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LEGAL ALERT



Legal Alert: Seventh Circuit Permits Plan Participants to Proceed with ERISA Action

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In one of the first federal appeals court decisions to address the issue following the U.S. Supreme Court decision in *LaRue v. DeWolff, Boberg & Associates, Inc.*, the Seventh Circuit has held that a group of plaintiffs may proceed with their ERISA breach of fiduciary duty claims against the administrator of their defined contribution plan, even though the losses for which they seek recovery were not incurred by the entire plan. See *Rogers v. Baxter International, Inc.* (7th Cir. April 2, 2008). The Seventh Circuit also rejected the defendants' argument that the plaintiffs could not use ERISA to circumvent the limitations placed on investor actions by the Private Securities Litigation Reform Act of 1995 (PSLRA).

In *Rogers*, the plaintiffs were participants in a retirement plan for Baxter's employees. The plaintiffs could exercise some control over the investments in their individual accounts in this defined contribution plan, but the plan and its trustees could limit what assets an account could contain and when trading may occur. The plaintiffs sued the plan trustees under ERISA, claiming the trustees violated their fiduciary duties by permitting participants to invest in Baxter's stock, even though the trustees knew it was overpriced in the market and, hence, a bad deal.

The defendants argued that under the Supreme Court's 1985 decision in *Massachusetts Mutual Life Insurance Co. v. Russell*, the plaintiffs could not pursue their claim under § 502(a)(2) because they sought recovery for losses in their individual accounts, not for losses incurred by the plan as an entity. However, while the case was pending, the Supreme Court decided *LaRue v. DeWolff, Boberg & Associates, Inc.*, in which the Court held that its decision in *Russell*, which involved a defined benefit plan, does not apply to claims by participants in a defined contribution plan. Thus, the Court in *LaRue* held that §502(a)(2) and §409(a) may be used by beneficiaries of a defined contribution account that suffers a loss, even though other participants are uninjured by the acts said to constitute a breach of fiduciary duty. According to the Seventh Circuit, the decision in *LaRue* "pretty much disposes of this appeal."

The Seventh Circuit also held that the amendments made by the PSLRA do not preclude the plaintiffs' claims under ERISA. Although the Seventh Circuit previously dismissed a securities law action against Baxter, finding that the plaintiffs failed to satisfy the standard that the PSLRA establishes for pleading scienter, the court noted that this standard applies only to claims under the federal securities laws; ERISA sets the standard for breach of fiduciary duty

claims. The court noted that nothing in the PSLRA amends how trustees fulfill their duties under ERISA.

Employers' Bottom Line:

This case may reflect a trend toward an increase in ERISA litigation by plan participants seeking to hold plan administrators liable for losses based on alleged breach of fiduciary duty, especially as federal courts appear to be construing federal securities laws claims more narrowly and precluding many actions by investors under these laws. For more information regarding this case or plan administrators' fiduciary duties under ERISA, feel free to contact any of the following attorneys in Ford & Harrison's Employee Benefits Practice Group: Michael Coval, mcoval@fordharrison.com, 404-888-3892; Joelle Sharman, jsharman@fordharrison.com, 404-888-3975; Tiffany Downs, tdowns@fordharrison.com, 404-888-3961; or Jeff Rickman, jrickman@fordharrison.com, 404-888-3925, or the Ford & Harrison attorney with whom you usually work.