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7th Circuit Certifies ERISA Breach of Fiduciary Duty Class in Defined-Contribution Plan

This week the United States Court of Appeals for the Seventh Circuit handed down a decision reversing a trial court's denial of class certification for breach of fiduciary duty under Sections 409 and 502 of the Employee Retirement Income Security Act (ERISA) in the context of a defined-contribution plan. The new decision, *Abbott v. Lockheed Martin Corp.*, now stands as a major guiding force for ERISA class actions in the Seventh Circuit. However, to understand its impact, it is necessary to examine a prior Seventh Circuit decision from two and a half years earlier – *Spano v. Boeing Co.*

In *Spano*, Circuit Judge Diane Wood, writing for the unanimous court, examined the issue of whether two cases had been properly certified as class actions where the allegations were for breach of fiduciary duty under ERISA when the issue was contributions to a defined-contribution retirement savings plan. The *Spano* court found that the classes were not properly certified.

In order to understand the following discussion about *Abbott* and *Spano*, we must take a brief look at ERISA. ERISA is a federal law that is designed to govern standards for the pension plans of private businesses. The *Spano* decision provides

a useful discussion of pension plan structures.

> A company establishing a pension plan has a choice of two models: a defined-benefit plan, or a defined-contribution plan. The former plans assure participants whose rights had vested that they will receive a specified payout upon retirement, while the latter plans make no such promise. For many years, most retirement plans took the form of a defined-benefit plan, and this fact is reflected in the earlier Supreme Court decisions in this area.

The type at issue in both *Abbott* and *Spano* is the defined-contribution plan. The first notable case in which the Supreme Court looked a defined-contribution plan was *LaRue v. DeWolff, Boberg & Assocs., Inc.*.

A person or company who operates a pension plan acts as a fiduciary for the persons who are to benefit from the plan. As such, the fiduciary has certain duties to act on behalf of the plan. When the fiduciary breaches one of those duties, section 409(a) of ERISA provides:

> Any person who is a fiduciary with respect to a plan who breaches any of the responsibilities, obligations, or duties imposed upon fiduciaries by this subchapter shall be personally liable to make good to such plan any losses to the plan resulting from each such breach, and to restore to such plan any profits of such fiduciary which have been made through use of assets of the plan by the fiduciary, and shall be subject to such other equitable or remedial relief as the court may deem appropriate, including removal of such fiduciary.

Section 502(a)(2) gives a plan participant the right to sue for a breach of a fiduciary duty.

Prior to *LaRue*, the Court had determined that the "fiduciary in a defined-benefit plan could not be held personally liable to a plan participant or beneficiary for damages that resulted from improper or untimely processing of benefit claims." Instead, the liability for the fiduciary was not to the individual but to the plan itself. *LaRue* provided the opportunity to examine the liability of a fiduciary in the defined-contribution context.

In *LaRue*, an individual plan member brought an action claiming "that the plan's fiduciaries had failed to carry out his directions to make certain changes to the investments in his individual account" resulting in a loss of $150,000 in value. Because the plan member brought an action alone, the trial court and appellate

court denied his claim on the basis that his suit was not for the benefit of the plan, just himself. The Supreme Court held differently. The Court held that defined-contribution plans were different than defined-benefit plans. This stems from the fact that a defined-benefit plan is based upon the promise to provide specific benefits to a person using the entire assets of the plan. To that end, the risk to an individual only exists if there is risk on default of the entire plan. On the other hand, a defined-contribution plan is unique to the individual. Thus, "[f]or defined contribution plans . . . fiduciary misconduct need not threaten the solvency of the entire plan to reduce benefits below the amount that participants would otherwise receive."

With that in mind, let us turn to the substance of *Abbott* and how it differentiates itself from *Spano*.

In *Spano*, the primary issue was whether this individual right to sue for breach in a defined-contribution context could be expanded to work on a class-wide basis. Before the court reached that ultimate question, it found that the specific cases before it were not suitable as class actions regardless of the theory because the class definitions – which identifies who are members of the class – were "extraordinarily broad" and based upon somewhat vague allegations. Due to the failure to meet the general class action criteria, the court never actually reached the issue of whether a class action could be brought for defined-contribution claims. To that end, the only thing the court could say was, "In our view, it would be inconsistent with *LaRue* to assume that class actions are impossible in these cases." The opening paragraph of *Abbott* refers to this as the court answering the question as "maybe."

The problem with a "maybe" is that it necessitates the question, "when?" It is that question that *Abbott* has helped to answer.

Once more taking the reins in addressing the topic was Judge Wood. Recognizing that *Abbott* is the necessary corollary to *Spano*, Judge Wood began the opinion by couching *Abbott* in those terms. After discussing the backdrop of *Spano*, the court made sure to clarify the limited scope of *Spano* by stating:

> While we may have offered some guidance for how to approach class certification in actions under Section 502(a)(2), we emphasized that we were deciding only the cases before us. [*Spano*] at 578 ("We are not here to review any or all hypothetical orders that the court might have crafted."); *id*. at 588 ("Nothing we have said should be understood as ruling out the possibility of class treatment for one or more better-defined and more-targeted classes.").

In *Abbott*, the court found a sufficiently well defined class so as to merit certification. The narrower definition was even accompanied by, what the court found to be, a reasonable method for excluding persons who had not suffered injury. Further, the nature of the claims in *Abbott* did not run a substantial risk of causing conflict among class members. Specifically, there appeared to be no risk that anyone who had benefitted from the actions of the fiduciary would see his or her benefits reduced.

In distinguishing the *Abbott* case from *Spano* the court's primary thrust was the lack of intra-class conflict. In *Spano*, the court thought that the vagueness of claims and the breadth of the class would inevitably result in intra-class conflict that would defeat the Rule 23(a) adequacy-of-representation and typicality prerequisites to certification. However, the court strongly emphasized that "the mere possibility that a trivial level of intra-class conflict may materialize as the litigation progresses [does not] forecloses class certification entirely."

Thus, the *Abbott* decision now stands as an example of a proper class action seeking to hold a fiduciary liable for the individual losses of plan members in a defined-contribution plan. It certainly has not provided the final word on such matters, but now stands as a measuring stick with *Spano* relegated to an illustration of a case that overreached.

Join us again next time for further discussion of developments in the law.

Sources

- *Abbott v. Lockheed Martin Corp.*, --- F.3d ---, No. 12-3736 (7th Cir. Aug. 7, 2013).
- *Spano v. Boeing Co.*, 633 F.3d 574 (7th Cir. 2011).
- *LaRue v. DeWolff, Boberg & Assocs., Inc.*, 552 U.S. 248, 128 S.Ct. 1020, 169 L.Ed.2d 847 (2008).
- Employee Retirement Income Security Act (ERISA) – codified in part at 29 U.S.C. ch. 18.

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