

## Benefits Group Of The Year: Jenner & Block

By **Dani Kass**

*Law360 (February 19, 2019, 1:41 PM EST)* -- Jenner & Block LLP helped Northwestern University beat a suit accusing it of mismanaging its employees' retirement savings and won The Northern Trust Co. the Second Circuit's clearance to amend its pension plan, earning it a spot as one of Law360's 2018 Benefits Groups of the Year.

The firm's Employee Retirement Income Security Act litigation team is small, with only 20 of the firm's more than 500 attorneys working on it full time, largely based out of Chicago. Despite the size, they take on cases with big impacts.

"Our focus is not to do everything, but is only to do the most impactful cases and that's generally what we focus on," newly minted firm chair Craig C. Martin said, adding that they usually steer away from single-plaintiff cases.

Practice chair Amanda S. Amert noted that many of the practice members also work in other practices, including bankruptcy, transactions and appellate.

"Our goal there is really to leverage those special skill sets to meet the particular needs of every case and every client," she said.

In May, Jenner & Block convinced an Illinois federal judge to throw out a proposed ERISA class action against Northwestern. The university's workers had alleged it mismanaged their retirement funds by offering insufficient index funds. The judge tossed all six counts of the suit, obliterating claims that Northwestern paid excessive plan fees, offered too many investment options and improperly kept two funds on the lineup, breaching its fiduciary duties in the process.

"Our basic argument was that the participants had enough choice to choose investment options that were satisfactory and actually, not just satisfactory, but were a good lineup of funds and certainly consistent with sound investment strategy and management," Martin said. "And also, we attacked the proposition that there was no real pleading, that there were excessive or unreasonable fees charged in connection with those plans. Put another way, Northwestern offered its employees and its staff and its faculty a state-of-the-art lineup with regard to investments."

These suits over so-called 403(b) plans have been picking up in recent years, but universities have



consistently been able to ward them off or settle.

In April, Jenner & Block secured a Seventh Circuit win on behalf of Northern Trust. The proposed class action led by an executive claimed the financial advisory firm discriminated against older workers by freezing the pension plan, in violation of ERISA's anti-cutback rule and the Age Discrimination in Employment Act.

Amert said the change made it so benefits wouldn't increase, but wouldn't decrease either, meaning Northern Trust is in the clear, and a three-judge panel agreed. The panel said this change — which adjusts the formula that calculates future salary increases for workers hired before a certain year — doesn't discriminate against older workers because the formula considers only length of employment, not age, and doesn't impact accrued benefits.

"We were able to demonstrate to the court that what Northern Trust had done through this fairly complicated change to its pension plan was an appropriate change and was not a violation of either statute," Amert said. "The case was pled as a class action, with the idea of trying to invalidate that change for all of the participants in the pension plan. When you think about it in terms of dollars, all of the planning Northern Trust had done over the years for how it was going to pay for its pension benefits would have been wrong, and they would have had to come up with greater funding."

The firm also helped Aon Hewitt Financial Advisors LLC dodge a potential ERISA class action litigation alleging an advisory fees kickback scheme, by proving it wasn't a fiduciary for participants in a Caterpillar Inc. retirement plan. Aon worked with Caterpillar to provide its plan participants online investment advice, and those participants claimed Aon's fee was too high. Aon was able to beat the suit on a motion to dismiss, and fix its reputation by proving the fees were in line with the rest of the market, Amert said.

Martin called this type of suit targeting online service providers, often involving artificial intelligence-based services, a "brand-new attack."

"It's really on the cutting edge of technology with financial products and whether you can satisfy your fiduciary duty," he said. "It's an old-fashioned legal attack using ERISA or the common law of trusts on a basically artificial technology-driven solution as to what offerings are in a particular 401(k) plan. It's new. We were happy to have fended off a challenge because that challenge could be multiplied multiple times with regard to many companies. ... If you win those cases on motions to dismiss early on, the hope would be that it shuts down that avenue of attack because we don't think it's a legitimate plaintiff's theory to pursue."

Amert added that, unlike the Northwestern case over one plan, this type of litigation would be much broader, allowing suits over several plans at once, meaning it had been extra important for the firm to shut it down.

--Additional reporting by Emily Brill and Diana Novak Jones. Editing by Marygrace Murphy.