

Seventh Circuit Denies Reconsideration of 401(k) “Fees” Case

July 16, 2009

On June 24, the U.S. Court of Appeals for the Seventh Circuit denied the plaintiffs’ petition for rehearing *en banc* in the *John Deere* 401(k) fees litigation. *Hecker v. Deere & Co.*, Nos. 07-3605, 08-1224, 2009 WL 1797441 (7th Cir. June 24, 2009). The plaintiffs filed their petition in the wake of the Seventh Circuit’s February 12, 2009 landmark decision dismissing their claims, the first of the many 401(k) “fees” cases scheduled to be considered by the federal appellate courts. The Seventh Circuit’s February decision held that:

- There is no ERISA fiduciary duty to affirmatively disclose revenue sharing in mutual fund investment options in a 401(k) plan as long as total “expense ratios” are disclosed.
- 401(k) fiduciaries do not have a duty to “scour the market to find and offer the cheapest possible fund” and the fiduciaries in this case discharged their duties by offering a wide range of funds as investment options with a wide range of expense ratios. Competition among mutual fund companies serves as a “market check” against excessive fees.
- Limiting 401(k) plan investment options to a family of retail mutual funds offered by a single mutual fund company was not a breach of fiduciary duty because the fiduciaries had offered a broad range of investment options under the plan.
- Although it is not at all clear that ERISA fiduciary duties apply to the selection of 401(k) plan investment options, in this case the plan complied with ERISA section 404(c) safe harbor provisions, shielding the Deere fiduciaries from liability on that basis as well. Further, there was nothing imprudent about the wide range of investment options offered.

After receiving the February decision, the plaintiffs, joined by the U.S. Department of Labor, petitioned the Seventh Circuit to rehear the case and reconsider the decision of the three-judge panel. In particular, the DOL argued strenuously that the Seventh Circuit had not given its position—that ERISA fiduciaries are always potentially liable for selecting 401(k) plan investment options—sufficient deference. The DOL’s position is reflected in a footnote to the preamble to its ERISA section 404(c) regulations. According to DOL, the footnote was entitled to the same deference courts are required to give the regulations themselves. But the Seventh Circuit rejected DOL’s argument:

With respect, we cannot agree with the Secretary that the footnote in the preamble is entitled to full *Chevron* deference. The panel did defer to the Secretary’s concerns to the extent that it refrained from making any definitive pronouncement on “whether the safe harbor applies to the selection of investment options for a plan” . . . instead, as we explain

further in this order, we left this area open for future development, whether on the basis of a different set of pleadings, or on the basis of a regulation directed to this issue.

Id. at *1. Thus, the question of whether section 404(c) shields plan fiduciaries from breach of fiduciary duty claims related to picking fund options was resolved in Deere’s favor because the court found on the facts before it that the “broad range” of options offered by Deere satisfied section 404(c)’s requirements.

The Seventh Circuit also rejected the DOL’s argument that the court’s February decision could be viewed as a complete exoneration under ERISA section 404(c) of any plan that included a wide range of investment options. The court explained that its February decision was “tethered closely to the facts before the court” and did not mean that any plan fiduciary could “insulate itself from liability by the simple expedient of including a very large number of investment alternatives,” and that the plaintiffs had “never alleged that any of the 26 investment alternatives that Deere made available to its 401(k) participants was unsound or reckless.” *Id.* at *2. Finally, the Seventh Circuit reaffirmed its February holding that the “market check” (competition among mutual funds) was sufficient protection against the payment of excessive fees by the retail mutual funds.

The denial of the petition for rehearing leaves the plaintiffs with the unattractive option of petitioning the U.S. Supreme Court for review, which that court rarely grants. Thus, the decision not only is a significant victory for Deere & Company, but also is an important favorable precedent that could carry the day for other fiduciary defendants in similar lawsuits pending around the country.

Deere was defended by a Chicago-based Morgan Lewis ERISA litigation team led by Chuck Jackson, Sari Alamuddin, and Deborah Davidson. If you would like any further information about the *Deere* decision or its ramifications, please contact any of the following ERISA Litigation Practice partners:

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