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BLOG

# Pension Risk Transfer Litigation Targets Multiply and Courts Finally Weigh In

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2024 was another high-volume year for pension risk transfer (PRT) transactions. But as defined benefit pension plans have continued to shift pension risk to annuity providers, plan participants have been filing lawsuits claiming the PRTs are risky and/or the fiduciaries choosing the annuity provider have breached their fiduciary duty. A number of these lawsuits involved PRT transactions to Athene Annuity and Life Co. (Athene), which is a private equity backed insurance company. However, similar PRT lawsuits have also been filed targeting State Street Global Advisors Trust Co. (State Street), Prudential Financial, Inc. (Prudential), and RGA Reinsurance Company (RGA).

## BACKGROUND ON PRTS

Plan sponsors and fiduciaries that engage in PRTs generally rely on guidance issued by the United States Department of Labor (the Department) in Interpretive Bulletin 95-1. This guidance requires fiduciaries choosing an annuity provider to "take steps calculated to obtain the safest annuity available." This guidance was issued by the Department in response to the Executive Life Insurance Company (Executive Life) insolvency. Executive Life was one of the country's largest insurers in the 1980s and early 1990s. Executive Life primarily invested in high-risk junk bonds to maintain profitability. Unfortunately, the market for such bonds collapsed, causing Executive Life to become insolvent in 1991. Executive Life was eventually taken over by state regulators with limited guarantees and sold to minimize damage, but annuitants were left with significantly reduced benefits as a result of Executive Life's insolvency. The Department's goal in issuing Interpretive Bulletin 95-1 was to prevent fiduciaries from putting retirees in a risky situation that could impact their annuity payments by obligating fiduciaries to choose the safest annuity provider available.

## PLAINTIFFS' ALLEGATIONS

In the case of the Athene PRT lawsuits, the plaintiffs allege that the defendants breached their fiduciary duties and engaged in prohibited transactions by selecting Athene's annuities, which the plaintiffs claim are not the "safest available" in accordance with the Department's guidance. Plan participants allege that Athene is "a private equity controlled insurance company with a highly risky offshore structure" and that the defendants chose Athene to save money, even though it is a riskier alternative for plan participant retirement assets. The plan participants also assert that Athene was a party in interest because it was a service provider for the plan, and therefore this PRT represents a prohibited transaction. Multiple defendants in these lawsuits have filed motions to dismiss.

In a similar lawsuit filed against Verizon Communications Inc. (Verizon), the plaintiffs allege that Verizon and State Street, the independent fiduciary Verizon hired to assist with the PRT annuity provider selection, breached their fiduciary duties and engaged in prohibited transactions by selecting Prudential and RGA as Verizon's annuity providers. Plan participants allege that Prudential, its affiliates, and captive reinsurers engage in risky "circular" transfers of liability designed to make their annuities appear safer than they actually are. They further allege that Prudential has been installing "secretive" captive insurers in "regulation light" jurisdictions like Arizona and Bermuda to take advantage of looser regulation. The lawsuit also asserts that State Street, a significant shareholder in both Prudential and Verizon, operated under a conflict of interest in selecting a Prudential entity as the annuity provider. Verizon and State Street filed motions to dismiss on April 4.

## PLAN SPONSOR/FIDUCIARY RESPONSES

Plan sponsors and fiduciaries have made a variety of arguments in response to the plaintiffs' allegations. They have argued that:

- The plaintiffs have failed to show any injury, as required to maintain a federal lawsuit. This injury-in-fact requirement is not satisfied, the defendants argue, because participants have received all their vested pension benefits so far, and the PRT transactions do not diminish participants' legal right to receive the same monthly payments for the rest of their lives.
- Pursuit of a PRT is not a fiduciary act; thus, the participants' fiduciary claims are limited only to the choice of the annuity provider.
- The plaintiffs have failed to meet their burden of alleging deficient process in the choice of an annuity provider.
- In cases where sponsors used an independent fiduciary, plaintiffs fail to point to specific breaches of the duty to prudently select or monitor their independent fiduciary service providers.

Although two courts have issued decisions, as discussed below, other courts have yet to weigh in on these arguments.

## SUMMARY OF THE RECENT COURT DECISIONS

Two district court decisions published on March 28, 2025, have provided insight regarding a plaintiff's likelihood of success in overcoming a motion to dismiss where the plaintiff is challenging a plan's PRT. On March 28, 2025, the U.S. District Court for the District of Maryland allowed a PRT challenge against Lockheed Martin Corporation (Lockheed) to proceed past the motion to dismiss stage; however, on the same day, a federal court in the District of Columbia dismissed a lawsuit against Alcoa USA Corp (Alcoa) challenging Alcoa's PRT. Both companies contracted with Athene for their PRTs.

Alcoa and Lockheed both filed motions to dismiss the lawsuits against them at the outset, asking the judges to find the plaintiffs had suffered no concrete injury. The *Alcoa* court agreed with the defendants and held the transfer did not impact the plaintiffs' monthly benefit payments, which they continue to receive. The court noted the plaintiffs had at most alleged a "theoretical reduction in value based on a riskier annuity provider." That theoretical harm, the court reasoned, was not concrete enough to sustain the lawsuit. The court further rejected the plaintiffs' argument that Alcoa failed to promote the plan participants' interests when it selected a risky insurance provider, explaining that ERISA does not entitle plan participants to choose their insurer. And although the Supreme Court's decision in *Thole v. U.S. Bank* explicitly left open the possibility that an ERISA plaintiff can show an injury based on a substantial risk of plan failure, the plaintiffs in *Alcoa* failed to successfully show that Athene was at a "*high* risk of failure—just that it [was] at a *higher* risk … than other annuity providers." Based on these conclusions, the *Alcoa* court determined the plaintiffs lacked standing to bring their claims based on a failure to sufficiently allege an injury in fact and granted Alcoa's motion to dismiss.

In contrast, the *Lockheed* court concluded the plaintiffs had just "barely" but successfully alleged facts pointing to a "substantially increased risk" that Athene would fail, with resulting harm to the plaintiffs. The court emphasized the collapse of Executive Life in the early 1990s as an example of the "very real possibility" that allegedly high-risk insurance practices threaten imminent harm. The court also focused on Athene's private equity ownership, noting

the plaintiffs' allegations that such firms benefit from premium cash flows and investment management fees to finance their own businesses and that private equity has come to control over 7% of the insurance industry's assets at a time when insurers are shifting toward higher-risk illiquid assets instead of safer investments. Other factors noted by the *Lockheed* court include: (1) Athene's allegedly "exceedingly small" surplus, (2) claims that Athene's use of a reinsurer in Bermuda allows it to appear financially stronger while using its surplus for stock buybacks and other investments, and (3) a study which found that Athene ranked lowest of the evaluated PRT insurance providers with a 14% economic loss to beneficiaries due to credit risk. Unlike the *Alcoa* court, the *Lockheed* court found these allegations sufficient to conclude the plaintiffs had adequately pled standing and therefore, denied the defendant's motion to dismiss.

Although the *Alcoa* and *Lockheed* cases involve similar facts and allegations, the courts reached opposite conclusions. These cases illustrate that the outcomes of these lawsuits depend on a plaintiff's success in alleging future harm. Even though the *Lockheed* court found in favor of the plaintiffs, the court's statements such as finding "[the plaintiffs] eked out sufficient injury-in-fact to establish standing" suggest that plaintiffs have a high bar to be able to identify specific and concrete potential harm. Nevertheless, the *Lockheed* court's decision denying the defendant's motion to dismiss may lead to an increase in the number of these plaintiff lawsuits.

### KEY TAKEAWAYS

Plan sponsors and fiduciaries should continue to carefully consider the guidance in the Department's Interpretive Bulletin 95-1 when choosing a PRT annuity provider. Decision-makers should pay special heed to the Bulletin's statement that "[u]nless they possess the necessary expertise to evaluate" the factors laid out in the guidance, "fiduciaries would need to obtain the advice of a qualified, independent expert." Even if a fiduciary obtains the assistance of a qualified expert, that expert should be independent, and the fiduciary must still monitor the performance of such expert. Plan sponsors and fiduciaries should also monitor how these cases proceed. As discussed above, the analysis by the courts in these lawsuits is fact-intensive. Nevertheless, the upcoming future court decisions are likely to highlight practices to emulate and those to avoid. Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation Practice o

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## Authors

Amy Gordon

Anne Becker

Justin A. Linder

Grant E. Shillington

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Amy Gordon

Anne Becker

Justin A. Linder

Grant E. Shillington

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