LEGAL UPDATE

Recent Developments in Forfeiture Cases

Michael A. Schloss, Esq. and Marcia S. Wagner, Esq.

As we continue to monitor the recent flood of "forfeiture" litigation, this update will report on and analyze the nature of the claims raised by plaintiffs, the defenses asserted against them and the Court opinions deciding the issues raised in these matters.

To date, we count twenty (20) forfeiture lawsuits filed in a variety of jurisdictions (although predominantly in Federal Courts in California). Five (5) decisions on Motions to Dismiss have been issued so far – two favoring plaintiffs and three favoring defendants. Two of the three favoring defendants – including the most recent decision issued in the *Thermo Fisher* matter and discussed more fully below – however, were without prejudice to plaintiffs filing amended complaints.

In addition to providing an overview of the *Thermo Fisher* decision, this update also discusses the recent Complaint filed against Knight Smith, as well as a similar Forfeiture Complaint filed by the Department of Labor in 2017. Unlike the facts alleged in other Forfeiture Complaints, the *Knight Smith* and Department of Labor pleadings allege that the plan documents required forfeitures to be used to pay plan expenses first before they could be used to reduce employer contributions. We wonder if this new type of forfeiture allegation is a harbinger of future lawsuits.

Decision in Thermo Fisher

On September 19, 2024, the United States District Court for the Southern District of California (Judge Robinson) issued a substantive decision, granting Thermo Fisher's Motion to Dismiss. *Dimou v. Thermo Fisher Scientific Inc., et al.*, 23-cv-1743 (S.D. Cal. 9/19/2024). In a discussion over 20 pages that in many ways closely follows the reasoning of the decision favoring HP Inc. (*Hutchins v. HP Inc., et al.*, 23-cv-5875 (N.D. Cal. 6/17/2024)), Judge Robinson's recent decision addresses both defendants' and plaintiff's arguments and deals with them in a thorough and thoughtful fashion. Similar to the *HP Inc.* decision, Judge Robinson's ruling leaves the door open for the *Thermo Fisher* plaintiff to amend her Complaint.

As an initial matter, the *Thermo Fisher* Court addressed whether the plaintiff had constitutional standing to bring the action in the first place:

> To establish Article III standing, a plaintiff must demonstrate (1) "an injury in fact"—i.e., she suffered "an invasion of a legally protected interest" that is "concrete and particularized"—(2) "that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016).

Thermo Fisher, at p 4.

Having articulated this standard, Judge Robinson then addressed each element and concluded that Plaintiff had met her burden and established standing. Of note, the Court considered whether plaintiff's claims were

redressable in light of defendants' arguments that plaintiff had "disclaimed any right to individual relief in the First Amended Complaint".

Thermo Fisher, at p. 6:

> [T]he plaintiff in *LaRue*, like Plaintiff here, brought claims under Sections 502(a)(2) and (3) to "make whole" the plan's assets and for other equitable relief and informed the court that he "'did not wish for the court to award him any money, but … simply wanted the plan to properly reflect that which would be his interest in the plan, but for the breach of fiduciary duty.'" 552 U.S. at 251. Here, Plaintiff asserts similar claims and seeks similar relief. (*See* FAC ¶¶ 2; 5; FAC Prayer for Relief). Thus, the Court concludes that the allegations in paragraph 5 [which purportedly disclaimed any request for individual relief] do not adversely impact her constitutional standing.

Thermo Fisher, at pp. 7-8.

The district court then addressed defendants' arguments that decisions to allocate forfeitures in the manner alleged in the complaint were sponsor decisions not subject to ERISA's fiduciary standards. Adopting the HP Inc. court's reasoning, the *Thermo Fisher* court rejected those arguments. Even so, the court concluded that "plaintiff's theory of fiduciary liability was too broad to be plausible" and dismissed plaintiff's fiduciary breach claims "with leave to amend the pleading to allege more particularized facts or special circumstances." (internal quotes omitted). *Thermo Fisher*, at p. 16.

Judge Robinson's treatment of plaintiff's remaining claims also followed the *HP Inc.* court's reasoning. Noting that "Plaintiff fails to allege removal of plan assets for the benefit of anyone other than the Plan participants" the court dismissed plaintiff's anti-inurement claims with leave to amend. *Thermo Fisher*, at p. 18. Plaintiff's prohibited transaction claims were also rejected:

> To sufficiently allege a claim under 29 U.S.C. §§ 1106(a) and (b), Plaintiff must identify a transaction. *Wright*, 360 F.3d at 1101. An intra-plan transaction, like forfeiture reallocation, is unlike a sale or leasing of property to a third party. *Lockheed*, 517 U.S. at 893. Under similar facts, the *Hutchins* court concluded that reallocating forfeitures in the plan "to provide pension benefits to other employees through use as matching contributions" is not a prohibited transaction. 2024 WL 3049456, at *9 (citing *Lockheed*, 517 U.S. 892–93). Because Plaintiff's allegations do not implicate a prohibited transaction, she fails to state a plausible claim under §§ 1106(a)(1) and (b)(1). Accordingly, the court **GRANTS** the Fiduciary Defendants' Motion to Dismiss Plaintiff's fourth and fifth causes of action with leave to amend.

Thermo Fisher, at p. 19 (emphasis in original).

Knight Swift Complaint – A Different Type of Forfeiture Case?

Up to last week, the recently filed forfeiture lawsuits were grounded in similar factual predicates. In particular, the cases alleged that plan documents provided fiduciaries with discretion to allocate forfeiture amounts to: (a) fund employer contributions, (b) pay plan expenses or (c) increase account balances of active participants. The complaints then alleged that these same fiduciaries violated their duties of prudence and loyalty and committed other violations of Title I of ERISA because they improperly applied forfeitures to reduce employer contributions instead of reducing administrative expenses borne by plan participants.

On September 16, 2024, a complaint was filed against Knight-Swift Transportation Holdings, Inc., that deviates from the allegations contained in the prior forfeiture actions in a fundamental way. *Jason Sievert v. Knight-Swift Transportation Holdings, Inc.*, Case No. 24-cv-2443 (D. Ariz. 9/16/2024). In the complaint, plaintiffs allege that the Knight-Swift plan document contains language mandating that forfeiture amounts be first used to satisfy plan expenses. In particular, the plaintiffs point to the following language contained in the audit report filed with the plan's Form 5500:

Forfeited Accounts

> Forfeitures of nonvested contributions and earnings thereon shall be used to pay Plan expenses and to the extent any remain, to reduce the Company's matching contribution. Forfeited nonvested account balances are $2,605,250 and $1,928,867 at December 31, 2022 and 2021, respectively. During 2022 and 2021, forfeitures of $2,066,956 and $926,027, respectively, were used to offset Employer-matching contributions and to pay administrative fees.

Knight-Swift Complaint at ¶ 13.

Thus, the plan language is arguably different from that found in the other plans that are subject to the current flood of forfeiture litigation because, while those plans allegedly gave plan fiduciaries discretion as to how to allocate forfeiture amounts, the Knight-Swift plan did not. The Complaint alleges that the Knight-Swift fiduciaries did not first use forfeitures to pay plan expenses but, instead, used plan assets instead to reduce millions of dollars in employer contributions. Complaint at ¶ 15. On this basis, plaintiffs allege violations of ERISA §§ 404(a)(1)(A) and (B) (but, surprisingly,

not 404(a)(1)(D)) as well as violations of Sections 403(c)(1) and 406(a) and (b).

It is important to note that the language quoted in the Complaint is not from the actual plan, but from a description of plan language found in the Plan's 5500. Consequently, it may be that the plan document itself contains different language from that described in the 5500 and that, in fact, the plan does not mandate prioritizing the use of forfeiture amounts to pay plan expenses ahead of funding employer contributions. Time will tell if such a difference exists.

2017 Department of Labor Forfeiture Lawsuit:

If the allegations in the *Knight-Swift* complaint are correct and the plan document mandated that forfeitures first be used to pay plan expenses, the plaintiffs may find some support in a complaint filed by the U.S. Department of Labor in 2017. In *Acosta v. Anthony C. Allen, et al.*, 17-cv-00784 (W.D. Ky. 2017), the Department of Labor alleged that documents governing four related plans managed by a common set of fiduciaries included language providing that forfeitures would be used first to pay plan expenses. Because the defendants "failed to ensure that the forfeiture funds were used to first pay plan expenses prior to using them to reduce employer contributions," the Department alleged that defendants violated their duties under Title I of ERISA First Amended Complaint (FAC) at ¶¶ 18 and 20.

In *Acosta*, the Department alleged that the fiduciaries' failure to apply forfeiture amounts first to pay plan expenses violated ERISA's duties of loyalty and prudence and their obligation to act in accordance with plan documents "insofar as the documents and instruments are consistent with ERISA." FAC ¶ 30. In addition, based on the same allegations, the Department alleged that certain defendants caused the four plans to engage in prohibited transactions in violation of ERISA §§ 406(a)(1)(D) and 406(b)(2).

In addition, the Department noted that the documents governing each of the four related plans stated:

> [C]ontributions made by the Participating Employer signing this Participating Employer Adoption Page (and any forfeitures relating to such contribution) will be allocated only to Participants actually employed by the Participating Employer making the contribution.

FAC, ¶ 61.

The Department alleged that defendants violated this requirement because:

> From January 1, 2012, through January 1, 2016, Defendants did not track forfeitures on a Plan-level basis. As a result, Defendants did not ensure that forfeitures that came from a particular plan were properly allocated pursuant to the governing documents.

FAC, ¶ 63.

On that basis, the Department asserted that the Defendants had also violated ERISA §§ 404(a)(1)(A), (B), and (D).

Thoughts:

The *Thermo Fisher* decision should be welcome news for the many defendants currently facing complaints alleging misuse of forfeited amounts. Like the *HP Inc.* decision on which its reasoning is modeled, it addresses head-on the essence of the plaintiff's case and will provide further support to defendants seeking an early release from the complaints against them. We note that an amended complaint was filed in the *HP Inc.* case on July 17, 2024, and the next month, on August 23, 2024, defendants moved to dismiss the amended complaint (hearing date currently set for January 30, 2025). Plaintiff in *Thermo Fisher* may certainly pursue a similar path. We will continue to monitor both cases and report on developments as they arise.

At the same time, we believe plan sponsors should closely examine the allegations in the recent *Knight-Swift* complaint as well as those raised by the Department of Labor in its 2017 action. As part of that review, plan sponsors should carefully examine plan documents, SPDs, and 5500 filings (audit language in particular) to ensure that their treatment of forfeiture amounts is consistent and accurately reflects the plan sponsor's goals.

Michael Schloss *is Of Counsel with the Wagner Law Group. He can be reached at 202-969-2800.*

Marcia S. Wagner *is the Managing Director of The Wagner Law Group. She can be reached at 617-357-5200 or* Marcia@WagnerLawGroup.com.