

## Plan Participant Who Withdrew All Assets from Retirement Plan Still has Standing to Sue for Breach of Fiduciary Duty

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Recently, in *Harris v. Amgen, Inc.*, \_\_\_ F.3d \_\_\_, 2009 WL 202758 (9th Cir. July 14, 2009), the Ninth Circuit Court of Appeals held that a former employee who withdrew his assets from an ERISA-governed retirement contribution plan still had standing to assert a breach of fiduciary claim against the plan fiduciaries, on the grounds that his retirement account might have been worth more at the time of the withdrawal had there been no breach of fiduciary duty.

Initially, Steve Harris, a former employee of Amgen, who withdrew his assets from his retirement account in July 2007, and Dennis Ramos, another former Amgen employee who still maintained assets in his retirement account, sued Amgen and several officers and directors for breach of fiduciary duty, alleging that the fiduciaries improperly allowed the plan to purchase and hold Amgen stock despite knowledge that the stock price was artificially inflated because of improper off-label drug marketing and sales. The district court dismissed Harris' claims, finding that because he had withdrawn his assets from the Plan, he did not have standing to sue the Plan. The district court dismissed Ramos' claims because he failed to identify the proper defendants. Both Harris and Ramos were denied leave to amend the complaint.

In order to bring a suit under ERISA, a plaintiff must have standing as a plan participant, defined as "an employee or former employee of an employer ... who is or may become eligible to receive a benefit of any type from an employee benefit plan which covers employees of such employer." 29 U.S.C. § 1002(7). In *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 117 (1989), the United States Supreme Court expanded the definition of plan participant to include "former employees who have ... a colorable claim to vested benefits." In reversing the dismissal of Harris' claims, the Ninth Circuit found that even though he previously cashed out his plan account, he still had standing to assert a claim under ERISA Section 502(a)(2). Specifically, the Ninth Circuit observed that "when employees withdraw their funds from a benefit plan, but claim that they would have had more to withdraw absent breach of fiduciary duty by those managing the plan, it is not difficult to see a common sense loss of benefits in their plan caused by the alleged breach of fiduciary duty." Accordingly, "former" plan participants still have standing to recover losses caused by an alleged breach of fiduciary duty. The Ninth Circuit further explained that it agreed with the First and Third Circuits "in holding that an ERISA plan participant who no longer has assets in the plan has statutory standing to assert a fiduciary claims under Section 502(a)(2), even when relief is available under Section 502(a)(1)(B)."

Finally, the Ninth Circuit ruled that both Harris and Ramos were improperly denied the right to amend their pleadings, as courts "should normally permit at least one amendment of a complex ERISA complaint that has failed to state a claim where, as here, the Plaintiffs might be expected to have less than complete information about the defendants' organization and ERISA responsibilities, where there is no meaningful evidence of bad faith on the part of the plaintiffs, and where there is not significant prejudice to defendants."