J. INDIVIDUAL EMPLOYMENT RIGHTS, Vol. 3(1) 65-73, 1994-95

EMPLOYEE RIGHTS LITIGATION UNDER THE RETIREMENT INCOME SECURITY ACT

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ABSTRACT

This article reviews statistical evidence about litigation between plan participants and corporate plan sponsors under the Employee Retirement Income Security Act of 1974 (ERISA). Under ERISA's system of equitable relief, penalties are limited to contractual amounts so that litigants are most often employees who are entitled to relatively high benefit levels, for example, corporate executives.

Three waves in the development of industrial democracy in America were social insurance statutes modeled after Bismarck's, New Deal legislation exemplified by the National Labor Relations Act, and postwar legislation aimed at individual rights [1]. Each was associated with a distinct dispute-resolution method. The first wave created administrative courts, the second private rights arbitration, and the third causes of action in federal court. But each method has differing implications for the facilitation of employees' rights. For example, because of procedural safeguards such as rules of evidence, litigation in federal courts is costly in comparison with other methods and so may inadvertently limit some employees' access to remedies.

This article analyzes how legal costs may have influenced plaintiffs' characteristics and trial outcomes in employee rights cases brought under the Employee Retirement Income Security Act of 1974 (ERISA) [2] against single-employer, corporate-sponsored employee benefit plans. The article proceeds first by reviewing ERISA's provisions and then by analyzing theoretical reasons for concern about the possibility of asymmetries in access to the courts under ERISA. Sources of empirical data are discussed and inferences drawn from the empirical evidence.

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doi: 10.2190/1CC7-CGLW-T2LM-MAKP
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RIGHTS UNDER ERISA

Passed in 1974 in the afterglow of the burst of individual rights legislation in the 1960s, ERISA's purpose is to enhance employee benefit plan participants' rights to benefits by establishing standards for plan disclosure, vesting, funding, and fiduciary conduct.[1] At the heart of ERISA's protective provisions is its creation of civil sanctions under a system of federal statutory interpretation [2, § 1132(a)]. Labor regulations require that plan administrators provide employees with a statement of ERISA rights that describes employees' rights to bring lawsuits in order to obtain benefits.[2]

But litigation is subject to economic constraints, specifically damages relative to trial costs [3, 4]. Consistent with earlier pension trust principles [5, 6, 7], ERISA provides for equitable relief [2, § 1132(a)], which limits damages to contractual and extracontractual amounts [2, § 1131, 1132; 8], eliminates jury trials, and permits plan sponsors to establish deferential standards of judicial review [9].

The most important of ERISA's constraints on individual participants' pursuit of benefit claims, at least for low-paid plan participants, is its limitation of damages to contractual sums. The reason is that benefit levels under retirement plans are surprisingly small. In 1989, the median pension income among recipients was only $4,380 per year [10]. At age sixty-two the present value of an immediate life annuity of $4,380 is $42,923. Since the minimum amount required to justify trials in federal court for nonstatutory claims was set at $50,000 during the 1980s [11], the stakes at issue in employee benefit disputes may be hypothesized to be too small to justify the costs of litigation. ERISA may tend to

[1] ERISA defines the term fiduciary to include trustees and others, including investment managers, attorneys, consultants, and insurance companies, who provide services to plans [2, § 1002]. Vesting refers to an employee's nonforfeitable right to a pension which is earned, for example, after a fixed number of years of service.

[2] The law requires that plan sponsors provide employees with booklets called summary plan descriptions (SPDs), which must explain the terms of plans in language that is understandable to the average participant. Labor regulations require that SPDs include a statement of ERISA rights that describes the right to bring law suits, to obtain benefits that have been denied improperly, and to remedy violations. The regulations include safe harbor language that has been communicated to participants. For example, General Electric's *G.E. Employee Benefits: Summary Plan Description* (1988, p. 206) states:

> If your claim for a pension is denied in whole or in part you must receive a written explanation of the reason for the denial. You have the right to have a review of the denied claim and that claim reconsidered. If you have a valid claim for benefits which is denied in whole or in part, you may file suit in federal or state court. If it should happen that plan fiduciaries misuse the plan's money or if you are discriminated against for asserting your rights, you may seek assistance from the U.S. Department of Labor, or you may file suit in federal court. The Board of Trustees is the Agent for Service of Process. The court will decide who should pay court costs and legal fees. If you lose, the court may order you to pay these costs and fees. Further, you have similar rights if you request certain materials from the fund and they are not provided to you within a reasonable time, except for reasonable cause. If you have any questions about your plans, you should contact the plan administrator. If you have any questions about this statement or about your rights under ERISA, you may contact the nearest office of the U.S. Labor-Management Service Administration, Department of Labor.

muffle the voices of employees who dispute benefit amounts[3] because it assumes that employees can readily bring actions in federal court.

In addition, access to federal courts may be skewed according to demographic and socioeconomic status. Groups characterized by relatively shorter service, higher turnover, younger ages, and lower salaries may have relatively limited means by which to enforce their rights under ERISA because benefit levels correlate with service, age, and salary. Females and minorities tend to receive pensions that are below the median amount, so they are likely to be underrepresented in ERISA cases [13, 14].

Even if employees can afford to bring cases, economic blockages may reduce their ability to win. Priest and Klein [5] showed that stakes (hence socioeconomic status) as well as judicial bias can influence plaintiffs' win rates in published judicial decisions. They showed that under standard economic assumptions, as well as symmetric stakes between plaintiffs and defendants, litigated disputes will not constitute a random sample of the underlying distribution of disputes but instead will tend to be close to the judicial standard where the disputes are most problematic. Thus, where stakes and information are equal, win rates should tend to converge to 50 percent. As plaintiffs' and defendants' errors diminish over time, the proportion of plaintiff victories should more closely approach 50 percent.

But the conditions for litigation between individual (as opposed to organized) employee plaintiffs and corporate defendants violate Priest and Klein's assumptions. Stakes asymmetrically favor corporate defendants because they are more likely than individual plan participants to be involved in future litigation. Organizational advantages such as specialized employee benefit counsel experienced with the company's plan engender relatively low marginal information costs. Corporate demand for regulatory information is relatively inelastic because the information is necessary to maintain tax qualification, while employees' demand for information is relatively elastic because it is limited to individual claim amounts. Thus, under ERISA, costs, stakes, and information favor defendants. Even with respect to class action suits, costs relative to stakes are higher for plaintiffs than for defendants because class actions entail market transactions for plaintiffs, while for defendants preexisting relationships with law and consulting firms keep trial costs relatively low. Analogously, Perloff and Rubinfeld [16] found that about 70 percent of antitrust cases are won by defendants. In contrast, organized employees tend to have good access to information about employee benefits and to have long service, low turnover, and high wages [17], so they may tend to be relatively successful at litigation under ERISA.

[3] Between 1980 and 1986 there were an average of 76,266 employee complaints to the Department of Labor concerning employee benefit plans each year, excluding routine requests for information [12].

In sum, although ERISA provides for an employee voice through litigation in the courts, its provision for equitable relief may muffle and disperse employees' voices. Gender and socioeconomic status can be expected to be associated with the employees' ability to voice disputes, as can unionization.

DATA

ERISA cases from three sources, *United States Code Service* [18], *Employee Benefit Cases* [19] and *Pension and Profit Sharing* [20], were analyzed to examine asymmetries in the availability of remedies under ERISA. Differences in findings from the separate sources were not statistically significant, so the data were combined in a single data set.

The data elements included whether the case was brought by a single employee or under a class action; the type of plan involved; which side the judicial decision favored;[4] the issue involved; damages; attorneys' fees; and the plaintiffs' demographic and socioeconomic characteristics. The majority of decisions did not include all of the data sought, particularly demographic data. The cases reviewed in this study involved single-employer-plan defendants where employees or employee organizations were plaintiffs.[5]

FINDINGS

Plaintiffs' win rates have been consistently below 50 percent over the fourteen years the sample covers. Table 1 shows that 38.7 percent of decisions on motions have favored plaintiffs in single-employer cases. Assuming a binomial distribution, the proportion is significantly below 50 percent at the 5 percent level of significance for a two-tailed test. As can be seen in Table 1, the percentage of motions favoring plaintiffs has been below 50 percent in twelve of fourteen years. Furthermore, there is no trend toward 50 percent win rates over time.

Table 2 shows that the divergence from 50 percent win rates does not apply to cases where a union is a named plaintiff, where a unionized blue-collar employee in a single-employer plan is a named plaintiff, or where an executive, defined as president, vice president or owner, is a named plaintiff. In these cases plaintiff win rates do not significantly differ from 50 percent, assuming a binomial sampling distribution.

However, where unions are named as defendants by employees, where the plaintiffs are nonexecutive white-collar employees, and where plaintiffs are

[4] Since many cases were settled out of court, were motions for summary judgment, or were motions to dismiss, this was often not a verdict.

[5] Single-employer plans are sponsored by corporate plan sponsors. Thus, this study did not include cases involving multiemployer plans qualified under the Taft-Hartley Act and cases not relevant to industrial conflict, such as divorce cases and lawsuits among plan trustees.

Table 1. Plaintiff Win Rates over Time

Year	Number of Cases	Percentage of Decisions Favoring Plaintiffs
1975	3	42.9
1976	5	12.5
1977	13	53.3
1978	16	50.0
1979	12	37.5
1980	37	46.0
1981	29	30.0
1982	41	43.7
1983	49	40.3
1984	65	42.9
1985	67	39.0
1986	81	35.5
1987	109	34.3
1988	100	42.2
Missing	94	
Total	721	38.7

widows, win rates are below 50 percent, and the differences are statistically significant, assuming a binomial sampling distribution. Furthermore, a chi square test of association shows that differences in win rates among these plaintiff categories are statistically significant. Plaintiff categories associated with higher stakes and better information are also associated with higher win rates.

Similarly, plaintiffs with demographic characteristics associated with high benefit levels dominate the cases. For example, males are 89.6 percent of plaintiffs in single-employer litigation concerning defined contribution plans and 83.4 percent of plaintiffs in litigation concerning defined benefit plans. However, they were 71.4 percent of plaintiffs in welfare plan cases.[6] Kotlikoff and Smith [21] indicated that in the period this study covers females were about 30 percent of participants in pension plans.

[6] Under defined benefit plans, benefits are fixed by a formula, and contributions fluctuate depending on investment return, mortality, and turnover. Under defined contribution plans, benefits fluctuate depending on investment return, and contributions are fixed by a formula. Welfare plans include health, life, disability, severance pay, and vacation plans.

Table 2. Plaintiff Win Rates

Category of Plaintiff	Number of Cases	Percentage of Decisions Favoring Plaintiff
Unions	60	57.7
Union employees	72	44.3
Executives	58	45.9
Other white-collar employees	152	28.6*
Widows	34	24.0*
Class Actions	297	40.0*
Individuals	384	37.3*

*$p < .05$ for rejection of the two-tailed test of the hypothesis that the win rate equals 50 percent, assuming a binomial sampling distrubtion.

Table 3 shows that the mean single employer litigant's age is 53.9. Plaintiffs tend to be younger in defined contribution and welfare plan cases than in defined benefit plan cases. T tests for differences between mean ages for the defined benefit plan and welfare plan litigation reject the null hypothesis of no difference at the 5 percent level of significance for a two-tailed test. Since age is more closely linked to benefit levels in defined benefit plans than in welfare or defined contribution plans, litigants in defined benefit cases tend to be older.

The same is true of service. The mean tenure of defined benefit plan litigants is 20.9 years; the mean tenure of defined contribution plan litigants is 13.9 years; and the mean tenure of active welfare plan litigants is 11.7 years. The differences among defined benefit, defined contribution, and welfare plans are significant at the 5 percent level, and they too are consistent with the hypothesized demographic and socioeconomic constraints on litigation under ERISA.

The preponderance of executive plaintiffs is especially telling. Executives are 16.3 percent of all litigants while nonunionized blue-collar employees are only 7.5 percent of litigants (see Table 4).

DAMAGES

Levels of damages also suggest that employees with small claims cannot afford to sue. Of eighty-five single-employer cases in the sample that include a discussion of the amount of damages, the mean amount is $189,868 for all single-employer cases and $414,140 for defined benefit plans. In eighteen class action suits mean damages amount to $649,130; in single plaintiff suits damages amount

Table 3. Demographic Characteristics of Plaintiffs in Single-Employer ERISA Cases

	Defined Benefit Plans	Defined Contribution Plans	Active Welfare Plans	Retiree Welfare Plans	Total
Percentage male	83.4	89.6	71.4	93.8	80.8
Average age	54.1	49.6	48.6	62.3	53.9
Average years of service	20.9	13.4	11.5	29.7	19.6

Table 4. Plaintiffs' Occupational and Marital Status by Plan Type

	Defined Benefit Plans (%)	Defined Contribution Plans (%)	Active Welfare Plans (%)	Retiree Welfare Plans (%)	Total (%)
Executives	6.6	6.4	3.2	0.3	16.3
White collar	19.8	6.9	13.8	.7	42.2
Unionized blue collar	13.8	1.2	7.5	3.7	26.1
Non-unionized blue collar	3.7	0.3	3.4	.0	7.5
Widows	4.3	0.3	3.4	.0	8.0
Total	48.1	14.9	31.2	5.7	100.0

to $66,485. Even after adjustment for inflation, mean damages are large in comparison with the $4,380 median pension benefit in 1989, which was at the end of the sample period. That is, observed stakes are large relative to the underlying distribution of benefits because only the upper tail of the socioeconomic distribution can afford to enforce claims.

The same factors are consistent with the prevalence of class action suits. Class action and multiple plaintiff suits are 44.2 percent of the cases in the sample. Ninety-seven percent of the cases concerning retiree welfare benefits and 47.8 percent of the cases concerning defined benefit plans have been class action suits.

CONCLUSION

Trial costs due to ERISA's method of dispute resolution appear to muffle and disperse employees' voice. Executives are over 16 percent of all plaintiffs, while females, who are 30 percent of all plan participants, are 19 percent of plaintiffs in the sample. Male participants with long service and high wages dominate the judicial decisions. In judicial decisions that discuss specific judgment amounts, damages appear to be higher than the median pension recipient's entire benefit, even though most employee benefit disputes concern only a part of a benefit. Furthermore, plaintiff win rates have been consistently below 50 percent. The divergence from 50 percent does not apply where a union or an executive is involved. Widows appear to rarely win when they dispute claims decisions.

A direction for reform is amendment of ERISA to mandate private rights arbitration under plans. Plans would be required to provide private arbitration as the final step of ERISA's claims procedure [2, § 1133]. The availability of district court review, as under the National Labor Relations Act [22], would be reduced to determination of whether an employee's claim is arbitrable. The courts would not review the substance of arbitration decisions but rather would determine whether ERISA's rules were followed. Then, the costs of asserting a claim would be reduced so that the small amounts involved in employee benefit disputes would not inhibit enforcement.

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