

## Publications

# Plaintiffs Target Use of 401(k) Plan Forfeitures

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**Litigation**

In the past month, plaintiffs have filed two separate lawsuits – *Dimou v. Thermo Fisher Scientific, Inc.* and *Rodriguez v. Intuit, Inc.* – accusing plan fiduciaries of violating the Employee Retirement Income Security Act of 1974, as amended (“ERISA”), by using plan forfeitures to offset future employer contributions. This use of forfeitures is widespread, so sponsors and providers will want to monitor the cases closely. For plan sponsors and service providers, these new claims are disconcerting and offer another example where a long common practice is now being challenged in the context of a class action complaint.

In both cases, the plans permitted the use of forfeitures for multiple purposes (*e.g.*, paying administrative expenses and reducing future employer matching contributions). The plaintiffs allege that the plan fiduciaries violated their duties under ERISA by using the forfeitures to offset the employers’ contribution obligation rather than some other purpose. They claim this decision amounts to a decision to use the forfeitures for the benefit of the employer rather than solely in the interest of the participants and beneficiaries. Plaintiffs further allege that the use of forfeitures resulted in prohibited transactions by effectively transferring property between the plans and the employers. The plaintiffs seek the “restoration” to the plan of amounts used to offset employer contributions, disgorgement of the assets and profits made by the plan sponsors’ use of the money that would have been contributed, attorneys’ fees, and other equitable relief.

The claims are surprising given that the use of forfeitures to offset employer contributions is well established and widespread. In fact, the longstanding practice is explicitly permitted under Treasury regulations and is consistent with Department of Labor guidance.

We will continue to monitor these cases and any additional cases that assert this novel legal theory. If you have any questions, please contact one of the authors or your Groom contact.