



Court Holds That Plan Sponsor's SEC Filings Were Incorporated By Reference Into Retirement Plan's Summary Plan Description and Constituted Part of the Plan Fiduciary's Communications to Plan Participants

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The U.S. Court of Appeals for the Ninth Circuit has held that an ERISA-regulated employee stock-ownership retirement plan's incorporation by reference of the plan sponsor's statements to the Securities and Exchange Commission (?SEC?) into the plan's summary plan description (?SPD?) constituted a fiduciary act, and those SEC statements thus became fiduciary statements to the plan participants which could support a claim of fiduciary breach against the plan fiduciaries. The Ninth Circuit's decision in *Harris v. Amgen*, No. 10-56014 (October 23, 2013), has thus potentially opened the door to a much broader scope for plan fiduciary liability based on SPDs.

The Background. The plaintiffs were current and former employees of the global biotechnology company, Amgen, Inc. (?Amgen?), and an Amgen subsidiary, Amgen Manufacturing, Limited. The defendants were Amgen, its subsidiary, the Fiduciary Committee of the subsidiary's retirement plans, and the individual members of the Amgen board of directors (collectively, ?the Defendants?).

Amgen sponsored a pair of employee stock-ownership retirement plans (?the Plans?) which included, among other investment funds, the Amgen Common Stock Fund holding only Amgen common stock. Eligible employees of Amgen and its subsidiary could invest their retirement funds in the Amgen Common Stock Fund, as well as the other investment accounts available to participants in the Plans. In 2004 and 2005, the Amgen Common Stock Fund constituted the largest single asset of both Plans.

The plaintiffs brought a class action against the Defendants following a sharp drop in the value of Amgen stock. The plaintiffs alleged that the Defendants breached their fiduciary duties by offering the

Amgen Common Stock Fund as an investment option under the Plans after the Defendants should have known, following the emergence of concerns with off-label use of key Amgen drugs, that the Amgen common stock was being sold at an artificially inflated price and, therefore, that the continued offer of the Amgen Common Stock Fund was no longer a prudent plan investment option.

Among several legal issues contested in *Harris*, the ones that concern us here are the claims against Amgen itself. The federal district court dismissed the claims against Amgen, the plan sponsor, on the ground that Amgen was not a plan fiduciary and thus, by definition, could not be held liable for fiduciary breach. The district court also dismissed the claims against the other Defendants. This alert will focus only on the ruling concerning Amgen's fiduciary status and the claim arising from allegedly false statements in the Plans' SPDs.

The Court's Ruling. The Ninth Circuit's decision of October 23, 2013 was a revised decision superseding the court's earlier decision of June 4, 2013. The court reversed the district court's dismissal of claims and remanded the case for further proceedings on all but one claim. The Ninth Circuit concluded that the plaintiffs had pleaded facts showing that Amgen was also a fiduciary, and its dismissal was reversed. Amgen thus faced a battle against all of the surviving fiduciary breach claims.

The Ninth Circuit's ruling against Amgen turned on the court's decision that Amgen had not delegated away all of its discretionary authority over the Plans to trustees and investment managers. While acknowledging that Amgen had indeed appointed trustees for the Plans, the court found that Amgen had not appointed an investment manager. Instead, Amgen retained the authority to exercise fiduciary power over the Plans' investments, including responsibility for communications to the plan participants.

An ERISA fiduciary's duty of loyalty includes ERISA's statutory duty to provide the plan participants with an accurate SPD, and the duty not to furnish SPDs that make false and materially misleading statements to the participants. The Ninth Circuit held that the defendants, including Amgen, explicitly incorporated by reference into the SPDs the Form 10-K filings for 2006 and 2007 which allegedly contained false and materially misleading statements concerning Amgen's financial health and the value of its stock. The court declared that "defendants' preparation and distribution of the SPDs, including their incorporation of Amgen's SEC filings by reference, were acts performed in their fiduciary capacities." Inclusion of those allegedly false SEC statements "may therefore be used under ERISA to show that [defendants] knew or should have known that the price of Amgen shares was artificially inflated, and to show that plaintiffs presumptively detrimentally relied on [those statements]."

The Significant Lesson. The Ninth Circuit's ruling holds at least two significant lessons for retirement plan sponsors and administrators. Amgen failed to show that it had expressly delegated away its discretionary authority over plan assets, including its administration of plan asset investments. Likewise, its SPDs explicitly incorporated Amgen's Form 10-K filings into the summary plan descriptions distributed to participants and thus left the door to litigation open over the accuracy of those SEC filings and of the SPDs which incorporated them. If a company wishes to avoid the same outcomes, it should review the delegation of plan fiduciary duties under the company's ERISA-regulated plans to ensure that all such duties have been plainly delegated to appropriate fiduciaries. It should also weigh the prudence of limiting any statements *in its plan SPDs* that purport to refer, expressly or by reference, to factors that affect the value or price of the plan's investment options.

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