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Employee Benefit Plan Review

ERISA Health Plan Litigation After *Cunningham v. Cornell*

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Since April, when the U.S. Supreme Court handed it down, *Cunningham v. Cornell*,[1] has made quite the splash in the Employee Retirement Income Security Act of 1974 (ERISA) litigation pool. The Court held that, to state a claim, plaintiffs alleging a prohibited transaction between a retirement plan and a party in interest under ERISA need only allege[2] the elements of a prohibited transaction, and do not need to plead that no exemption applies.[3] Many predicted the decision will open the floodgates for more retirement plan litigation by making it easier for plaintiffs to survive motions to dismiss. But there has been little discussion of another potential ERISA litigation impact: the inevitable application of *Cunningham* to claims in class actions involving employer-sponsored health plans, another booming area for plaintiffs.

The most common health plan claims are single-plaintiff lawsuits challenging denial of medical coverage. But more recently, plaintiffs have begun borrowing theories from retirement plan litigation and filing putative class actions accusing health plan fiduciaries of allowing plans to pay excessive fees to service providers, such as pharmacy benefit managers, resulting in increased medical costs for participants. Such allegations mirror the excessive fee claims that have proliferated around retirement plans for the past twenty years.

Although *Cunningham* dealt with an alleged prohibited transaction in the retirement plan context, nothing in the decision indicates that its lower pleading standard is limited to retirement plan claims. Plaintiffs are already starting to invoke the decision in creative ways, and given the huge amounts of money running through health plans today and the fact that *Cunningham*'s low pleading standard is enticing to all types of ERISA plaintiffs, we expect prohibited transaction claims to quickly become popular in health plan litigation as well.

The *Cunningham* Decision

Plan fiduciaries rely on prohibited transaction exemptions literally daily to conduct the business of ERISA plans. The *Cunningham* plaintiffs made an allegation typical of retirement plan class actions, alleging that plan fiduciaries committed a prohibited transaction by entering into an arrangement for recordkeeping and administrative services, because the plan's recordkeeper was a party in interest under ERISA, and so any transaction between it and the plan is prohibited by the statute. The plan fiduciaries argued, and the district court and Second Circuit agreed, that plaintiffs also must plead that the transaction was not within a prohibited transaction exemption to state a claim.

The Supreme Court reversed, holding plaintiffs need only allege facts the elements of a

prohibited transaction. It explained exemptions are affirmative defenses, and thus "'not something the plaintiff must anticipate and negate in her pleading.'" Because ERISA's prohibited transaction provisions apply to both retirement plans and health care plans, it is difficult to craft an argument that the same standard should not be applied in the health plan context as well.

Potential Impact of *Cunningham* on Health Plan Litigation

As retirement plan litigation remains extremely lucrative and health plans become ever larger, health plan litigation has begun to borrow theories from class actions against retirement plans. Health plan participants have started to allege breaches of fiduciary duties and prohibited transactions under ERISA for allegedly paying excessive fees to health plan services providers Even before *Cunningham*, plaintiffs had brought prohibited transaction claims against the fiduciaries of very large health plans, attacking their service arrangements with and fees paid to pharmacy benefit managers.

Cunningham is likely to give these claims a boost. For example, one post-*Cunningham* complaint alleges that the plan's health insurer was a fiduciary and party in interest to the health plan, and thus was prohibited from "engaging in a transaction to furnish 'goods, services, or facilities'" to that plan. This is in line with an emerging trend of class action complaints targeting plan fiduciaries who contract with interested service providers such as PBMs, brokers, and consultants. These service provider contracts are critical for ensuring that health plans run smoothly for participants, and many rely on prohibited transaction exemptions. *Cunningham* can only raise the bar for dismissal at the pleading stage, forcing defendants into costly discovery.

Conclusion

The *Cunningham* decision will have a ripple effect across the entire realm of ERISA litigation. We expect the health plan sector, which has already seen expanded theories imported from retirement plan class actions, to be one of the first places those effects will be seen. To prepare for those effects, health plan fiduciaries would benefit from understanding the prohibited transaction landscape.

Notes

1. Cunningham v. Cornell, No. 23-1007 (U.S. Apr. 17, 2025).
2. 29 U.S. Code § 1106.
3. 29 U.S. Code § 1108.

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