

August 24, 2010

## MEMORANDUM TO CLIENTS

**RE: Another Federal Court Adopts More "Defense-Friendly" Position on Damages in Stock Drop Cases**

A key issue in ERISA "stock drop" litigation is how to measure alleged losses. Plaintiffs typically argue that alleged losses should be measured by the gap between what the plan actually earned on its company stock investments (typically a large negative number) and what the plan purportedly would have earned had the same money instead been invested in an alternative fund within the plan (typically a large positive number). A recent decision from the United States District Court for the Northern District of Ohio rejected this "alternative investment" methodology and held instead that the appropriate measure of damages in an ERISA case premised on allegations that the market price of company stock was artificially inflated is the difference between what the plaintiff paid for the stock and the stock's value. *Taylor v. KeyCorp*, No. 1:08 CV 1927 (N.D. Ohio Aug. 12, 2010). The court then dismissed the entire case because the named plaintiffs had sold their KeyCorp stock during the alleged class period, meaning that they profited from the alleged artificial price inflation and did not suffer the kind of injury-in-fact needed to maintain a civil action in federal court.

The KeyCorp Plan is a defined contribution plan that allows participants to invest in the KeyCorp Common Stock Fund. Plaintiffs claimed that the price of KeyCorp stock was artificially inflated during the class period, and that defendants breached their ERISA fiduciary duties by continuing to offer the company stock fund as an investment option during that time period. Defendants argued that the two named plaintiffs in the class action did not have standing to bring the suit because they profited from the alleged stock price inflation by selling their stock during that time period, and, therefore, did not suffer any loss. Plaintiffs responded that they could show investment losses under an "alternate investment" damages model, which measures loss by comparing the performance of the allegedly imprudent investment (employer stock) with the performance of an alternative investment fund or funds within the Plan (*e.g.*, another equity fund or funds).

The Court adopted defendants' view, holding that the proper measure of damages when artificial inflation of stock price is alleged is the difference between what the plaintiff paid for the stock and what the stock was worth. Because the named plaintiffs sold their KeyCorp stock during the class period when they contended that the price was artificially inflated, the Court determined that the plaintiffs profited from any such artificial inflation and thus suffered no injury. In so finding, the Court followed a line of recent district court cases holding that plaintiffs who benefit from alleged artificial inflation lack standing to sue over the artificial inflation, regardless of how their claim is pleaded. *See In re Boston Scientific Corp. ERISA Litig.*, 254 F.R.D. 24, 30 (D. Mass. 2008); *Brown v. Medtronic, Inc.*, 619 F.Supp.2d 646, 650 (D. Minn. 2009); *Vermeylen v. ProQuest Co.*, 2007 WL 1218713 at \*5 (E.D. Mich. Apr. 23, 2007). Other district courts

have rejected this reasoning and have applied the "alternate investment" damages model in ERISA stock drop cases where plaintiffs alleged artificial inflation of the company stock price. *See, e.g., Moore v. Comcast Corp.*, 2010 WL 1375462, at \*2-4 (E.D.Pa Apr. 6, 2010).

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If you have any questions, please contact your regular Groom contact or any of the attorneys listed below:

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