eActionAlert

Cashed-out DC Plan Participants can Sue for Investment Losses Caused by Breach of Fiduciary Duty

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In our July 17, 2008 eAlert, we told you about three court cases decided this year. In LaRue v. DeWolff, Boberg & Associates, the U.S. Supreme Court held that a 401(k) participant can sue under Section 502(a)(2) of the Employee Retirement Income Security Act of 1974, as amended ("ERISA") to have his account balance restored to what it would have been had the fiduciaries not breached their duties. In two other federal cases, the courts held that former, cashed-out participants have standing to sue under that statute. (Young v. Principal Financial Group was decided by the U.S. District Court for the Southern District of Iowa, which is within the 8th Circuit and Wangberger v. Janus Capital Group, Inc. was decided by the 4th Circuit Court of Appeals which includes Maryland.) On July 18th, the 1st Circuit Court of Appeals, which includes Massachusetts, became the latest federal appeals court to decide that cashed-out former employees who allege that breaches of fiduciary duties diminished the value of their accounts have standing to sue as participants under ERISA.

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In the most recent case, *Evans v. Akers,* the plaintiffs were former employees of W. R. Grace & Co. ("Grace") and they had participated in one of the company's defined contribution plans (the "Plan"). After leaving the company, they received lump-sum distributions of their account balances. Later, they filed a class action suit against Grace and several other fiduciaries. The plaintiffs claimed that the fiduciaries breached their duties by (1) continuing to use Grace common stock as employer contributions, (2) not allowing participants to diversify out of that investment fund until they reached age 50 and (3) offering such stock as an investment option under the Plan, all after it was no longer prudent to do so. Plaintiffs brought these claims to recover alleged losses on behalf of the Plan.

The U.S. District Court for the District of Massachusetts dismissed the suit. This decision was rendered before the three cases discussed in our July 17th eAlert were decided. In the District Court's view, the Plaintiff's were asserting claims for personal compensatory damages rather than for additional benefits under the Plan and thus were not participants with a right to sue.

As in any case of statutory construction, the appellate court began its analysis with the plain language of the statute. The court noted that ERISA Section 502(a)(2) provides that a civil action may be brought by the Secretary of Labor, a participant, beneficiary or fiduciary for appropriate relief under ERISA Section 409. That section of ERISA says a fiduciary who has breached his duties with respect to a plan shall be personally liable "to make good to the plan any losses to the plan resulting from each such breach." The court

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also noted that Section 3(7) of ERISA defines "participant" to include any former employee who is or may become eligible to receive a benefit of any type from an ERISA-covered plan.

Defendants conceded that this is the correct definition of participant but contended that plaintiffs had not stated a claim for "benefits" under the Plan but instead wanted relief for personal "damages." The court noted that three other Circuits recently rejected this argument and said it also would not endorse this distinction. The court cited the Supreme Court's statement in *LaRue* that a defined contribution plan "promises the participant the value of an individual account ..." and this court further said "under ERISA, a participant is also promised that the funds in [the] individual account will be managed prudently by the plan fiduciary... Consequently, the full 'benefit' ... is the value of [the] account unencumbered by any fiduciary impropriety." And "... plaintiffs seek only the amount that should have been in their accounts but for the defendants' fiduciary impropriety."

Defendants also argued that damages sought by plaintiffs are too "speculative" and "unascertainable" to be characterized as a claim for "benefits." The court disagreed and said there is nothing in ERISA to suggest that a benefit must be a liquidated amount in order to be recoverable and that experts can compare the performance of imprudent investments with that of prudent investments.

The court concluded that plaintiffs "... have stated a colorable claim that their benefit payments were deficient on the day they were paid due to fiduciary breaches by the defendants. As a result, they are 'participants' with standing to maintain their suit under ERISA § 502(a)(2)." The appellate court therefore vacated the district court's dismissal and remanded the case back to the lower court for further proceedings.

What this means to you and M&A's Recommendations

Every fiduciary must know the nature and extent of his obligations to the plan and its participants and beneficiaries. You must guard against a breach of fiduciary duty by you as well as by other fiduciaries. This includes being aware of changes in applicable laws and regulations as well as staying informed about litigation like that described in this eAlert and that of July 17th.

Mahoney & Associates helps you reduce the likelihood of litigation in many ways. For example:

- M&A's qualified plan experts monitor the activities of your recordkeeper and other vendors to help assure that they complete all legally required functions in a competent, timely manner;
- Our internal Retirement Services Group is staffed with rollover specialists who can offer independent retirement financial planning advice to your plan participants who are about to retire or who have recently left the company;
- Our qualified plan investment professionals meet with you quarterly to help fiduciaries prudently select and monitor investment funds and understand associated fees; and
- We can prepare a fiduciary handbook that helps plan fiduciaries understand their many obligations and guides them through various activities, such as selecting appropriate vendors, choosing, monitoring and changing investment funds, reporting to the government, disclosing information to participants, generally managing the plan and protecting the plan against imprudent acts.

M&A is an employee benefits consulting and management firm and, as such, we do not practice law or accounting. However, if you would like to explore additional ways we can help your plan officials and participants, please contact your Senior Consultant at (877) 564-4300.

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