

BAE Beats 401(k) Plan Forfeiture Suit

A federal judge in Virginia dismissed a proposed class action, marking one win for defendants amid a slew of recent forfeiture complaints.

Reported by ALEX ORTOLANI

BAE Systems Inc. has beaten back a class action lawsuit accusing the company of misusing 401(k) plan forfeitures.

U.S. District Judge Anthony Trenga, of the U.S. District Court for the Eastern District of Virginia, granted BAE's motion to dismiss the complaint by a current employee and plan participant seeking class action status, according to an [opinion and order](#) filed Thursday. The initial complaint in *Naylor v. BAE Systems* was filed on April 4, with the plaintiff represented by the Wenzel Fenton Cabassa law firm.

Trenga, who heard arguments from both sides on July 31, granted BAE's motion to dismiss the case. He also ruled against a motion by the plaintiff to disqualify the defendant's counsel, Groom Law Group. In that motion, the plaintiff alleged that Groom Law was not a suitable firm because it had been paid out of plan forfeitures for other projects by BAE Systems.

The lawsuit is one of a [slew of cases](#) alleging improper use of 401(k) plan forfeitures by retirement plan committees at firms including Bank of America, Intuit Inc. and Qualcomm Inc. Michael Schloss, counsel at the Wagner Law Group, pegs the number of forfeiture cases at 19. To date, courts have issued four decisions on motions to dismiss these cases. Two decisions have sided in favor of the plaintiffs and two have now sided with the defense.

In the initial complaint against BAE Systems, the plaintiff alleged seven violations of the Employee Retirement Income Security Act, including using forfeitures to offset future employer contributions rather than to "cover administrative expenses" or otherwise bolster plan assets. Specifically, the plaintiff alleged the plan managers had "wrongfully taken" about \$9.7 million in forfeitures from 2016 to 2022, with additional amounts from 2023 set to be added as the case progressed.

Plan Document Rules

In this matter, Trenga pointed to the plan document's language on plan forfeitures, which clearly laid out the use of the funds for employer matching contributions.

"It is unclear how under these Plan provisions any forfeiture amount during the relevant years could have been directed towards any other purpose than offsetting contributions when the employer contribution amount each year exceeded the available forfeiture amounts," he wrote.

While the plan committee may also have chosen to use the funds for administrative expenses, Trenga ultimately ruled it was not obligated to do so.

Schloss says Trenga's ruling is a little different from others because his decision focused on the plan language detailing how the forfeitures would be used, rather than the actions of the fiduciaries themselves.

"It's a very interesting decision because it basically holds that the plan language effectively deprived the fiduciaries of discretion," he says. "It says the plan requires, without any discretion, that forfeitures go to employer contributions, and ... [it] presumes that is OK for the plan to do that."

The initial complaint also alleged that plan fiduciaries had allowed for excessive fees in the plan. In one case, it alleged that BAE Systems made millions each year by offering participants a managed account program called the Professional Management Program that, it claimed, was not worth the additional fee for participants.

In this area, Trenga ruled that the plaintiff did not provide sufficient facts and benchmarking to “make plausible that the PMP fees were excessive and provided ‘zero benefit’ to plan members.”

Legal Fees

In addition, the complaint alleged that BAE Systems paid excessive fees to its counsel, Groom Law Group, for “ERISA compliance related services.” The plaintiff called the roughly \$700,000 per year being paid to Groom—as noted on its Form 5500—as “excessive and unreasonable.”

Here again, the judge ruled that the excessive fee claim was not backed up with enough evidence, writing that “there are no facts alleged with respect to the services that Groom Law Group provided to the Plan as compared to services provided to the other clients.”

He also rejected an attempt by the plaintiff to have Groom Law Group representatives disqualified due to also having advised on the plan. He noted that case law does not back up this disqualification of a firm that had advised on fiduciary obligations.

Schloss, of Wagner Group, believes the decision will be noticed by other courts considering the plan forfeiture lawsuits.

“I think it raises issues that other courts will certainly want to consider,” he says. “It is a thoughtful decision; it holds together well, I think.”

He also notes that while the IRS has issued guidance approving the use of plan forfeitures to fund employer contributions, the Department of Labor has not weighed in on the issue. With more cases likely to be filed, he says, each agency may want to issue some guidance on how plan forfeitures should be viewed under ERISA.

The BAE Systems Employees’ Retirement Plan had assets of \$4.15 billion and 29,887 participants, as of December 31, 2022, according to its most recent Form 5500.

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