Case Holds That ERISA Claims Based On Initial Investment Decisions Are Time-Barred

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In a suit brought under the Employee Retirement Income Security Act of 1974, as amended ("ERISA") against Bank of America and its Corporate Benefits Committee, the U.S. District Court for the Western District of North Carolina held that certain claims for breach of fiduciary duty relating to investment decisions for Bank of America's 401(k) employee retirement plan (the "401(k) Plan") were barred by ERISA's statute of repose. In *David, et al. v. Alphin, et al.*, No. 3:07cv11 (W.D.N.C. Sep. 22, 2011), the district court held that the alleged decision by the plan administrators to favor Bank of America's proprietary mutual funds over other funds available in the market did not constitute a continuing breach, and that ERISA's statute of repose barred inquiry into whether the selection of funds in the 401(k) Plan complied with the plan administrators' fiduciary duties.

The 401(k) Plan gave the participants a range of mutual fund options. In the late 1990's, the 401(k) Plan's investment lineup was modified to add several proprietary funds. In December 1999, the Corporate Benefits Committee, which administered the 401(k) Plan, evaluated the investment options available to participants and determined that "the investment management and performance results of the Plan mutual funds were competitive." By July 2000, the 401(k) Plan's investment lineup consisted of a Bank of America stock fund, ten other Bank of America proprietary funds, and the "Stable Capital Fund". The 401(k) Plan regularly provided plan participants with information about the plan investment options in accordance with the requirements of ERISA. For example, since at least May 2000, the 401(k) Plan's summary plan description consistently set forth a description of each of the plan's investment options.

The plaintiffs' breach of fiduciary duty claims asserted that the 401(k) Plan's plan administrator had a "continuing obligation to remove, revisit, or reconsider funds based on allegedly improper initial selection." The defendants asserted in response that the claims were barred by ERISA's six year statute of repose, 29 U. S. Code ? 1113.

ERISA does not contain a general statute of limitations for bringing benefit claims, which has led federal courts to look to analogous state statutes of limitations to apply to ERISA benefit claims. However, ERISA's section 1113 does contain a statute of limitations and statute of repose for claims of fiduciary breach. The statute of repose bars such claims six years after the "the last action which constituted a part of the breach or violation" or, in the case of an omission the fiduciary could have cured, six years after the omission. The statute of limitations bars claims three years "after the earliest date on which the plaintiff had actual knowledge of the breach or violation". The statute contains an exception in the case of fraud or concealment, but bars a claim six years after the date of discovery of such breach or fiduciary violation.

The court held that ERISA imposed no such continuing duty to "remove, revisit, or reconsider" as the plaintiffs alleged, and held further that the plaintiffs failed to present evidence raising a genuine issue of material fact as to whether there was fraud or concealment that prevented the plaintiffs from uncovering the alleged defects in the administration of the 401(k) Plan. The court therefore held that ERISA's statute of repose barred the claims, granted the defendants' motion for summary judgment, and dismissed the case.

Significantly, the district court rejected the plaintiffs' contention that separate violations occurred each time the Corporate Benefits Committee met and each time that plan assets were deposited into allegedly prohibited funds in the 401(k) Plan. The court reasoned that a continuing obligation of that nature would "mak[e] Section 1113(1)(b)'s open-ended period of repose for failure to correct *omissions* also applicable to failure to correct *affirmative* acts, which are clearly controlled by Section 1113(1)(a)'s close-ended period of repose." The court held that the plaintiffs' claims attacked the initial investment decisions to select the challenged bank-affiliated funds, which were selected more than six years before the plaintiffs filed suit.

The district court's holding with respect to whether there was a continuing duty to evaluate the selection of investment funds invites a comparison with the Seventh Circuit's recent decision in *George, et al. v. Kraft Foods Global, Inc., et al.*, No. 10-1469 (7th Cir. Apr. 11, 2011). See Williams Mullen ERISA Case Alert, May 6, 2011. In *George*, the Seventh Circuit held that a fiduciary's failure to exercise discretion could constitute a breach of the fiduciary duty of prudence under ERISA, and a failure to correct a defect in plan design could violate that duty. *George* remanded that case to determine whether the plan administrators had breached their duty of prudence in the critical time period by failing to take steps to limit or eliminate certain administrative costs to the plans. Although *George* did not address a statute of limitations or statute of repose issue, *David* is arguably inconsistent with *George's* view of a plan administrator's ongoing duty to monitor the design and administration of the plan, even with respect to plan decisions that occurred in prior time periods.

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