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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Eye On ERISA: A Chat With Morgan Lewis' Practice Chairs

By **Emily Brill**

Law360 (May 31, 2019, 6:15 PM EDT) -- Morgan Lewis & Bockius LLP's ERISA litigation practice chairs Deborah Davidson, Jeremy Blumenfeld and Brian Ortelere are helping employers navigate arguably the hottest topics in Employee Retirement Income Security Act litigation today: universities' retirement plan management and workers' savings being steered toward proprietary investment funds.

The firm recently negotiated a $14.5 million settlement of ERISA class action claims against Vanderbilt University and helped Washington University in St. Louis beat a similar suit over its 403(b) retirement plan at the motion-to-dismiss stage.

Morgan Lewis also helped Jackson National Life Insurance Co. strike a $4.5 million deal to resolve claims it steered workers' retirement savings toward company-controlled funds even though better-performing options existed.

With these successes have come setbacks, however — in May, the Third Circuit reversed the firm's win for client University of Pennsylvania in a suit accusing the school of placing subpar investment funds in its retirement plan and allowing plan record-keepers to overcharge workers.

Morgan Lewis is currently appealing that ruling, asking the Third Circuit on Thursday to rethink the three-judge panel's decision to revive the suit.

In an exclusive interview with Law360, Davidson, Blumenfeld and Ortelere discussed their work on these cases and the litigation they're watching. This interview has been edited for length and clarity.

Tell me about the ERISA litigation Morgan Lewis has handled lately.

Blumenfeld: We're tremendously proud of the 403(b) litigation we've handled. We've probably handled or are handling more than 50% of these litigations, which is a testament to the work we do.

We've also done a lot of proprietary fund litigation. We've gotten much more than a toehold on that market. If you looked for these litigations and compared them to the number of our competitors who we're pitted against, we have a disproportionate share of the market in both of these areas.

Can you tell me about some of the practice area's recent accomplishments?

Ortelere: Debbie and I successfully fended off the claims in the Washington University 403(b) litigation. There were very few motions to dismiss granted in those.

There was also the Troudt v. Oracle litigation in Denver. We're tickled to death by a summary judgment ruling dismissing the recordkeeping claims, which came on the heels of a pretty cool opinion rejecting one of [well-known ERISA plaintiffs' attorney Jerry] Schlichter's experts. That was a one-two punch — getting rid of the expert and then getting summary judgment.

Who was the expert, and why do you consider it a cool opinion?

Ortelere: Michael Geist. He was touted as a former T. Rowe Price analyst who claimed to have expertise in the field but, interestingly, he was very miserly in what he was willing to disclose, claiming his methodologies were proprietary. It's a very common argument, that somehow they can't disclose the secret sauce of their conclusions for these reasons.

Jerry tries mightily to keep hidden the bases for [expert] opinions, and finally, in Oracle, he got tripped up on that, which seems [like it will] be helpful in all of these cases.

Blumenfeld: These cases often come down to a battle of the experts. This stuff is critical to the outcome.

Is casting doubt on the plaintiffs' experts a key part of your strategy in these cases?

Davidson: That's certainly part of the strategy. We're obviously looking also at what the factual record looks like from a fiduciary perspective and developing that evidence. In terms of the court's decision-making, the experts tend to be a really key part of the case.

On a related note, one of the issues we're watching closely is whether the Supreme Court is going to accept the cert petition that was filed in the Brotherston v. Putnam case, which was a proprietary fund case. It brought up the question of who bears the burden of proving losses to the plan when cases are brought under [ERISA Section] 502(a)(2), on behalf of the plan. The answer to that question can have a big impact on expert strategy — it determines how we approach our initial expert report, whether we have to poke holes in the [plaintiffs' experts' reports].

What other issues are you watching in the appellate courts?

Davidson: There's a lot to watch related to pleading standards, fiduciary standards and fiduciary discretion and how courts are going to approach those issues at the pleading stage.

There was a fairly recent decision in a proprietary funds case — Meiners v. Wells Fargo — that was, we think, appropriately decided and set forth the right standards to apply in evaluating fiduciary prudence-related claims at the pleading stage. But there are other pending appeals on this topic, and decisions going both ways in the university cases.

Ortelere: There's the question of when will this stuff find its way to the Supreme Court. Schlichter has filed a petition for cert in the White v. Chevron litigation, and he argues that there is a circuit split. I'm not sure I see a stark circuit split right yet, but I think by the end of the year there may be, and the Supreme Court might be relied upon to resolve these issues. [Note: The Supreme Court rejected the White petition on May 28.]