

LEGAL UPDATE

Class Certification Lite

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It is frequently the case that actions for breach of fiduciary duty under ERISA are filed as class action lawsuits; before any of the substantive issues in the case are addressed, the court rules on whether the putative class satisfies all of the requirements under Federal Rules of Civil Procedure Section 23. However a recent Colorado District Court case, *Ramos v. Banner Health*, raises the issue of whether in the defined contribution plan context, there may be circumstances in which that requirement can be avoided.

By way of background, in a 2008 Supreme Court decision, *LaRue v. DeWolf, Boberg & Associates, Inc.*, relying upon the nature of a defined contribution plan, held that ERISA Section 502 authorized recovery for fiduciary breaches that impair the value of plan assets in an individual's account. However, such Section does not allow remedies for *individual* injuries distinct from plan injuries. *LaRue* did not address whether participants in a defined contribution plan may seek remedies only for their individual accounts or for all plan injuries. District Courts considering the issue have reached opposite conclusions in interpreting *LaRue*. Courts (that allow direct action claims) reason that ERISA Section 409 makes a plan fiduciary liable to make good to such plan any losses to the plan resulting from a breach of fiduciary duty, and ERISA Section 502(a)(2) allows a plan participant to bring an action for relief of such violation. For example, in *Waldron v. Dugan*, 2007 WL 4365358 (N.D. Ill. 2007), the District Court concluded that "neither ERISA itself nor the Federal Rules of Civil Procedure require ERISA participants to bring Section 502 claims derivatively" or as a class action. Other Courts have expressed skepticism about the ability of plaintiffs to proceed on behalf of the plan absent class certification, expressing concerns about whether the action is appropriately structured to bind all plan participants some of whom may be unaware of the litigation and about the very real possibility of inconsistent rulings

should the defendants face multiple lawsuits. As another District Court in Illinois expressed in *Fish v. Greatbanc Tr. Co.*, 667 F. Supp. 2d. 949, "to permit the action to go forward without the type of protections provided by [Rule 23 or Rule 23.1] or their equivalent would be overly myopic." The District Court in *Ramos v. Banner* indicated that each of these approaches was unsettling in its own way. To allow plaintiffs to proceed in a direct action for all plan losses attributable to defendant, rather than only their individual losses, would create significant due process concerns about whether and how potential plaintiffs would be bound by resolution of the case, whether by settlement or by trial. It also would raise the question as to why any plaintiff bringing an action under ERISA Section 502(a)(2) would ever seek class certification. However, to require a plaintiff to obtain class certification in order to recover plan-wide losses reflects the Supreme Court's historic interpretation as set forth in *Mass Mutual Life Insurance Co. v. Russell*.

To resolve this conundrum, the Colorado District Court looked to the opinion of the Second Circuit in *Coan v. Kaufman*, 462 F. 3d. 250 (2d Cir. 2006). In that case, the Second Circuit concluded that "plan participants need not always comply with Rule 23 to act as a representative of other plan participants or beneficiaries." However, because a plan participant would be acting in a representative capacity, he or she must "take adequate steps under the circumstances properly to act in a representative capacity on behalf of the plan." The Second Circuit indicated that Congressional silence as to the appropriate safeguards "does not mean that Congress intended to allow individual participants and beneficiaries to bring suit on behalf of an employee benefit plan without observing any procedural safeguards for other interested parties." However, the Second Circuit did not indicate what those procedural safeguards needed to be. Rather, "Congress was intent to leave the procedures necessary to protect absent parties and

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to prevent redundant suits, to be worked out by parties and judges according to the circumstances on a case by case basis.”

In *Ramos v. Banner*, applying that standard, the District Court concluded that plaintiffs had failed to take adequate steps to act in a representative capacity. However, the extent to which a plaintiff can satisfy those procedural requirements

other than by satisfaction of Rule 23 standards remains an open issue.

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