

Two District Courts Reach Conflicting Holdings Over Excessive Recordkeeping Fee Claims

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Two District Courts have reached conflicting decisions on the same day when ruling on substantially similar allegations that plan fiduciaries violated ERISA by paying too much for recordkeeping services, with one court dismissing the claims and the other court allowing the claims to move forward into the (often expensive) discovery phase of litigation. The cases are: *England v. Denso Int'l Am., Inc.*, No. 22-cv-11129, 2023 U.S. Dist. LEXIS 131386 (E.D. Mich. July 28, 2023) and *McDonald v. Lab'y Corp. of Am. Holdings*, No. 22-cv-680, 2023 U.S. Dist. LEXIS 130614 (M.D.N.C. July 28, 2023).

The courts in both cases addressed various allegations that the fiduciaries had breached their duties by failing to prudently manage their respective 401(k) plans. Both complaints contained claims pertaining to excessive recordkeeping and share class costs, and the complaint in *England* also included additional claims pertaining to the prudence of offering participants the option to invest in particular investments.

The *England* court dismissed plaintiffs' claims that recordkeeping costs were too high while the *McDonald* court upheld them. Plaintiffs in both cases presented the recordkeeping services of purported comparator plans in an attempt to support an inference that the defendants were paying too much for recordkeeping services. In dismissing the claim, the *England* court required that plaintiffs plead facts that would allow a plausible inference that the recordkeeping fees were excessive *relative to the services rendered*, and stated that it was insufficient for plaintiffs to lodge conclusory allegations that all the services the plans received were more or less the same. The *McDonald* court, in contrast, reasoned that plaintiffs were not required to allege details pertaining to the actual services received by the plans, crediting the allegation that the services were similar enough that any differences between them were immaterial to explaining discrepancies in the total fees paid. The courts further diverged by disagreeing about just how similar the comparator plans needed to be with the target plans in terms of amounts of assets and participants.

The *England* court also dismissed claims that the defendant fiduciaries imprudently offered particular investment options that were allegedly underperforming or too expensive compared to available alternatives. The *McDonald* court denied dismissal of similar claims except as to a particular mutual fund, where the purported imprudence was only supported by comparison to a collective investment trust, a comparison the court did not accept.

Proskauer's Perspective

In an effort to avoid the need to allege specific facts about the services rendered by the recordkeeper, the plaintiffs' bar has been gravitating in favor of allegations that recordkeeping services are all more or less the same. As evidenced here, the courts' reception to that tactic has been mixed.

The mixed results here and elsewhere are a direct consequence of the lack of decisive guidance from the Supreme Court on pleading standards. Unfortunately, we would expect the trend toward conflicting results to continue, both between and sometimes within jurisdictions.

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