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District Court Breaks Trend and Allows Claims Challenging Prudence of BlackRock LifePath Index Target Date Funds to Proceed

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We have previously blogged on the flurry of class action lawsuits challenging 401(k) plan investments in the BlackRock LifePath Index Target Date Funds. District courts around the country—seven of them in total—have granted motions to dismiss claims by 401(k) plan participants because their copy-cat allegations of underperformance were insufficient to raise a plausible inference of imprudence. That is, until now. Last week, a federal district court judge in the Eastern District of Virginia became the first to conclude that the participants' allegations of imprudence related to the BlackRock Funds were plausible. *Trauernicht v. Genworth*, No. 22-cv-532, 2023 WL 5961651 (E.D. Va. Sept. 13, 2023).

As a preliminary matter, it bears noting that, unlike the other cases challenging the prudence of investing in the BlackRock Funds, the participants here were permitted to use facts learned during early discovery to twice amend their complaint prior to any substantive ruling on defendants' motion to dismiss. With the participants' allegations now amplified by these facts, the court ruled that:

- The participants raised a plausible inference of imprudence by alleging that (i) the plan fiduciaries' procedures for monitoring the BlackRock Funds were inadequate because they failed to scrutinize their performance against appropriate alternatives; and (ii) the plan fiduciaries never discussed the performance of the BlackRock Funds. In so ruling, the court declined to consider the facts offered to disprove the participants' allegations because they were not appropriate for resolution on a motion to dismiss.
- One of the alleged comparators, the S&P Target Date Fund Indices, was a "meaningful benchmark" because the plan's investment policy statement specifically identified it as a benchmark. The court also concluded that the alleged comparator funds were meaningful because the plaintiffs alleged that they represented the most likely replacement alternatives for the BlackRock Funds.

- The alleged underperformance of three and one-half years was long enough toraise an inference that the BlackRock Funds were imprudently retained.

The court distinguished two earlier decisions from the same District that granted defendants' motions to dismiss concerning the BlackRock Funds' retention in other 401(k) plans, reasoning that the complaint here was materially different than the complaints in those cases largely due to the facts learned in discovery.

The only silver lining in the court's decision was that it granted the motion for lack of standing concerning the claims for injunctive relief because plaintiffs were no longer invested in the BlackRock Funds.

Proskauer's Perspective

It is unfortunate that the court was unwilling to consider the facts proffered by the defendants to refute the participants' allegations, particularly since the participants were permitted to supplement their allegations multiple times and seemingly relied on many of the same types of documents that the defendants sought to use to establish that the allegations were without merit. We previously wrote here about the need for a fresh look at defense strategies, such as considering immediate motions for summary judgment, in jurisdictions with adverse precedents on motions to dismiss. The same may hold true when litigating in a jurisdiction that permits discovery while motions to dismiss are pending.

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