Standing and Statue of Limitations Issues in New Proprietary Funds Case

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A financial services company sponsoring a 401(k) plan that includes the sponsor's own mutual funds on the plan's investment menu has an inherent conflict of interest and needs to avoid even the appearance of favoring its own funds. More than a decade ago, one of the first class action lawsuits alleging excessive 401(k) fees was brought against First Union Corporation and ultimately settled for the then enormous sum of $26 million. First Union's liability exposure was significantly enhanced by the fact that it made its proprietary funds the plan's exclusive investment options.

The lessons of the First Union case were slow in being learned. In a series of related legal actions, similar claims were recently made against SunTrust with respect to its selection of eight proprietary mutual funds (coincidentally the same number as in the First Union case) for inclusion on the investment menu of its in-house 401(k) plan. The plaintiffs allege that this resulted in (i) a breach of fiduciary duty and (ii) a prohibited transaction, but SunTrust raised interesting defenses based on the plaintiffs' standing to bring the case, as well as the statute of limitations.

Standing. Article Three of the U.S. Constitution states that "The Judicial Power shall extend to all Cases . . . [and] to Controversies . . . ." This limitation on the scope of the federal judiciary's authority has given rise to the requirement of "standing," which means that a plaintiff prosecuting a claim must have a sufficient connection to the harm allegedly done to support the lawsuit. Generally speaking, the federal courts cannot accept a lawsuit simply because someone wants to prove a point; the plaintiff must be someone who has been harmed by the defendant's actions.

Barbara Fuller, one of the original plaintiffs in the *SunTrust* case, was a SunTrust retiree who had been a participant in the SunTrust 401(k) plan. However, the complaint failed to allege that she ever invested in certain SunTrust proprietary funds. In March 2012, the court dismissed her claims with respect to these funds, because she could not have suffered the kind of harm that would enable her to meet the standing requirement.

Statute of Limitations. Fuller's complaint against SunTrust alleged that SunTrust committed a prohibited transaction in selecting the proprietary funds as plan investments. However, ERISA's statute of limitations bars lawsuits that are brought after either six years from the last action that constituted a part of the violation or three years after the earliest date on which a plaintiff like Barbara Fuller had actual knowledge of the violation. As to the prohibited transaction claims, the district court held that the last action taken was the original selection of the funds and could not be the mere failure to subsequently remove a fund. This resulted in dismissal with respect to funds added to the 401(k) plan before April 2004, which effectively eliminated the prohibited transaction cause of action with respect to most of the proprietary funds chosen in the late 1990s. One exception was the STI Classic International Equity Index Fund, which was added in 2005, but in which Barbara Fuller did not invest and with respect to which she therefore lacked standing.

As to the plaintiffs' claims that SunTrust violated its duties of prudence and loyalty, however, the March 2012 decision held that these duties did not end upon fund selection. In other words, there was a continuing duty to monitor the performance of the funds. Consequently, the statute of limitations had not run on the prudence and loyalty claims, and the defendants' motion to dismiss these claims was denied.

SunTrust. The new case, filed on October 31, 2012, involves former SunTrust employees who invested in four of the proprietary funds, and in this respect are probably more suited as representatives of a class of plaintiffs than Fuller.

This is not the first time plaintiffs' attorneys have substituted plaintiffs with respect to claims against SunTrust. Barbara Fuller had a predecessor named Mary Lee who submitted fiduciary breach and prohibited transaction claims to the SunTrust plan administrator in 2008 which were subsequently denied pursuant to SunTrust's internal claims process. Lee then assigned her rights in the class action claim (including any right to further litigate the claim) to a new group of individual plaintiffs, presumably including Fuller and the current plaintiffs.

The district court in the *Fuller* case accepted the contention (which defendants did not contest) that the statute of limitations was tolled for 336 days while the Lee claims were being pursued administratively. The statute then began to run again until it was stopped by the filing of Fuller's class action. In tolling the limitations period pending the administrative process, the district court appears to have implicitly extended the Supreme Court doctrine stated in *Crown, Cork & Seal Co. v. Parker* that the filing of a class action tolls the statute of limitations for other members of the putative class. *Crown, Cork & Seal* involved claims for employment discrimination, but it applies in all cases where a class action involving similar claims

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has been instituted. The rationale for this doctrine is that potential class members would otherwise be induced to intervene or join in the class action in order to protect themselves against the possibility that class certification would be denied, and that this would impede the class action process.

The new SunTrust plaintiffs cite *Crown, Cork & Seal* to the effect that the statute of limitations was tolled while the *Fuller* lawsuit was ongoing. There was a concern expressed in *Crown, Cork & Seal's* concurring opinion that the tolling rule might lead to an abuse of process by allowing successor plaintiffs to open up new areas not covered in the original class action. One wonders whether it might also be viewed as abusive to use the class action certification process to continually extend the statute of limitations as plaintiffs' attorneys search for more qualified plaintiffs, for example, plan participants that have a better claim on the standing issue. Unless such an argument can be successfully asserted by SunTrust, however, the tolling rule will operate to subtract the approximately 20 months during which the *Fuller* case was pending (March 2011 through October 2012) from the running of the limitations period. ❖

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