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ERISA Litigation

Interpreting Section 502(a)(2) of ERISA with Respect to Individual Account Plans

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The Employee Retirement Income Security Act of 1974 (ERISA) contains two remedy provisions for plan participants and beneficiaries who seek relief for an alleged breach of fiduciary duty. One provision is Section 502(a)(2),[1] which allows plan participants and beneficiaries to bring an action against plan fiduciaries for "appropriate relief" under Section 409(a),[2] which provides that plan fiduciaries who breach their duties are "personally liable to make good to such plan any losses to the plan resulting from each such breach … and shall be subject to such other [appropriate] equitable or remedial relief." The other provision, Section 502(a)(3),[3] only allows plan participants and beneficiaries to bring an action against plan fiduciaries for "appropriate equitable relief," such as injunction or restitution. Because money damages are available under Section 502(a)(2), but not Section 502(a)(3), and because Section 502(a)(2) offers the same equitable relief as Section 502(a)(3), plaintiffs sue under Section 502(a)(2) whenever possible. However, a Supreme Court decision interpreting Section 502(a)(2) prevents plaintiffs from seeking individual relief.

The Supreme Court Decision

In *Massachusetts Mutual Life Insurance Co. v. Russell*,[4] the Supreme Court held that a single plan participant cannot bring a Section 502(a)(2) lawsuit to seek recovery for extra-contractual damages payable directly to such participant. In support of its holding, the Court made the following statements, which would later be the source of controversy, and for a brief period, cause a circuit split:

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> Petitioner contends . . . that recovery for a violation of § 409 inures to the benefit of the plan as a whole. We find this contention supported by the text of § 409, by the statutory provisions defining the duties of a fiduciary, and by the provisions defining the rights of a beneficiary. . . . A fair contextual reading of [§ 409] makes it abundantly clear that its draftsmen were primarily concerned with the possible misuse of plan assets, and with remedies that would protect the entire plan, rather than with the rights of an individual beneficiary.[5]

What did the Court mean by "inures to the benefit of the plan as a whole"? That was the subject of great debate with respect to individual account plans after the Fifth Circuit's narrow interpretation of that language in *Milofsky v. American Airlines, Inc.*[6]

The Milofsky *Panel Decision*

In March 2005, the Fifth Circuit, in a two to one decision of a panel, affirmed the dismissal of a Section 502(a)(2) lawsuit brought by a subset of plan participants for lack of standing, based on its interpretation of *Russell*.[7] The plaintiffs in *Milofsky* sought recovery for damages to be paid directly to their individual account plan, to be allocated among their individual accounts in proportion to their losses resulting from the alleged fiduciary breach, which only affected the plaintiffs and not each and every plan participant.[8] Even though damages would be paid directly to the plan, and not directly to the subset of plan participants, the majority stated that the lawsuit did not inure to the benefit of the plan as a whole, because the money would pass through the plan and into only the plaintiffs' individual accounts, and not the individual accounts of any other plan participants.[9]

The majority concluded that in order for a Section 502(a)(2) lawsuit based upon an individual account plan to inure to the benefit of the plan as a whole, (1) the lawsuit would have to increase the individual account balance of each and every plan participant, so all plan participants would be directly benefited; or (2) the lawsuit would have to seek to "vindicate the rights of the plan as an entity when alleged fiduciary breaches targeted the plan as a whole."[10]

The Fifth Circuit's decision in *Milofsky* split with the Sixth Circuit's decision in *Kuper v. Iovenko*,[11] which the majority in *Milfosky* criticized for being "internally inconsistent" and "unaware of *Russell* or overlook[ing] …[*Russell*'s] crucial language in fashioning its opinion."[12] In *Kuper*, a case factually similar to *Milofsky*, the Sixth Circuit allowed a subclass of plan participants to sue for a breach of fiduciary duty, directly rejecting defendants' argument that such a breach must harm all of a plan's participants in order to be subject to a Section 502(a)(2) lawsuit.[13] The dissenting judge in *Milofsky* sided with the *Kuper* decision, writing that "Russell never reached the conclusion that the majority reach[ed]" and that "the majority's holding [went] far beyond the holding of Russell."[14]

Plan fiduciaries and defense attorneys had little time to cite the majority's controversial opinion in *Milofsky* before the Fifth Circuit vacated the decision and granted a rehearing en banc.[15]

Schering-Plough

Shortly after the Fifth Circuit ordered that *Milofsky* be reheard en banc, the Third Circuit, in *In re Schering-Plough Corporation ERISA Litigation*,[16] reversed the dismissal of another Section 502(a)(2) lawsuit brought by a subset of plan participants seeking damages payable to their individual account plan. The district court had held that the *Schering-Plough* plaintiffs lacked standing under Section 502(a)(2), because even though they sought damages payable directly to the plan, they could only show that they suffered individualized losses and could not demonstrate losses to the plan.[17]

In reversing the district court's decision, the Third Circuit held that losses due to a fiduciary breach need not affect every participant in order to constitute a loss to the plan.[18] The court noted that *Russell* did not hold otherwise, and that recovery would benefit the plan as a whole anyway, because the money recovered by the plan would be subject to its terms and could be used, for example, to pay operating expenses that would benefit all plan participants.[19] The court specifically disagreed with the majority's opinion in *Milofsky*.[20]

The **Milofsky** *En Banc Decision*

With *Milofsky* vacated and *Schering-Plough* overturned, momentum had abruptly shifted towards the *Kuper* school of thought. All attention was now focused on the Fifth Circuit's rehearing of *Milofsky* en banc. Would the en banc Fifth Circuit vary from both the Sixth and Third Circuits? Or, would the en banc Fifth Circuit abandon the interpretation of *Russell* originally advocated by a panel of the Fifth Circuit in *Milofsky* and the district court in *Schering-Plough*? It turns out that it did neither.

On March 2, 2006, the Fifth Circuit issued its en banc decision.[21] The en banc panel stated in its opinion that the *Milofsky* plaintiffs were "entitled to further development of their breach of fiduciary duties claims, brought under ERISA sections 502(a)(2) and 409(a), … seeking to recover losses to the … [p]lan (to be allocated among plaintiffs' accounts)."[22] One might have then expected the panel to go into a full-blown, or even a cursory, analysis of Sections 502(a)(2) and 409(a) to support its decision and to firmly establish the law in the Fifth Circuit. Instead, the panel supported its decision in one sentence, simply explaining that "[m]easured by the principles of notice pleading and the standards controlling dismissal under FED. R. CIV. P. 12(b)(6), the district court erred in dismissing these claims."[23] The whole opinion was just three sentences long. So while the district court's dismissal of plaintiffs' Section 502(a)(2) lawsuit was ultimately vacated and remanded, it remains unclear whether the Fifth Circuit agrees with the broader interpretation of *Russell* advocated by the Third and Sixth Circuits.

Other Court Decisions

No other circuit besides the Third, Fifth, and Sixth Circuit has addressed the narrow interpretation of *Russell*. However, district courts in the First,[24] Fourth,[25] Seventh,[26] and Eleventh Circuits[27] have adopted the broader interpretation of *Russell* advocated by the Fifth and Sixth Circuits.

However, there is also the case of *Fisher v. J.P. Morgan Chase & Co.*[28] In *Fisher*, the district court for the Southern District of New York held that plaintiffs lacked standing to bring their claims pursuant to Section 502(a)(2), because they sought "recovery on behalf of a 'specific subclass of [plan] participants' and not on behalf of the [p]lan itself."[29] However, the *Fisher* decision was partly based on the vacated panel decision in *Milofsky*, and it cited the overturned district court decision in *Schering-Plough* for support.[30]

Looking Ahead

Most courts now follow the broader interpretation of *Russell* adopted by the Third and Sixth Circuits. However, even if that interpretation ultimately prevails uniformly, the question remains whether a subset of plan participants can be so low in number relative to the membership of the plan that any damages recovered by the subset can no longer be reasonably said to benefit the plan as a whole. This leaves open the argument that such a subset of plan participants do not have standing to bring a Section 502(a)(2) lawsuit.

Notes

1. 29 U.S.C. § 1132(a)(2).

2. *Id*. § 1109(a).

3. *Id*. § 1132(a)(3).

4. 473 U.S. 134 (1985).

5. *Id*. at 140–142.

6. 404 F.3d 338 (5th Cir. 2005).

7. *Id*.

8. *Id*. at 341.

9. *Id*. at 343–344.

10. *Id*. at 344.

11. 66 F.3d 1447 (6th Cir. 1995).

12. 404 F.3d at 345–346.

13. 66 F.3d at 1453 ("Such a result clearly would contravene ERISA's imposition of a fiduciary duty that has been characterized as 'the highest known to law.'").

14. 404 F.3d at 349.

15. Milofsky v. American Airlines, Inc., 418 F.3d 429 (5th Cir. 2005).

16. 420 F.3d 231 (3d Cir. 2005).

17. *Id*. at 234.

18. *Id*. at 235.

19. *Id*.

20. *Id*. at 238–240.

21. Milofsky v. American Airlines, Inc., No. 03-11087, 2006 U.S. App. LEXIS 5282 (5th Cir. March 2, 2006).

22. *Id*. at *2.

23. *Id*. at *2–3.

24. *See* Kling v. Fidelity Management Trust Co., 270 F. Supp. 2d 121 (D. Mass. 2003).

25. *See* Difelice v. US Airways, Inc., No. 1:04cv889, 2006 U.S. Dist. LEXIS 15711 (E.D. Va. March 22, 2006).

26. *See* Rogers v. Baxter International Inc., 417 F. Supp. 2d 974 (N.D. Ill. 2006).

27. *See* Woods v. Southern Company, 396 F. Supp. 2d 1351 (N.D. Ga. 2005).

28. 230 F.R.D. 370 (S.D.N.Y. 2005).

29. *Id*. at 375.

30. *Id*. at 375–376.

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