FOURTH CIRCUIT AGREES AN AWARD OF EQUITABLE RELIEF IS NOT WARRANTED IN CASE INVOLVING A TRANSFER OF 401(K) PLAN ASSETS

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In 1998, Bank of America (BOA) amended its 401(k) plan to provide eligible participants with the opportunity to transfer their account balances to BOA's cash balance pension plan. BOA offered the transfer option because it believed it could obtain a higher return with the beneficiaries' money than the participants were obtaining under BOA's 401(k) plan. Many participants elected to transfer their 401(k) plan account balances to the pension plan. Nearly $2 billion of 401(k) plan assets were transferred to the pension plan.

In 2005, the IRS concluded that the transfers violated ERISA's "anti-cutback" rules because the transfers stripped participants of the 401(k) plan's "separate account feature" and exposed participants to the risk that BOA would invest the transferred assets poorly. The IRS imposed sanctions on BOA that included a $10 million fine, the obligation to establish a special purpose 401(k) plan to receive a transfer of assets that were initially transferred from the 401(k) plan, and making additional restorative payments to certain participants' accounts. Participants also filed a lawsuit which included a claim premised on BOA's violation of ERISA's anti-cutback provision. Plaintiffs effectively sought to obtain equitable relief based on sharing in the "profits" BOA retained as a result of the transfers of participant 401(k) plan account balances to the pension plan.

In 2015, the Court of Appeals for the Fourth Circuit ruled that plaintiffs would have suffered a "legally cognizable ongoing injury" *if* BOA retained a profit as a result of the transfers of 401(k) plan balances to the pension plan and the pension plan's investment of those balances. The Fourth Circuit also ruled that the plaintiffs' claim for a share of the profit is an available form of equitable relief under ERISA, and remanded the case back to federal district court to determine whether BOA profited from the transfers. The district court conducted a four-day bench trial to determine whether, after it restored the separate account feature and paid a $10 million fine to the IRS, BOA could still be said to have profited from the 401(k) plan transfers to the pension plan. The district court, after listening to the expert testimony of both the plaintiffs and BOA, ruled in BOA's favor and concluded that BOA did not realize a profit stemming from the transfers.

The plaintiffs appealed the district court's ruling and the Fourth Circuit, in an unpublished opinion, affirmed the judgment of the district court that the plaintiffs were not entitled to an award of equitable relief because BOA did not retain any profit as a result of the transfers. In upholding the district court's ruling, the Fourth Circuit reaffirmed its position that ERISA entitles plan participants to an accounting for profits attributable to an ERISA violation. ERISA does not allow a plan sponsor to wrongfully use plan participant funds for the sponsor's benefit and, in such circumstances, the plan sponsor must disgorge the resulting benefit to plan participants.

In this specific case, however, the Fourth Circuit ruled that the district court was not *required* to follow plaintiffs' proposed "proportionate-share-of-the whole" approach to assessing whether BOA profited from unlawfully transferred funds, although it was within its discretion to do so. The Fourth Circuit further ruled that the district court did not clearly err by concluding that the application of the proportionate-share-of-the-whole methodology was inappropriate in this particular case, or by relying on BOA's "attribution" approach in determining BOA did not profit from the plan asset transfers. The Fourth Circuit concluded that there was adequate factual basis to deviate from the "proportionate-share-of-the-whole" methodology, which other courts have used to assess whether profits are realized from unlawfully commingled funds. It is worth noting that the Fourth Circuit was not unanimous in this ruling. The dissenting judge offered a strongly worded opinion that BOA profited "lavishly" from its unlawful use of the transferred assets for its own purpose, and that the district court "plainly abused its discretion" in the case. *Pender v. Bank of America* (4th Cir.).