

Bailey Glasser Defeats Motion Disputing Constitutional Standing of ESOP Participants

02.21.2018

Bailey Glasser lawyers for two plaintiffs, participants in the ISCO Industries Inc. Employee Stock Ownership Plan (ESOP), defeated a motion to dismiss by defendant Wilmington Trust, N.A. that challenged their constitutional standing to bring Employee Retirement Income Security Act (ERISA) claims for monetary relief to the ESOP and a proposed class of participants. The decision by District Judge Richard G. Andrews makes the US District Court for the District of Delaware the second consecutive court in recent months to reject an argument being tested by the defense bar that would mean participants cannot seek to rectify alleged multimillion-dollar injuries to their plans but must rely on suits by the Department of Labor or fiduciaries to do so.

The plaintiffs' complaint alleges that Wilmington Trust, the ESOP's trustee, caused the ESOP to engage in an ERISA-prohibited transaction when in 2012 the ESOP bought all of the outstanding and issued shares of ISCO common stock above its fair market value, for \$98,000,000. Judge Andrews held "that Plaintiffs' complaint demonstrates a cognizable injury-in-fact with respect to the damages claims." The court rejected as "not well grounded in the law" a so-called "sell-to-sue requirement," under which a participant could not sue in federal court until he or she has sold the employer stock from his or her individual plan account. Judge Andrews observed: "the argument that there can only be subject matter jurisdiction when Plaintiffs sell a majority of their stock runs counter to reality" because "unlike investors in publicly-traded companies, ESOP participants below retirement age in an ESOP holding privately-held stock generally cannot sell the stock in their plans." In October 2017, the Southern District of Iowa held similarly for a plaintiff-participant in another benefit plan, in *Innis v. Bankers Trust Co. of South Dakota*, Case No. 4:16-cv-00650, 2017 WL 4876240 (S.D. Iowa Oct. 13, 2017).

The plaintiffs are represented by Bailey Glasser attorneys Greg Porter, Ryan Jenny, David Felice and Patrick Muench. The decision is reported at *Swain v. Wilmington Trust, N.A.*, Case No. 17-71, 2018 WL 934598 (D. Del. Feb. 16, 2018). This is the second lawsuit brought by Bailey Glasser's ERISA team on behalf of plan participants alleging Wilmington Trust breached ERISA by making their ESOPs pay too much for stock in transactions orchestrated by investment bank CSG Partners, LLC. On March 13, 2017, Bailey Glasser achieved a post-trial award of \$29,773,250.00 against Wilmington

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Trust in *Brundle v. Wilmington Trust N.A.*, 241 F. Supp. 3d 610 (E.D. Va. 2017).

Attorneys

David A. Felice

Ryan T. Jenny

Patrick Muench

Gregory Y. Porter

Practice Areas

ERISA, Employee Benefits & Trust Litigation