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Recent Sixth Circuit Decision Will Strike Fear Into the Hearts of 401(k) Plan Fiduciaries

Under federal pension law, if a participant is permitted to and does exercise control over the assets in his/her individual plan accounts, no person who is a plan fiduciary will be liable for any loss, or by reason of any breach, which results from the participant's exercise of control. Many 401(k) plans (as well as other individual account plans that allow participant investment direction) rely on this rule contained in Section 404(c) of the Employee Retirement Income Security Act of 1974, as amended (ERISA) to insulate plan fiduciaries from potential investment liability.

Department of Labor regulations clarify that, among some 25 requirements imposed for ERISA Section 404(c) to apply, participants must be provided an opportunity to choose from a broad range of investment alternatives (at least three) with varying risk and return characteristics and each of which is diversified (such as a money market fund, a fixed income fund, and an equity fund).

However, according to a recent decision by the Sixth Circuit Court of Appeals (*Pfeil v. State Street Bank and Trust Co.*[1]), just because participants are permitted to direct their investments by choosing among a broad array of investment options does not relieve the plan fiduciary from responsibility with respect to the selection of prudent options or from monitoring those options to ensure they remain a prudent choice. The Court quoted with approval the rationale stated by the Seventh Circuit in *Howell v. Motorola, Inc.*[2] that "[t]he choice of which investments will be presented in the menu that the plan sponsor adopts is not within the participant's power. It is instead a core decision relating to the administration of the plan and the benefits that will be offered to participants." Thus, the Sixth Circuit went on to state that "[a] fiduciary cannot avoid liability for offering imprudent investments merely by including them alongside a larger menu of prudent investment options. Much as one bad apple spoils the bunch, the fiduciary's designation of a single imprudent investment offered as part of an otherwise prudent menu of investment choices amounts to a breach of fiduciary duty …"

Therefore, the plan sponsors and plan fiduciaries of qualified retirement plans that offer participants a large array of investment choices may wish to reconsider the number of options being made available since, although well intentioned, this broad menu puts a large burden on the plan fiduciaries both with respect to initial selection and the monitoring of ongoing performance of investment options. And, based on the Sixth Circuit's pronouncement in the *Pfeil* case, even a single bad apple will spoil the bunch and expose the fiduciaries to liability for breach of duty!

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[1] *Pfeil v. State Street Bank and Trust Co. No. 10-2302 (6th Cir. 2/22/2012).*
[2] *Howell v. Motorola, Inc. 633 F.3d 552, 567 (7th Cir. 2011), cert. denied sub nom. Lingis v. Dorazil, 132 S. Ct. 96(2011).*