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Second Circuit Vacates Class Certification Order in Long-Running ERISA Retirement Plan "Revenue Sharing" Case

February 8, 2012 -- This week, the United States Court of Appeals for the Second Circuit vacated a Connecticut federal district court order certifying a class of 401(k) plan trustees in the long-running *Haddock v. Nationwide Life Ins. Co.* lawsuit filed against retirement plan service provider, Nationwide, in 2001. The suit alleges violations of Nationwide's purported fiduciary obligations under the Employee Retirement Income Security Act of 1974 (ERISA).

In 2009, the district court certified a nationwide class of over 24,000 trustees of disparate ERISA-governed retirement plans. The plaintiff trustees allege that Nationwide breached ERISA fiduciary duties by receiving and retaining so-called "revenue sharing" payments from advisers or other affiliates of mutual funds offered for selection as investment options under Nationwide annuity contracts issued to the plans or their participants. In seeking class certification, the plaintiffs advanced two fiduciary liability theories which the district court labeled, respectively, the "specific accumulation unit theory" and the "mutual fund selection theory." Under the "specific accumulation unit theory," the plaintiffs claimed that Nationwide used its purported control over plan assets to bargain for revenue sharing payments from the mutual funds. Under the "mutual fund selection theory," the plaintiffs claimed that Nationwide's purported ability not only to select the mutual fund investment options made available through its contracts, but also to remove or replace those options once selected by plans or participants, constituted requisite authority or control to render Nationwide an ERISA fiduciary. The plaintiffs in turn argued that Nationwide's alleged liability under both of these theories could be tried on a classwide basis. The district court agreed, certifying a "hybrid" class under Federal Rule of Civil Procedure 23(b)(2), with notice and opt-out rights provided to class members. The district court did not address the plaintiffs' alternative request for class certification pursuant to Rule 23(b)(3).

In 2010, the Second Circuit granted Nationwide's petition seeking immediate review of the district court's ruling. Among other things, Nationwide argued that none of the plaintiffs' alleged causes of action stated cognizable ERISA claims (or, at a minimum, claims that could be tried on a classwide basis) and, moreover, that certification was improper under Rule 23(b)(2) because the plaintiffs were primarily seeking monetary relief in the form of disgorgement of

alleged revenue sharing payments previously received by Nationwide. While the Second Circuit expressly avoided any analysis of the merits of the plaintiffs' ERISA claims, the appellate court agreed with Nationwide that, especially in light of the Supreme Court's decision in *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), certification of the *Haddock* plan trustee class under Rule 23(b)(2) was inappropriate. The Second Circuit observed:

In *Wal-Mart*, however, the Supreme Court instructed that unless merely "incidental" to the requested declaratory or injunctive relief, claims for individualized monetary damages preclude class certification under Rule 23(b)(2). 131 S. Ct. at 2557-60. In the case at bar, if plaintiffs are ultimately successful in establishing Nationwide's liability on the disgorgement issue, the district court would then need to determine the separate monetary recoveries to which individual plaintiffs are entitled from the funds disgorged. This process would require the type of non-incidental, individualized proceedings for monetary awards that *Wal-Mart* rejected under Rule 23(b)(2).

The Second Circuit therefore vacated the district court's certification order and remanded the case "for reconsideration of plaintiffs' motion for class certification in light of the Supreme Court's decision in *Wal-Mart*."

Based on the rationale of the Second Circuit's ruling, on remand the district court should be limited to considering certification of the *Haddock* class under the more stringent requirements of Rule 23(b)(3), rather than reconsideration of the class under Rule 23(b)(2). While the ruling does not end the litigation for Nationwide or necessarily preclude future certification of the class under Rule 23(b)(3), it is an important decision in the context of Rule 23(b)(2) jurisprudence for cases where putative class plaintiffs seek substantial monetary relief in addition to purported injunctive or declaratory relief.

Jorden Burt represented the American Council of Life Insurers as *amicus curiae* in support of Nationwide and in favor of reversal of the district court's order in *Haddock*. If you have any questions about this decision, please contact Wally Pflapsen at wjp@jordenusa.com or 202-965-8133, Michael Valerio at mav@jordenusa.com or 860-392-5046, or John Pitblado at jcp@jordenusa.com or 860-392-5024.

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