Proskauer

Eighth Circuit Joins Growing Number of Courts Rejecting Common ERISA Fee and Investment Claims

Employee Benefits & Executive Compensation Blog on **October 18, 2022**

In *Matousek v. MidAmerican Energy Co.*, 2022 WL 6880771, __ F.4th __ (8th Cir. 2022), the Eighth Circuit joined the Sixth and Seventh Circuits in affirming dismissal of ERISA breach of fiduciary duty claims alleging that the plan fiduciaries allowed the plan to pay excessive recordkeeping and administrative fees and offered imprudent investment options.

Background

Plaintiffs, participants in the MidAmerican 401(k) plan, made a now typical series of allegations against their plan fiduciaries: recordkeeping and administrative expenses were excessive, some investment options were too costly and some investments performed poorly. In furtherance of their claims and in an effort to support an inference of imprudence, plaintiffs offered various comparators, such as other plans' recordkeeping arrangements and investment options. They claimed that cheaper and better-performing comparators showed that defendants must have acted imprudently when managing the plan.

The Court's Decision

In affirming the dismissal of all claims, the Court found that plaintiffs failed to plead "meaningful benchmarks" to support an inference of breach of ERISA's duty of prudence. Bolstering its analysis of the requirement for valid comparators, the court cited a recent Seventh Circuit decision upholding the full dismissal of similar claims, which we wrote about here.

Regarding the plan's recordkeeping expenses, the Court found that plaintiffs' comparisons created a mismatch. The plan, in addition to offering a basic suite of recordkeeping services, received and paid for additional services such as individualized investment advice for participants; commissions for individual trades; and trading, loan-origination, returned-payment, and check-service fees. By contrast, plaintiffs' comparators included industry averages for recordkeeping services that reflected only basic recordkeeping services. In other instances, the Court could not ascertain from the complaint what services plaintiffs' comparators received. Therefore, the Court was unable to conclude that the services the plan received were the same as the services that plaintiffs' comparators received. Accordingly, the court concluded that plaintiffs failed to provide meaningful benchmarks for recordkeeping fees and did not create a plausible inference that the fiduciaries breached their duties.

Regarding the investment options challenged for being too expensive, the Court similarly found that plaintiffs did not provide meaningful benchmarks for comparison. Plaintiffs identified "peer groups" of funds with lower costs than the plan's challenged investments, but did not explain what types of funds were in the peer groups, what criteria were used to sort them, and whether they are similar to the plan's investment options in terms of securities held, investment strategy and risk profile.

Similarly, regarding allegations that some funds performed poorly, the Court found that the benchmarks offered to prove the point were not meaningful because they pursued strategies explicitly at odds with the strategies of the funds challenged. For example, while a plan investment option pursued a "value" strategy, plaintiffs' comparator pursued a "growth" strategy. Due to the contrasting investment styles, the investments had different aims, different risks, and different potential rewards. Therefore, the Court concluded that plaintiffs' attempted comparison was neither sound nor meaningful.

Due to plaintiffs' failure to plead facts supporting the conclusion that their comparators were meaningful benchmarks, the Court held that the complaint did not state create a plausible inference that the plan fiduciaries breached their duties. The Court also agreed with the defendants that the district court correctly dismissed the complaint with prejudice where plaintiffs failed to affirmatively file a motion to amend the complaint.

Proskauer's Perspective

The decision is notable because it is yet another indication that, notwithstanding the Supreme Court's failure to provide helpful guidance in *Northwestern v. Hughes*, the circuit courts are prepared to lead the way in setting the standard for what type of fee and investment claims can survive dismissal. And, at least for now, the trend at the circuit court level appears to be very helpful to plan sponsors and fiduciaries seeking to reduce the risks and costs associated with this wave of litigation.

View original.

Related Professionals

- **Joseph E. Clark**
  Senior Counsel
- **Myron D. Rumeld**
  Partner