Bloomberg BNA

ERISA Litigation Tracker
Litigator Q&A

December 5, 2011

Erin M. Riley Explores the Pro-Plaintiff Aspects of the *Citigroup* Ruling

ERIN M. RILEY (INTERVIEWED BY JO-EL J. MEYER)

BNA: How long have you been an ERISA Litigator?
RILEY: Ten years.

BNA: What are your general practice areas within ERISA litigation?
RILEY: I have worked on numerous plaintiff-side defined contribution plan breach of fiduciary duty cases. I am also currently working on defined benefit and welfare plan cases.

BNA: When exploring your options in filing an employer stock case, what types of factors do you and your firm take into consideration?
RILEY: We look at several factors, including what the employer did ''wrong.'' We then look at where on the continuum the bad acts, or ''wrong,'' falls. For example, we look into whether there was fraud, serious mismanagement, criminal activity, and/or artificially inflated stock.

We separate those types of cases from ones where there was merely a stock drop, which was not based on fraud or mismanagement, or where the stock is likely to rebound.

Additionally, we research the defined contribution plan itself. We look at how much stock was in the plan. We likewise look at the percentage of stock in the plan in comparison to the plan's total value and how many participants were in the plan.

Also, we like to find out who the fiduciaries of the plan are. We typically are looking into whether they would have been in a position to have been involved in, or have knowledge of, what the employer did wrong.

Further, we discuss the strengths and weaknesses of the potential case with the plan's participants.

BNA: What are your thoughts on the U.S. Court of Appeals for the Second Circuit's recent decisions in *In re Citigroup ERISA Litigation* and *Gearren v. McGraw-Hill Cos.*?
RILEY: I think the Second Circuit was wise in rejecting the defense argument that defendants had no duty to override plan terms requiring employer stock to be in the plan. This holding is consistent with ERISA, which requires fiduciaries to follow plan terms ''only to the extent that they are consistent with ERISA,'' which would include ERISA's prudence requirement.

This aspect of the Second Circuit's ruling makes sense, otherwise fiduciaries could invest in *anything* , such as lottery tickets, or engage in *anything*, even criminal activity or fraud, with no liability. All of this would cause participants to pay for plan losses.

Additionally, while the Second Circuit adopted the presumption of prudence, it did not adopt a presumption that would be insurmountable. The court did not hold that plaintiffs *could not* allege viable claims. Rather, the court held that the plaintiffs in that case *did not allege* viable claims.

We at Keller Rohrback do not agree with that holding for a variety of reasons, but it's important that the court did not rule out liability entirely. Significantly, new company stock cases have been filed against Citigroup

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 ISSN 0000-0000

that plead facts necessary to overcome the presumption as it has now been articulated by the Second Circuit.

And finally, it is worth pointing out that the dissent (by Circuit Judge Straub) is strongly worded, well-reasoned, and quite lengthy. Straub squarely rejects many of the majority's holdings, including the adoption of the presumption of prudence. It is quite possible that some day other courts will adopt the reasoning of Judge Straub.

BNA: What impact, if any, do you think the Second Circuit's *Citigroup* and *McGraw-Hill* decisions will have on future employer stock cases?

RILEY: In considering this question, it is important to keep in mind that ERISA is an important statute, particularly in this economy where employees and retirees are losing out in many ways and face risks at every turn.

The purpose of ERISA is to make sure fiduciaries of retirement plans take the necessary actions to protect plan participants. Thus, if there is a situation where 401(k) plan participants' retirement savings have collapsed, and where fiduciaries knew or should have known that the company was facing dire financial circumstances and/or serious mismanagement, then it is likely that plan participants will bring suit.

  ERLTI ISSN 0000-0000