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ERISA Litigation

The ERISA Trifecta: Injury, Standing, and Equitable Relief

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The Fourth Circuit recently held, in *Pender v. Bank of Am. Corp.*,[1] that plaintiffs who elected to transfer their 401(k) plan balances to the Bank of America pension plan had constitutional and statutory standing to challenge the Bank's retention of investment gains attributable to plaintiff's 401(k) dollars. The court held that the Bank's actions violated ERISA's anti-cutback provision, and that as a result plaintiffs could seek the equitable remedy of "an accounting of profits" without showing that the Plan at issue had suffered a loss, so long as they could plead the existence of a profit based on wrongdoing that would otherwise not be recoverable. The decision, which is in accord with some courts' holding and in tension with some others, sets up an interesting series of questions about the boundaries of equitable relief under ERISA.

The Pender Decision

At issue in *Pender* was the "one-time opportunity" offered to participants to transfer their 401(k) account balances to the Bank's Pension Plan. Under the 401(k) plan, participants elected their own investments and experienced the account's actual gains and losses. Under the Pension Plan, investments selected by the participants only provided "hypothetical" gains, because the Bank would invest their contributions in whatever way it deemed fit. Although the Bank guaranteed those who elected to transfer would, at a minimum, receive the value of the original balance of their 401(k) Plan accounts (Transfer Guarantee), the transfers were quite profitable for the Bank. The Bank credited each participant's account with the greater of either "(1) the hypothetical performance of the participant's selected investment option, or (2) the Transfer Guarantee," but "as long as the Bank's actual investments provided a higher rate of return than Pension Plan participants' hypothetical investments, the Bank would retain the spread."[2]

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The Internal Revenue Service (IRS) investigated and determined that the transfers violated IRS and Treasury Regulations because they failed to provide the full gains earned by a participant's investments to that participant. Specifically, the transfers impermissibly eliminated the 401(k) plan participants' separate account feature, meaning that participants were no longer being credited with the actual gains and losses of their accounts. The Bank reached a settlement with the IRS in 2008 whereby it agreed to pay a $10 million fine, transfer back the transferred Pension Plans into a special 401(k), and make additional payments to participants who had elected to make the transfer if the return of these participants' hypothetical investments was below an amount specified in the settlement agreement.

Plaintiffs had previously filed an action against the Bank in 2004 under ERISA, claiming that the transfer policy violated several of the statute's provisions. After the IRS resolved much of the suit, plaintiffs were left with a single claim, that the transfers violated ERISA's "anti-cutback provision," § 204(g)(1), which they sought to enforce under ERISA's civil enforcement provision, ERISA § 502(a). Defendants argued that Plaintiffs had neither constitutional nor statutory standing to challenge a claim already resolved by the IRS, arguing there was no injury left to challenge. The United States District Court for the Western District of North Carolina agreed and dismissed their case.

The Fourth Circuit however, disagreed. Looking to ERISA's enforcement provisions, the court found that relief under §§ 502(a)(1)(B) and 502(a)(2) was not available for the plaintiffs because (1) they did not seek benefits under the plan terms, and (2) their claims were not against fiduciaries.

However, the court next considered whether standing for the plaintiffs' claims existed under § 502(a)(3), and found that it did. Looking to the statutory provisions of 204(g) and underlying trust law, the court noted that violations of the anti-cutback provision are within the scope of what § 502(a)(3) is meant to provide a remedy for—in essence, it is a variation on a trustee's duty to preserve property.[3] Next, the court determined that the IRS provision that the Bank was found to have violated is very similar to ERISA's anti-cutback provision. As a result, the court concluded that the transfers violated § 204(g)(1) by impermissibly reducing a plan participant's accrued benefit: "The transfers at issue here resulted in a loss of the separate account feature and thus violated Section 204(g)(1)."

Lastly, because the "accounting for profits" that Plaintiffs sought constituted the type of "appropriate equitable relief" that falls within the scope of § 502(a)(3), not only did the Plaintiffs successfully demonstrate a violation of ERISA, but they also properly articulated a form of recovery that was both appropriate and available for such a violation. The court noted that because ERISA's other civil enforcement mechanisms afforded no relief for the Plaintiffs, § 204(g)(1) necessarily needs to provide an avenue for relief, stating that "[i]f Section 204(g)(1)'s proscription against decreasing accrued benefits is to have any teeth, the available remedies must be able to reach situations like the one this case presents, *i.e.,* where a plan sponsor benefits from an ERISA violation, but plan participants—perhaps through luck or agency intervention—suffer no monetary loss."[4]

The court also rejected the Bank's argument that there was no Article III standing because Plaintiffs did not suffer a financial loss or "injury in fact." The Court noted that "an injury refers to the invasion of some 'legally protected interest' arising from constitutional, statutory, or common law," and that further "a financial loss is not a prerequisite for [Article III] standing to bring a disgorgement claim under ERISA."[5] The court concluded that to require otherwise would allow those with obligations under ERISA to profit from their ERISA violations, so long as the plan and plan beneficiaries suffer no financial loss. It would also directly contradict ERISA provisions designed "to restore any profits" to the plan, such as § 409(a) of the statute.

Implications of the Decision

In finding that the Plaintiffs had both statutory and constitutional standing, the Fourth Circuit joins the Third and Ninth Circuits in clearly articulating that disgorgement/accounting for profits is a form of equitable relief under ERISA § 502(a)(3), and that such a claim does not require proof of financial loss. *Edmonson v. Lincoln Nat. Life Ins. Co.*,[6] the Third Circuit case the *Pender* court cites in its opinion, reaches the same conclusion as the Fourth Circuit regarding disgorgement as a permissible remedy under ERISA, but in the context of a breach of fiduciary duty claim. Ninth Circuit precedent has found this equitable remedy permissible as well for breach of fiduciary duty claims.[7]

However, while the Third, Fourth, and Ninth Circuits have now made clear that "[r]equiring a financial loss for disgorgement claims would effectively ensure that wrongdoers could profit from their unlawful acts as long as the wronged party suffers no financial loss" and would contravene the spirit of the protections provided by ERISA, the Supreme Court has not explicitly allowed for this type of standing argument in an ERISA case and not all of the courts that have considered the issue have reached the same conclusion.[8] For example, in the Southern District of New York, in *Faber v. Metro. Life Ins. Co.*,[9] the district court came to the exact opposite conclusion and held that a request for an accounting and disgorgement of any profits was insufficient to demonstrate an "injury in fact" or satisfy the constitutional standing requirement.[10] On appeal, the Second Circuit did not address the issue regarding standing for disgorgement claims, specifically disavowing that it needed to address the issue.[11]

As it now stands, the fact that certain equitable remedies can only be construed as conferring standing to ERISA plaintiffs in certain jurisdictions could result in some procedural arm-wrestling over choice of forum. ERISA plaintiffs may seek to file in jurisdictions allowing for standing to pursue equitable claims under a theory that would not require a showing of loss, while defendants will prefer to litigate these claims in jurisdictions like the Second Circuit, where they have a better opportunity to knock out these types of claims at the outset for lack of standing.

Once they advance past the standing issue, these cases may pose a number of other complex questions. For example, inasmuch as ERISA does not prohibit fiduciaries' or plan sponsors' receipt of incidental benefits, how can a profit be recoverable in equity if it does not cause a loss to a plan or a participant? At this point, the only certain thing is that *Pender* and its cohorts will be worth watching.

Notes

1. Pender v. Bank of Am. Corp., 788 F.3d 354 (4th Cir. 2015).

2. *Pender* at 359.

3. *Pender* at 364.

4. *Pender* at 365.

5. *Pender* at 367 ("It is black letter law that a plaintiff seeking an accounting for profits need not suffer a financial loss... Requiring a financial loss for disgorgement claims would effectively ensure that wrongdoers could profit from their unlawful acts as long as the wronged party suffers no financial loss. We reject that notion.).

6. 725 F.3d 406 (3d Cir. 2013).

7. *See* Waller v. Blue Cross of California, 32 F.3d 1337, 1339 (9th Cir. 2004) (holding that even after defendants had terminated its retirement plan, plaintiffs had standing to bring suit under ERISA to pursue "equitable remed[ies] of a constructive trust to distribute defendants' allegedly ill-gotten profits to the former participants and beneficiaries of the Plan"); Ellis v. Hollister, Inc., No. S-05-1726 LKK/GGH, 2006 WL 988529, at *5 (E.D. Cal. Apr. 14, 2006) (citing to *Waller* as support for its finding that Plaintiffs had standing to seek the equitable remedy of disgorgement of defendants' ill-gotten profits).

8. *Pender* at 367; *see also Edmonson* at 415.

9. No. 08-10588, 2009 WL 3415369 (S.D.N.Y. Oct. 23, 2009).

10. *See Faber* at *4-5 (finding that although the Plaintiffs claimed that they were entitled to the "amount of the difference between the interest that [the Plan] paid to Plaintiffs" in connection with their individual accounts and "the amount that [the Plan] earned by reinvesting Plaintiffs' benefits" which could be determined by an accounting and subsequent disgorgement, that did not constitute an injury or harm to the Plaintiffs for which they were entitled to relief).

11. Faber v. Metropolitan Life Ins. Co., 648 F.3d 98, 103 (2d Cir. 2011).