Fourth Circuit Holds That Plan Administrators' Alleged Fiduciary Breach Based on 401(k) Plans' Fund Selection Is Time-Barred

01.23.2013

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The Fourth Circuit rejected the claims of a putative class action brought on behalf of participants of two retirement plans sponsored by Bank of America. In *David v. Alphin*, No. 11-2181 (4th Cir. Jan. 14, 2013), the court affirmed the lower court in holding that the plaintiff representatives could not pursue alleged breaches of fiduciary duties where the plaintiffs could not show that they were worse off as a result of such alleged breaches. Significantly, the Fourth Circuit also agreed that where the 401(k) plan administrator's alleged fiduciary breach began with the selection of Bank of America funds in 1999, subsequent routine meetings of the plan administrator did not constitute on-going breaches of fiduciary duty. As a result, the plaintiffs' claims in 2007 were time-barred by ERISA's six-year statute of repose.

The two plans at issue were a pension plan and a 401(k) plan sponsored by Bank of America. Plaintiffs contended that Bank of America, as sponsor of the plans, and its plan fiduciaries, including Bank of America's Corporate Benefits Committee ("CBC"), had breached their fiduciary duties by improperly selecting and retaining mutual funds affiliated with Bank of America as part of the investment mix for the two plans. Plaintiffs alleged that there were superior mutual funds with lower costs available to them, and that the defendants' failure to use those superior funds caused a breach of fiduciary duty.

Defendants moved to dismiss the pension plan claims on the basis that the plaintiffs had not identified any actual injury, thus lacking standing to sue under Article III of the Constitution. Defendants also contended that the 401(k) plan claims were barred by the statute of repose.

The court agreed with Defendants, as well as the district court, that the plaintiffs had not identified any injury under the pension plan that the courts could redress. Plaintiffs' claims neither alleged that they had been denied pension benefits to which they were entitled nor alleged that their receipt of future benefits was in jeopardy. Bank of America was required to make additional contributions to the pension plan if it became underfunded, and the Pension Benefit Guaranty Corporation guaranteed the participants' vested benefits up to a statutory minimum. The court held, therefore, that the risk that the plaintiffs' pension benefits would at some point in the future be adversely affected as a result of the present alleged violations was too speculative to give rise to standing to file a lawsuit. In essence, the pension plan was not underfunded, so plaintiffs could not claim that they had been injured by Bank of America's use of its own mutual funds.

Regarding the 401(k) plan, the Fourth Circuit held that the plaintiffs' claims were barred by ERISA's statute of repose for breach of fiduciary duties, which bars claims six years from the date of the last act giving rise to the claim. The court determined that following the initial selection of the bank-affiliated funds in 1999, the failure to remove Bank of America funds at each subsequent CBC meeting was not a separate breach of fiduciary duty. Rather, the only actions that could support breaches of fiduciary duty with respect to the selection of mutual funds were the initial selection of such funds. Because such decisions occurred more than six years prior to the filing of the complaint in 2007, plaintiffs' claims under the 401(k) plan based on fund selection alternatives were time-barred.

Points to remember.

David v. Alphin has important points to remember. First, it is a warning to participants in ERISA-governed plans that they should not sit on claims that they may have regarding funding decisions of the plan administrators. ERISA's statute of repose will be enforced.

David v. Alphin is also an important ruling on the issue of whether each meeting of a plan committee is a separate action of the committee regarding its prior funding decisions. The federal circuit courts have not yet settled this area of law, though the Fourth Circuit's decision is binding within its own circuit. At minimum, *David* underscores the importance to plan fiduciaries of documenting the date and circumstances surrounding a decision with respect to selection of plan assets, so that the fiduciaries may better establish the earliest date of the decision when calculating a statute of repose period. However, plan administrators should be cautious in their interpretation of the holding in this case. While the Fourth Circuit stated in *David* that it could find no continuing obligation on the part of the plan fiduciaries to remove, revisit, or reconsider funds based on the allegedly improper initial selection, other cases with more egregious facts might lead to a different holding and find an on-going duty to identify and correct a problem with fund selection. If that were to happen, the last such violation might occur less than six years before the plaintiff files suit, and the claim might thus survive the statute of repose defense.

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