

**Motion for Class Certification Denied  
in 401(k) Fee Case Against Plan Service Provider**

Many of the 401(k) fee lawsuits brought against recordkeepers and other retirement plan service providers are brought by plan sponsors (*i.e.*, the service providers' customers) rather than by individual plan participants. Additionally, many such plan sponsor plaintiffs seek to maintain their lawsuit as a nationwide class action on behalf of all similarly-situated customers of the targeted service provider.

If a fee lawsuit can be maintained on behalf of such a nationwide class, the stakes of any single lawsuit can become enormous. The fees at issue would include not only those associated with the plan sponsored by the named plaintiff, but also the fees across the service provider's entire customer base. Thus, the court's decision whether to certify a class can become a pivotal issue in any such case.

On August 27, 2008, in the 401(k) fee lawsuit brought against Principal Life Insurance Company, the United States District Court for the Southern District of Iowa ruled that the plaintiff could *not* maintain the action on behalf of a class consisting of the thousands of different 401(k) plans for which Principal provided retirement services. The decision denying the plaintiff's motion for class certification is the first in a series of rulings on class certification issues that are expected in the coming months and, although not binding on other courts, may shape their consideration of similar motions. A summary of the decision in the Principal lawsuit follows.

**The Parties**

The plaintiff, Joseph Ruppert ("Ruppert"), is a trustee of the Fairmount Park, Inc. Retirement Savings Plan ("Fairmount Park Plan"), a 401(k) plan. Defendant, Principal Life Insurance Company ("Principal"), is a nationwide provider of retirement plan services. In this capacity, Principal assists its retirement plan clients in designing plan documents and service agreements to suit its clients' individual needs. Principal also offers its clients an array of investment options, including mutual funds, for selection by plans and plan participants. Significant in this case is the fact that Principal received so-called "revenue sharing payments" from certain of these mutual funds.

**The Claims**

In his amended complaint, Ruppert alleged that Principal is an ERISA fiduciary because:

- It offers full service 401(k) retirement plans, including a menu of mutual funds from which employers can plan investment options;
- It retains the authority to substitute funds or close funds to new investment;

- It has discretion to negotiate with mutual funds for revenue sharing payments; and
- It provides "investment advice" as defined by ERISA by representing that the mutual funds on its platform are appropriate for plans; by recommending mutual funds that are similar to funds previously offered under plans; and by providing investment advice to participants through interactive tools and the matching of funds to participants' risk tolerance.

Count one of Ruppert's complaint alleged that Principal breached its fiduciary duties under ERISA § 404(a)(1)(A) by: (1) failing to disclose its negotiation and acceptance of revenue sharing payments from the mutual funds and failing to disclose the amount of those payments; (2) keeping revenue sharing payments for its own benefit, instead of using such payments to defray plan administration expenses; and (3) failing to act with care, skill, prudence, and diligence.

Count two alleged that Principal engaged in ERISA prohibited transactions under § 406(b)(1) and § 406(b)(3) by: (1) using plan assets to generate revenue sharing payments; and (2) keeping such payments for its own account.

Count three alleged that Principal breached its fiduciary duties and engaged in prohibited transactions by keeping the interest income earned on plan contributions prior to investment in designated investment options – commonly known as "float" – and by failing to disclose this practice to plan participants.

### **The Proposed Class and Class Questions**

Ruppert sought certification of a class of all trustees and plan sponsors of 401(k) retirement plans to which Principal provided services which included investment options from which Principal received revenue sharing payments.

In order to obtain class certification, a plaintiff must satisfy a number of criteria under Federal Rule of Civil Procedure 23. At issue in the court's decision on Ruppert's class certification motion were the so-called "commonality" and "typicality" requirements of Rule 23. The commonality element requires that there be questions of law or fact common to the class. The typicality element requires that the claims of the class representative (in this case, Ruppert) be typical of the claims of the class as a whole.

In support of his motion for class certification, Ruppert argued that Principal's fiduciary status (specifically, its provision of investment advice and its control over plan assets) and Principal's fiduciary breach were subject to class-wide proof, thereby satisfying the requirements of commonality and typicality. In opposition to class certification, Principal argued that Ruppert failed to satisfy Rule 23's commonality requirement. In particular, Principal contended that variations from plan to plan among the following defeated commonality and, therefore, precluded class treatment: Principal's alleged fiduciary status; its alleged breach of fiduciary duty; the degree of revenue sharing; the method and adequacy of disclosure of revenue sharing; the reasonableness of revenue sharing payments received; and the amount of damages.

### **The Court's Ruling**

The court denied Ruppert's motion for class certification, largely on the basis of deposition testimony given by various employees and representatives of Principal. According to the court, such testimony demonstrated substantial plan-to-plan variability as to the following:

- The breadth, type, and number of investment options offered by Principal to its plan clients. Certain investment options varied from plan to plan, and Principal created customized lineups of funds for its clients.
- The plan documents and service agreements prepared by Principal for its clients. Different clients had different needs, which Principal accommodated through modifications to these documents.
- The delivery and use of Principal's client-directed marketing materials and educational programs. For example, instead of using mass-produced materials, Principal targeted plans based upon their unique characteristics and designed customized education programs for plan participants.
- The amount of revenue sharing received by Principal from the mutual fund companies. There was no "standard revenue sharing fee." Instead, such fees varied from mutual fund company to mutual fund company.
- The manner in which such revenue sharing payments were handled by Principal, once received. For example, Principal reduced nonproprietary asset fees by the amount of revenue sharing payments it received from outside mutual fund companies.
- The reports sent to Principal's clients discussing the plans' investment performance, and the contents of such reports, which varied depending upon the uniqueness of the plan involved, whether the plans allowed for loans, the plans' contribution and matching formulas, etc.
- The investment guidelines provided by Principal to its clients, which were based on plan characteristics, total assets, and plan participants.

According to the court, such variability among the services provided to plans precluded Ruppert from demonstrating "commonality" and "typicality" – which must be satisfied under Rule 23(a) in order to obtain class certification.

In support of its ruling, the court further noted, "Principal's fiduciary status, to the extent it exists, 'entails a functional, and thus subjective, analysis' and would have to be determined on a plan-by-plan basis, as would any breach of that status." The court concluded, "[t]he proposed class involves 24,000 plus plans. Such individualized and fact-specific inquiries into Principal's alleged fiduciary status and breach thereof would be unduly burdensome and the litigation unmanageable. The class, as proposed by Ruppert does not give rise to common questions of fact and law."

As mentioned above, there are a number of other 401(k) fee cases against plan service providers in which class certification motions are pending or are currently being briefed. Groom Law Group is involved in several of these, and we're continuing to monitor developments in this area. As decisions are issued, we will be preparing similar summaries and updating the 401(k) fee litigation materials on our website [http://www.groom.com/401k\\_fee\\_litigation.html](http://www.groom.com/401k_fee_litigation.html)

Please contact one of the following Groom attorneys if you have any questions.

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