress on the findings of the review and an assessment of risk to plan participants. It generally is understood that Congress’s direction came, in part, because of concerns some parties have raised regarding private equity-owned annuity providers.

The DOL’s review and report was to be completed by December 29, 2023. While at the time of this writing the DOL has not yet issued its report to Congress, the ERISA Advisory Council [issued a statement](#) in August 2023 with the Council’s positions and recommendations relating to IB 95-1.

Among the Council’s recommendations was that the DOL update IB 95-1 to provide that fiduciaries should consider the following: (1) an insurer’s ability to fund annuities in the long-term; (2) whether an insurer invests in riskier and/or less liquid assets; (3) whether a higher level of reserves is appropriate for insurers with riskier and/or less liquid investments; and (4) the risk of potential self-dealing or conflicts of interest when an insurer is owned, or the insurer’s portfolio is managed in part, by a private equity firm. The Council further recommended that the DOL’s guidance should clarify that fiduciaries are not prohibited from considering insurers that are invested in risky assets.

Claims Against AT&T and State Street

In the lawsuit against AT&T, the plaintiffs, who are former AT&T employees, take issue with the 2023 PRT to Athene, which transferred \$8 billion of pension plan liabilities for the benefits of 96,000 participants and beneficiaries. Plaintiffs allege that the annuity purchase resulted in profit to AT&T of approximately \$350 million, and a loss to

participants of ERISA and PBGC protection. Plaintiffs further allege that Athene, which is owned by a private equity firm, has highly risky investments, including offshore reinsurance with Athene affiliates, which make it unsafe, and that AT&T chose Athene only because Athene was cheaper than other annuity providers.

Plaintiffs bring two types of claims against AT&T and State Street relating to the PRT. The first set of claims is for breach of fiduciary duty, alleging that AT&T and State Street (as a co-fiduciary) breached their duties to plan participants by selecting Athene, an allegedly unsafe insurer. As a result of this breach, plaintiffs allege, participants are at increased and substantial risk of not receiving their benefits, have lost ERISA protections, and have a decreased value of their pension benefit. There is no allegation that any participants have actually experienced any losses.

The second set of claims alleges AT&T and State Street engaged in prohibited transactions involving (1) State Street, when AT&T caused the plan to engage State Street, (2) Athene, when AT&T and/or State Street caused the plan to purchase the annuity contract from Athene, and (3) AT&T, when State Street caused the plan to purchase the annuity, which benefited AT&T. The complaint simply alleges that these parties were “parties in interest” at the time of the applicable transactions – implicating ERISA’s prohibited transactions rules – and does not address whether the transactions involved unreasonable compensation or were otherwise not covered by a statutory exemption.

The plaintiffs ask the court to order (1) AT&T and State Street to guarantee the annuities purchased from Athene, (2) AT&T to be secondarily liable for plaintiffs’ pension benefits, (3) reinstatement of the putative class as plan participants, and (4) disgorgement of profits earned from the annuity purchase, among other things.

Allegations Against Lockheed Martin

The factual allegations against Lockheed Martin are substantially similar to those made against AT&T. Plaintiffs bring claims for breach of fiduciary duty against Lockheed Martin, alleging that Lockheed Martin’s decision to do the PRTs to Athene was a breach of fiduciary duty, and also that

Lockheed Martin failed to monitor unnamed fiduciaries who made the decision to place the annuities. As a result, plaintiffs allege there is an increased and significant risk that they will not receive their benefits and, therefore, a decrease in the value of their benefits.

Plaintiffs also claim that Lockheed Martin engaged in a prohibited transaction when it engaged in the PRTs to Athene. Unlike the plaintiffs in the AT&T lawsuit, the Lockheed Martin plaintiffs further allege that the transactions do not qualify for any statutory prohibited transaction exemption because Athene received more than reasonable compensation for the services provided to the pension plans.

Plaintiffs seek disgorgement of profits, and the posting of security by Lockheed Martin to ensure plaintiffs receive their benefits. Unlike plaintiffs in the AT&T case, these plaintiffs are demanding a jury trial.

Thompson Hine’s Takeaways

We expect that the defendants in these cases will seek dismissal of the claims. Not only must the plaintiffs sufficiently allege facts to support a fiduciary breach claim, but plaintiffs must also sufficiently allege that they suffered an injury in connection with the transfer of their benefits to Athene. Plaintiffs’ arguably speculative and conclusory allegations regarding the risk to their benefits transferred to Athene may not meet this pleading standard. Any advances beyond a motion to dismiss could have significant implications for plan fiduciaries selecting annuity providers.

The lawsuits may also have implications for ERISA plan fiduciaries more broadly. Neither the First Circuit nor the Fourth Circuit have weighed in on the pleading standard for prohibited transaction claims, but several other circuits, including the Second, Third, Seventh, and Tenth Circuits, require plaintiffs to allege transactions involved unreasonable compensation, conflict of interest, self-dealing, or the absence of a statutory prohibited transaction exemption. A few other appellate courts have interpreted the prohibited transaction provisions more expansively, which has led to a circuit split on this issue. This case could potentially present an opportunity for

additional circuits to weigh in on the pleading standard for prohibited transaction claims.

For now, fiduciaries should continue to follow the guidance in IB 95-1 and be mindful of their fiduciary duties under ERISA. Fiduciaries also should be on the lookout for any amendments to IB 95-1 or related guidance from the DOL, which may address similar allegations made by the plaintiffs in this case.

FOR MORE INFORMATION

We will continue to monitor these cases. If you have any questions, please contact the authors or your regular Thompson Hine attorney.

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