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# Wisconsin Federal District Court Issues Five Rulings on Motions to Dismiss 401(k) Investment and Fee Cases – Is There a Way to Reconcile Them?

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Defense counsel frequently lament the difficulties of defending 401(k) investment and recordkeeping fee litigation when different judges render conflicting rulings on motions to dismiss seemingly indistinguishable complaints. Even when the judges purport to apply the same legal standards, the outcomes can differ. For that reason, we thought it would be interesting to track the decisions by a single judge in the Eastern District of Wisconsin who rendered five rulings in this arena within one week, in each case adopting the report and recommendation ("R&R") of the same Magistrate Judge. The hope was that the rulings would provide some insight as to distinguishing features that, at least for this judge, would drive the outcome of each motion to dismiss. Unfortunately, however, a close review of the decisions has generated few insights.

The opportunity for a meaningful comparison was enhanced by the fact that each of the five complaints in question was filed by the same law firm and asserted claims that retirement plan fiduciaries breached their duty of prudence in making decisions regarding the plan's recordkeeping fees. Specifically, each complaint alleged that plan fiduciaries employed an imprudent process for selecting and monitoring the plan's recordkeeper because they failed to solicit bids for third-party recordkeepers, use the plan's bargaining power to negotiate a reduced fee, and monitor the recordkeeping fees to ensure they remained reasonable over time. In support of their claims, plaintiffs compared the recordkeeping fees paid by the defendants' plan to fees paid by up to fifteen allegedly similar plans, and from the range of fees charged by the proposed comparators derived an allegedly reasonable fee that defendants' plan should have paid. Two of the complaints also asserted claims that plan fiduciaries imprudently retained high-cost investment funds in the respective plans.

Defendants moved to dismiss each complaint for failure to state a claim. With respect to the recordkeeping fee claims, defendants argued that the complaint relied on inappropriate comparisons of the fees charged by the defendants' plan and the plaintiffs' "potentially random assortment" of chosen comparator plans, and on the conclusory allegation that all recordkeepers provided the same services to large plans such that there could have been no justification for the challenged plan to pay higher recordkeeping fees. As for the investment fee claims (in two of the cases), defendants similarly argued that plaintiffs failed to allege that their preferred alternative investments were sufficiently comparable so as to support an inference of imprudence.

In considering each motion, the court relied on the standards set forth in the Seventh Circuit's decision (on remand from the Supreme Court) in *Hughes v. Northwestern University*, 63 F.4th 615 (7th Cir. 2023) (previously discussed here), including that in order to state a claim for breach of fiduciary duty, "a plaintiff must plausibly allege fiduciary decisions outside a range of reasonableness." Using these standards, Magistrate Judge Dries readily concluded that the investment claims were dismissible because the allegations regarding the performance of comparable funds were too conclusory. With respect to the recordkeeping claims, however, the results were disparate: the Magistrate Judge recommended dismissal in three cases and allowed the claims to proceed in two, even while acknowledging that the latter were "close case[s]." District Judge Greisbach subsequently adopted all five R&Rs with little additional discussion.

In the two cases in which the recordkeeping fee claims were allowed to proceed—*Glick v. ThedaCare Inc.*, No. 1:20-cv-1236, 2023 WL 9327209 (E.D. Wis. July 29, 2923)[1] and *Nohara v. Prevea Clinic, Inc.*, No. 2:20-cv-1079, 2023 WL 9327202 (E.D. Wis. July 21, 2023)[2]—Magistrate Judge Dries found that the operative complaints' allegations were sufficient to plausibly plead the recordkeeping claims. Specifically, plaintiffs alleged that (i) the recordkeepers provided standardized recordkeeping services consistent with those provided to all plans, and (ii) any minor variation in the services provided to different plans would not justify material differences in the fees charged. In neither R&R did Magistrate Judge Dries engage in a detailed analysis of whether the allegedly similar plans were suitable comparators for the challenged plans. Indeed, the *Nohara* R&R specifically rejected the idea that a court should engage in this analysis at the pleading stage, and the *Glick* R&R merely said "[n]o more is required" than the plaintiff's allegations that the plan received the same standard bundle of recordkeeping services as similarly sized plans.

In the cases in which the court granted the motion to dismiss recordkeeping fee claims—*Cotter v. Matthews International Corp.*, 1:20-cv-1054, 2023 WL 9321285 (E.D. Wis. Aug. 9, 2023);[3] *Guyes v. Nestle USA, Inc.*, No. 1:20-cv-1560, 2023 WL 9321363 (E.D. Wis. Aug. 23, 2023);[4] and *Laabs v. Faith Technologies, Inc.*, No. 1:20-cv-1534, 2023 WL 9321358 (E.D. Wis. Aug. 30, 2023)[5]—the allegations were largely the same. However, in each of these cases, unlike the other two, the Magistrate Judge (and in turn, the District Court) rejected plaintiffs' purported comparator plans as not sufficiently similar to the defendants' plan. For example, the *Guyes* plaintiff compared the Nestle plan with thirteen allegedly comparable plans and their respective recordkeeping fees. The alleged comparators had between approximately 13,000 and 83,000 participants and $350 million to $17 billion in assets. Even though the Nestle plan appeared to be right in the middle of these ranges, with 40,000 participants and $4.2 billion in assets, the R&R found the plans were too different in size, both from each other—with the largest plan more than six times as large as the smallest—and from the Nestle plan to use those plans' recordkeeping fees to calculate a proposed reasonable fee. Similarly, in *Laabs* and *Cotter*, the size disparities among the alleged comparator plans supported the R&Rs' conclusions that plaintiffs had no basis to allege the challenged plans' recordkeeping fees were excessive compared to plaintiffs' proposed alternatives. Absent comparisons to fees paid by suitable comparator plans, the court found, the allegations that the plans paid too much for the same quality of services and failed to regularly solicit competitive bids for recordkeeping fees were "not enough to cross the line from possibility to plausibility."

**Proskauer's Perspective**

That the court readily dismissed the investment performance claims, even while allowing two of the recordkeeping claims to proceed (in different cases), may be indicative of a larger trend in which courts appear to be more skeptical of claims that are based on after-the-fact comparisons of a fund's performance relative to that of other funds that may have utilized different investment strategies. With respect to the recordkeeping claims, however, it is difficult to discern why the court more intensely scrutinized the allegedly comparable plans in some cases than in others. The only apparent difference is that the R&Rs leading to the three dismissals were rendered about a month later than the R&Rs recommending denial of the motion to dismiss. Perhaps, with time, the Magistrate Judge appreciated the need to take a more responsible approach to the court's gatekeeping role, rather than allow a flood of claims to proceed to discovery on the strength of flimsy allegations.

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[1] *Report and recommendation adopted*, 2024 WL 233370 (E.D. Wis. Jan. 22, 2024).

[2] *Report and recommendation adopted*, 2024 WL 233373 (E.D. Wis. Jan. 22, 2024).

[3] *Report and recommendation adopted*, 2024 WL 218417 (E.D. Wis. Jan. 19, 2024).

[4] *Report and recommendation adopted*, 2024 WL 218420 (E.D. Wis. Jan. 19, 2024).

[5] *Report and recommendation adopted*, 2024 WL 218418 (E.D. Wis. Jan. 19, 2024).

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