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Ivy Can't Nix ERISA Suit Over \$227M Madoff Investment

By **Ian Thoms**

Law360, New York (September 26, 2011, 5:16 PM ET) -- A New York federal judge refused Monday to dismiss a pair of complaints against Ivy Asset Management LLC brought by classes of retirement plan investors who say the company negligently invested \$227 million of their nest eggs with imprisoned fraudster Bernard L. Madoff.

U.S. District Judge Leonard B. Sand kept most of the claims asserted against Ivy, saying the firm had failed to show that U.S. District Judge Colleen McMahon had erred in denying its original motion to dismiss the suits, which have been consolidated in a mass class action. The class action alleges Ivy violated the Employee Retirement Income Security Act.

Ivy had asked Judge Sand to reconsider Judge McMahon's order and dismiss claims brought by the Buffalo Laborers Security Fund, the Welfare Fund and Welfare Staff Fund, Ernest A. Hartman and others.

In pushing to nix the claims alleged by plaintiffs who elected to invest with Madoff, rather than having their funds channeled to Madoff through feeder funds, Ivy said that Judge McMahon must have mistakenly neglected to dismiss that portion of the suits because she did not address it in her order.

But Judge Sand disagreed. "An absence of justification is not the same thing, however, as the presence of error," he wrote in his decision.

While Judge Sand refused to toss the bulk of the claims against Ivy, he agreed to dismiss a claim charging the firm with violating ERISA by reaping funds based on the falsely inflated value of Madoff- invested assets.

Judge McMahon relied heavily on a previous decision in the class action against Ivy, so it seemed odd to Judge Sand and Ivy that she wouldn't follow an earlier decision nixing a similar claim over inflated fees. In that decision, Judge Sand dismissed the claim "because of lack of evidence that, when it received its excessively inflated fees, Ivy knew or should have known that they were the result of fraud."

Judge McMahon granted Ivy's bid for reconsideration and dismissed the fee claim from the suits brought by Buffalo Laborer and Hartman.

"This argument is more persuasive than the previous argument regarding the direct investors since, in denying Ivy's motion to dismiss this claims, Judge McMahon didn't merely depart from the four corners of Beacon's text but appears to have reached a result in direct conflict with it. It is therefore difficult to understand how Judge McMahon reached this result other than in error," Judge Sand wrote.

Judge Sand also agreed to nix a claim in the Hartman complaint that alleges the firm failed to act in accordance with its retirement plan documents, saying the plaintiffs failed to show that plead sufficient facts to support their claim.

Judge Sand declined to dismiss the remaining claims alleged in the Buffalo Laborers and Hartman complaints.

Ivy has repeatedly sought to dismiss the various suits claiming its decision to invest clients' retirement funds with Madoff federal law.

While the various judges overseeing the different cases have trimmed bits and pieces from the claims, the company has failed so far to get the litigation tossed.

In December, Judge Sand refused for the second time in three months to accept Ivy's claim that it could not be sued under federal securities law because it was the one that had been defrauded, not its investors.

At the time, Judge Sand also declined to reconsider his order upholding most — but not all — investor claims brought against Ivy, a Bank of New York Mellon Corp. investment unit, under ERISA.

Retirement plan participants brought the class action against Ivy and other retirement fund investors in January 2009, just months after Madoff was charged by the U.S. Securities and Exchange Commission with running a massive Ponzi scheme.

The Buffalo Laborers plaintiffs are represented by Milo Silberstein of Dealy & Silberstein LLP, Edward W. Ciolko and Joseph H. Meltzer of Kessler Topaz Meltzer & Check LLP, and Joseph A. Weeden and Peter H. LeVan Jr. of Barroway Topaz Kessler Meltzer & Check LLP.

The plaintiffs in the Hartman complaint are represented by David Seven Preminger, Amy C. Williams-Derry, Derek W. Loeser, Havila C. Unrein, Lynn Lincoln Sarko and Rob Kilgard of Keller Rohrback PLC. They are also represented by Margaret E. Hasselman, Jerry G. Lewis, Angelica K. Jongco and Andrew Lah of Lewis Fineberg Lee Renaker & Jackson PC.

Ivy is represented by Jeffrey A. Rosenthal, Nowell D. Bamberger and Steven J. Kaiser of Cleary Gottlieb Steen & Hamilton LLP.

The case is In re: Beacon Associates Litigation, case number 1:09-cv-00777, in the U.S. District Court for the Southern District of New York.

--Additional reporting by Melissa Lipman. Editing by John Quinn.

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