

Class Certified in Kraft 401(k) Fee Case

On July 17, 2008, Magistrate Judge Sidney I. Schenkier of the United States District Court for the Northern District of Illinois granted plaintiffs' motion for class certification in the 401(k) fee case brought against Kraft Foods Global, Inc. ("Kraft"). The *Kraft* case is the fourth 401(k) fee case in which a court has granted class certification (classes also have been certified in the lawsuits brought against Exelon Corp., ABB, Inc., and United Technologies Corp.). Class certification was denied in the fee case commenced against Northrop Grumman Corp.

Like the plaintiffs in other fee cases, plaintiffs in *Kraft* principally allege that the defendants breached their fiduciary duties by allowing excessive fees and expenses to be charged to the Kraft 401(k) Plan and by failing to properly disclose such fees and expenses to the Plan participants. In the complaint, the putative class of plaintiffs was defined to include "[all] persons who were or currently are participants or beneficiaries of the Plan, and those who will become participants of the Plan in the future." Plaintiffs sought to exclude the named defendants from the class.

In opposing class certification, defendants argued that the proposed class was overbroad and should not include (1) Plan participants whose claims are time-barred under ERISA; (2) former Plan participants; (3) participants who executed releases in exchange for severance benefits; (4) future Plan participants as they lack constitutional standing; and (5) Kraft officers who may have interests that conflict with those of other class members. The court overruled the first four of these objections holding that: (1) the fraud and concealment exception to the ERISA's statute of limitations provision may allow participants who have claims dating back more than six-years to proceed; (2) former participants are properly included in the class because they may have received less than what they should have received when they cashed out of the Plan; (3) former employees who signed releases may be included in the class because such releases did not purport to extinguish such employees' abilities to bring claims on behalf of the Plan (as opposed to bringing claims in their individual capacities); and (4) future participants may be included because injunctive relief, if granted, will affect future participants. As to the fifth objection, the court held that class should be redefined to exclude the officers and directors of Kraft because they may have a conflict of interest.

The court also overruled the defendants' objection that the proposed class did not satisfy the typicality requirement of Fed.R.Civ.P. 23(a)(3) because there exists individual issues regarding the extent to which Plan participants detrimentally relied on particular fee and expense disclosures. The court concluded that individual detrimental reliance issues are not relevant to the certification of a class to assert claims for breach of fiduciary duty under ERISA and explained that typicality is "measured by reference to defendants' actions toward the Plan as a whole, not with respect to individual defenses that might be raised with respect to how participants later may share in a recovery by the Plan." For similar reasons, the court rejected defendants' argument that the typicality requirement could not be satisfied because the application of a "safe harbor" defense based on disclosures made in accordance with ERISA §404(c) would require an individualized determination.

In challenging typicality, defendants also had pointed out that certain participants may have benefited from the cash component of two unitized stock funds that were in the Plan while other participants may have suffered a detriment. In ruling that this did not mean that the typicality requirement was not satisfied, the court noted that plaintiffs did not explicitly allege that holding cash in the unitized stock funds constituted a breach of fiduciary duty. It further ruled that, even if the plaintiffs had alleged a breach of fiduciary duty, typicality would not be defeated because, again, the focus of the inquiry going forward would be on the defendants' behavior toward the Plan and the proof of loss to the Plan, not to individual participants.

The court also rejected the defendants' argument that the plaintiffs did not satisfy the adequacy of the representation requirement of Fed.R.Civ.P. 23(a)(4). The court concluded that the named plaintiffs satisfied the requirement because it was established that they "know the basic facts underlying the lawsuit as alleged in the complaint" and are "willing to participate in discovery." The court also noted that the plaintiffs were represented by competent counsel.

In addition to concluding that the Rule 23(a) factors discussed above were satisfied, the court ruled that certification was appropriate under Rule 23(b)(1), which provides that an action may be maintained as a class if (1) prosecuting separate actions by individual class members would create the risk of inconsistent or varying adjudications, or (2) an adjudication with respect to individual class members would, as a practical matter, be dispositive of the interests of the other members or would substantially impair or impede their ability to protect their interests. The court reasoned that the adjudication of the claims brought by the named plaintiffs would be dispositive of other participants' claims on behalf of the Plan. The court further reasoned that other participants' claims would be impaired because the claims brought by the named plaintiffs involve the recovery and distribution of Plan assets, rather than individual accounts.

Finally, the court held that certification was appropriate under Rule 23(b)(2), which provides that an action may be maintained as a class if the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate. In reaching its conclusion, the court found:

Plaintiffs make no direct claim for money damages. Although money will undoubtedly change hands if plaintiffs prevail, the monetary relief in this case in this case is equitable in nature because it is sought as restitution for breach of fiduciary duty.

There are a number of other 401(k) fee cases against plan sponsors and service providers in which class certification motions are pending or are currently being briefed. As decisions are issued, we will be preparing similar summaries and updating the 401(k) fee litigation materials that can be found on our website at http://www.groom.com/401k_fee_litigation.html

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