

December 3, 2010

## MEMORANDUM

### **RE: Groom Law Group Secures Dismissal of 403(b) Fee Lawsuit**

On November 23, 2010 the United States District Court for the Eastern District of New York dismissed the complaint filed in *Montoya v. New York State United Teachers*, No. 2:10-cv-02068-LDW-ARL, a state-law based class action challenging 403(b) fees, revenue sharing, and alleged “kick backs.” As discussed below, the court concluded that removal of the case to federal court was proper, and the Securities Litigation Uniform Standards Act (“SLUSA”) mandated dismissal of the complaint.

### **Background**

The plaintiffs, Betsabe Montoya and Blanche Pesce, are New York public school teachers. Ms. Montoya and Ms. Pesce also are members of the New York State United Teachers (“NYSUT”), a labor organization consisting of members who work in, or are retired from, New York’s schools, colleges and healthcare facilities. Plaintiffs participated in a tax-deferred 403(b) annuity program offered by their local school district through ING. NYSUT Member Benefits Trust (“NYSUT Trust”) endorsed, marketed, and promoted the ING 403(b) product to its members.

### **ERISA Class Action**

In 2007, Ms. Montoya and Ms. Pesce filed a putative class action complaint under ERISA against NYSUT, NYSUT Trust and its individual Trustees, and ING. That complaint alleged that the NYSUT defendants engaged in a scheme that paid the plaintiffs fees for their endorsement of ING as the 403(b) annuity provider for NYSUT members. The complaint further alleged that the charges associated with ING’s investment options were excessive, and that ING received improper revenue sharing “kick backs” from mutual funds included in the menu of investment options offered to 403(b) participants. The plaintiffs alleged that these actions constituted breaches of fiduciary duty under ERISA.

In August 2009, the United States District Court for the Southern District of New York dismissed the action for lack of subject matter jurisdiction. In particular, the court agreed with the defendants that the 403(b) plan that Ms. Montoya and Ms. Pesce participated in is a plan established and maintained by their public school district. Thus, according to the court, the plan is a governmental plan exempt from ERISA’s coverage.

### **State Law Class Action**

Six months later, Ms. Montoya and Ms. Pesce filed a putative class action complaint in New York state court against the same defendants. The complaint was based on the same underlying facts and alleged state law claims for breach of fiduciary duty, aiding and abetting fiduciary breaches, and unjust enrichment.

The case was removed to federal court on the grounds that the allegations in the complaint are the type of allegations falling within the prohibition under SLUSA against maintaining a state law class action involving an untruth, manipulation, or deception in connection with the purchase or sale of securities. Congress enacted SLUSA in the wake of the Private Securities Litigation Reform Act of 1995 (“PSLRA”), which imposed heightened pleading standards and evidentiary requirements with respect to securities law class actions. SLUSA is designed to prevent plaintiffs from circumventing the PSLRA’s limitations by filing securities class actions in state court.

After removing the case, the defendants moved to dismiss the complaint on the grounds that, despite Ms. Montoya and Ms. Pesce’s efforts to repackage the same allegations they had made in their ERISA lawsuit, SLUSA clearly applies. In moving to dismiss, the defendants argued that SLUSA’s requirements have been met because the case is a “covered class action” based on state law, it concerns “covered securities,” and the complaint alleges that the defendants employed a “deceptive device or contrivance,” and made “untrue statements or omissions of material fact.” The court agreed. In doing so, the court rejected Ms. Montoya and Ms. Pesce’s contention that ING’s inclusion of a single fixed annuity option, which is within an integrated variable annuity contract, somehow affected the nature of the variable annuity, thereby rendering it outside the definition of a “covered security.” The court further rejected their contention that the complaint did not allege an untruth or manipulation, or a scheme or deception. In particular, the court noted that notwithstanding the effort to edit language out of the complaint containing express allegations of fraud or omissions, the complaint contains allegations that the defendants hid information from participants regarding NYSUT Trust’s endorsement fees and ING’s revenue sharing “kick backs.” Based on this, the court dismissed the complaint and denied Ms. Montoya and Ms. Pesce’s motion to remand the matter back to state court.

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Ted Scallet, Lars Golumbic and Julia Zuckerman led the defense of the NYSUT defendants through both proceedings. Groom Law Group also is representing defendants in several other fee cases that have been filed and we continue to track developments in this area. If you would like further information or have a question regarding the fee cases, please contact any of the attorneys listed below:

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