Seventh Circuit Interprets ERISA's Statute of Limitations for Fiduciary Breach: Fish v. GreatBanc Trust Company

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The Seventh Circuit Court of Appeals in *Fish v. GreatBanc Trust Company*, No. 12-3330 (7th Cir. May 14, 2014), has issued a decision that clarifies the rules for suits for fiduciary breach under ERISA. The decision primarily concerned whether the plaintiffs' case was time-barred by ERISA's statute of limitations for breaches of fiduciary duty. The Seventh Circuit allowed the case to proceed on the basis that the clock did not begin to run until the plaintiffs had actual knowledge of facts showing the alleged breach. The way in which the court reached that conclusion is worth careful consideration.

The Background. The plaintiffs were employees of The Antioch Company ("Antioch"), a relatively small, closely held company which sold scrapbooks and related accessories. Antioch sponsored an Employee Stock Ownership Plan ("Plan"). Under a 2003 proposal from the family members who held most of the stock, the Plan would decline a tender offer of $850 per share, leaving the Plan as sole shareholder. To buy the proffered stock, Antioch would be required to borrow most of the money needed to pay more than $150 million for the stock. As fiduciaries of the Plan as well as the primary beneficiaries of the buy-out, the family members were expected to remain in control of the company.

The proposed buy-out was a "prohibited transaction" under ERISA § 406, which prohibits transactions between plans and fiduciaries unless, pursuant to ERISA § 408, the purchase is for fair market value as determined in good faith by the fiduciary. In this case, the individual owners of Antioch were also fiduciaries of the Plan, thus triggering the prohibited transaction rules.

Accordingly, Antioch designated GreatBanc Trust Company ("GreatBanc") as the Plan trustee on a temporary basis to evaluate the fairness of the proposed buy-out to the Plan. GreatBanc hired a financial advisor to assist with valuation and assessment of the transaction. That firm initially described the proposed transaction as "the most aggressive deal structure in the history of ESOPs," which resulted in a threat by the Antioch owners to terminate both GreatBanc and the advisor firm. The transaction was then modified, but in ways that contractually increased the risk to Antioch and the Plan. GreatBanc and the advisor firm ultimately approved the transaction under the market value standard in late 2003.

Within a year of the closing of the buy-out transaction, seventy Antioch employees under the age of fifty resigned and sold their shares. Plaintiffs alleged that these sales of stock depleted Antioch's cash reserves and "set off a downward cycle as liabilities increased and revenues decreased, forcing Antioch into bankruptcy by 2008." Antioch's shares and the Plan became worthless, representing a total loss of $60 million. Plaintiffs alleged that the cause of such large numbers of employees resigning and cashing out was an overly generous share price which benefited the prior owners as well as the employees that exercised the option to buy, to the detriment of the Plan and Antioch. Plaintiffs filed suit in 2009 for fiduciary breach.

Defendants GreatBanc, Antioch and the prior individual fiduciaries of the Plan defended on the basis of ERISA's statute of limitations and statute of repose for claims of fiduciary breach (ERISA § 413). Defendants contended that the ERISA suit was filed more than six years from the date of the alleged actions giving rise to the claims in 2003, and more than three years from the date of Plaintiffs' actual knowledge of the relevant facts.

<u>The Court's Ruling</u>. The Seventh Circuit held that an ERISA plaintiff does not have actual knowledge of the basis for a claim of fiduciary breach until the plaintiff has knowledge of "all material facts". This does not necessarily require "knowledge of every detail or knowledge of illegality." Under that standard, the three-year statute of limitations did not begin to run until Plaintiffs had knowledge of facts suggesting that the fiduciaries failed to uphold their duty under ERISA § 408 to evaluate the transaction in good faith according to the market value standard. In analyzing the nature of Plaintiffs' claims, the court observed that "[a]n independent appraisal [by the financial advisor] is not a magic wand that fiduciaries may simply wave over a transaction to ensure that their responsibilities are fulfilled." Thus, whether GreatBanc had properly approved the transaction depended on knowledge of whether its process for evaluating the fairness of the transaction was adequate. The court held that Plaintiffs did not acquire knowledge of facts allegedly showing an improper approval until less than three years before filing suit. ERISA's statute of limitations therefore did not bar their claims, and the case was remanded to the district court for further proceedings.

<u>The Significant Lessons</u>: ERISA's statute of limitations for claims of fiduciary breach does not begin to run until all material facts are known to the plaintiff. In a situation such as *Fish*, the statute of limitations begins to run only when the material facts of both the self-dealing violation and the failure to abide by the market value standard under ERISA § 408 become actually known to the plan participants.

Fish also provides a useful analysis of a fiduciary's obligations in the buy-out context. The facts starting the statute of limitations period pertained to the *exception* under ERISA § 408, which provides that an otherwise prohibited transaction between a plan and the fiduciaries is acceptable if it is based on "the fair market value of the asset as determined in good faith by the fiduciary or fiduciaries," not simply knowledge of the prohibited transaction itself. The court declined to hold as a matter of law that the statute of limitations began to run once large numbers of employees began electing to sell shares for the high stock price during the summer of 2004. Such a number of sales, by themselves, did not necessarily put Plaintiffs on notice of a potential fiduciary breach claim. The Seventh Circuit also emphasized that mere reliance on an independent fairness opinion does not, by itself, necessarily satisfy the fiduciary’s obligations.

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