LEGAL UPDATE

A Standing Issue in Class Action Lawsuits

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As ERISA practitioners, we advise our clients as to best practices under Title I of ERISA so that they can decrease the likelihood of their being sued for breach of fiduciary duty, or in the event that they are sued, that the action can be dismissed at the earliest possible stage. We always conclude with the caveat that no practitioner can guarantee that a client will not be sued. Further, once an ERISA litigation is filed, it is subject to the same procedural rules as any other civil litigation; these have little or no relationship to a plan fiduciary's conduct.

One of the most frequently cited bases for dismissal in an ERISA civil litigation is lack of standing under Article III of the Constitution. (This is a separate issue from class action standing, which is a separate requirement.) This is a threshold requirement with respect to which the plaintiff bears the burden of proof with respect to each of three requirements. First, plaintiff must have suffered an injury, in fact, an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or speculative. Second, there must be a causal connection between the injury and the conduct complained of. Third, it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

In a class action breach of fiduciary lawsuit, defendant will allege that a participant lacks Article III standing because he or she did not invest in a particular investment option and, therefore, could not have suffered an injury. Some recent cases accept this as a straightforward proposition. For example, in *Wilcox v. Georgetown* (D.D.C. January 2019), the District Court dismissed various claims of plaintiff, because plaintiff did not invest in the particular TIAA fund that he was challenging. Similarly, in *Dorman v. Schwab* (N.D. Cal. 2018), the District Court explained that because plaintiff did not participate in a self-directed brokerage account, he could not claim that he was injured by the overly complex nature of the arrangement. In contrast, in *Hay v. Gucci America, Inc.* (D.N.J. 2018), the Court acknowledged that while in certain types of cases, Courts have found that a plaintiff cannot suffer an injury from an investment that he or she did not purchase, "Courts have declined to apply the above bright-line rule when addressing ERISA claims for breach of fiduciary duties. Rather, Courts have looked to the nature of the claims and allegations to determine whether the pleaded injury relates to the defendants mismanagement of the Plan as a whole." Applying that standard, the Court concluded that plaintiff had alleged an injury rooted in managing all of the funds as a group, citing *Urakhchin v. Allianz Asset Management of America, L.P.* (C.D. Cal. 2016). Similarly, in *Velasquez v. Massachusetts Financial Services Co.* (D. Mass. 2018), the District Court summarily rejected defendant's argument that plaintiff lacked standing on behalf of a plan for which she had never enrolled. It stated that defendants have conflated standing requirements with class certification analysis, and that "it is well established that for purposes of constitutional standing a plaintiff need not have invested in each fund at issue, but must merely plead an injury implicating defendants' fund management practices."

As occasionally occurs in all litigation, there are competing threads of case law on the issue of standing where a plaintiff has never invested in a fund and cannot invest in it in the future because the plan no longer offers it as an investment option. One line of cases, followed in *Wilcox* and *Dorman*, state that a plaintiff in an action of this nature must demonstrate that he or she has been injured by each alleged fiduciary breach. A second line of cases, reaching the contrary conclusion, find significance in the fact that any recovery a plan wins is paid to the plan itself, rather than to plaintiff. They conclude that a plaintiff who has suffered some plan-related injury may sue on the plan's behalf for that injury as well as other plan-related injuries that other plan participants suffered. Noting this distinction in the case law, the District Court in *Barrett v. Pioneer Natural Resource USA, Inc.* (D. Colo. 2018) permitted two excessive fee claims to proceed, but dismissed a claim alleging that a money market fund was an imprudent offering.

Many of these ERISA actions involved 401(k) plans. An unresolved issue, particularly in the Second Circuit, is whether ERISA standing cases involving defined benefit plans and employee welfare plans are equally applicable to defined contribution plans. The District Court in *Wilcox* held that those Second Circuit cases were not relevant, but other cases in the Second Circuit reached a contrary conclusion. A decision by the Second Circuit on this issue may reduce some of the inconsistency in this area of the case law.

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