

DISMISSAL OF DOL'S FAILURE TO MONITOR SUIT WAS APPROPRIATE BASED ON RETIREMENT COMMITTEE'S SWIFT ACTION TO RECTIFY UNDIVERSIFIED TRUST

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As a result of a custodial trustee's resignation, assets for Severstal Wheeling, Inc.'s ("Severstal") two ERISA-covered retirement plans were transferred to a new trust. The retirement committee for the Severstal retirement plans ("Committee") appointed a new investment manager, Ronald LaBow and his company WPN Corporation ("LaBow"), to invest the assets of the plans. An investment management agreement was executed in December of 2008, reflecting a retroactive effective date of November 1, 2008 to reflect the reality of the established relationship between the Committee and LaBow.

The Committee specifically instructed LaBow to have the Severstal trust mirror the asset allocation within the prior trust. Instead of following these instructions, LaBow acquired an account that consisted entirely of large cap energy stocks, making up 97% of the assets in the new Severstal trust. The Committee discovered on December 29, 2008 through the quarterly report of its consultant, Mercer Investment Consulting, that the Severstal trust was undiversified, and that LaBow had failed to follow the Committee's instructions to acquire an allocation proportionate to that of the prior trust.

Thereafter, the Committee and its outside ERISA counsel engaged almost daily with LaBow regarding the reallocation of the assets in the Severstal trust to achieve diversification. During this particularly turbulent period in the markets, LaBow was not successful in reallocating the trust assets and ultimately sold the large cap energy stock account for cash in March, 2009. LaBow was fired in May, 2009 and Severstal ultimately prevailed in its lawsuit alleging that LaBow breached fiduciary duties under ERISA.

While the fiduciary breach lawsuit between Severstal and LaBow was pending, the federal district court stayed the DOL's separate lawsuit alleging failure to diversify, co-fiduciary breaches and failure to monitor claims against the Committee and other co-defendants. Once the fiduciary breach judgment against LaBow was affirmed by the Second Circuit, the court issued a decision allowing the DOL lawsuit to proceed, but only based upon the Committee's alleged failure to monitor LaBow.

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In cross-motions for summary judgment, the DOL's expert testified that the Committee should have communicated its investment allocation strategy to LaBow before the assets were transferred to the Severstal trust. She opined that the backdated investment management agreement was a "red flag" and that LaBow should have been fired earlier. In contrast, Severstal's expert testified that the Committee acted reasonably and prudently by hiring two reputable investment consultants after discovering LaBow's failure to diversify the Severstal trust. He further opined that given the volatility in the market, it was prudent for the Committee to be cautious in correcting LaBow's misallocation, and in allowing additional time before terminating LaBow.

The district court's memorandum opinion confirmed that the Committee's authority to appoint an investment manager carried with it a duty to monitor LaBow. However, that duty to monitor does not encompass every investment manager decision, nor it is possible where the plan fiduciary could not have reasonably predicted the actions of its investment manager. Citing to DOL guidance, the district court indicated the following actions are encompassed within the duty to monitor:

- the appointing authority must adopt routine monitoring procedures;
- the appointing authority must adhere to the routine monitoring procedures;
- the appointing authority must review the results of the monitoring procedures;
- the monitoring procedures must alert the appointing authorities to possible deficiencies; and
- the appointing authority must act to take required corrective action.

Significantly, the district court held (and the DOL conceded) that the Committee did not have actual notice of LaBow's breach until it received the quarterly report from Mercer on December 29, 2008. No duty to monitor arose until that point, and the record was replete with evidence that the Committee and its ERISA counsel were engaged in overseeing LaBow on an almost daily basis thereafter until the large cap energy account was dissolved. Within this context and with the extreme volatility of the market, the court held that the Committee did not breach its duty to monitor and granted summary judgment in its favor.

The ruling is strong support for the proposition that retirement committees must institute proper monitoring procedures, review and evaluate the information reported through such processes, and take corrective action when necessary. *Scalia v. WPN Corp.*, 2019 WL 4748052, W.D. Pa. Civ. 14-1494 (September 30, 2019)