# Eleventh Circuit Reiterates that Burden of Proving Loss Causation Stays with Plaintiffs

**Employee Benefits & Executive Compensation** on **August 19, 2024**

The Eleventh Circuit Court of Appeals recently affirmed a district court's grant of summary judgment in favor of the fiduciaries of the Home Depot 401(k) plan, who defended against claims that they breached their fiduciary duties by permitting the plan to pay excessive financial advisor fees and retaining underperforming investments. In so ruling, the court brought back to the fore a circuit split over whether the burden of persuasion on loss causation shifts when a plaintiff establishes or raises genuine issues of fact as to breach and loss to the plan. The case is *Pizarro v. Home Depot, Inc.*, No. 22-13643, 2024 WL 3633379 (11th Cir. Aug. 2, 2024).

**Background**

Plaintiffs, who were current and former employees of Home Depot who participated in the plan, alleged that defendants Home Depot and the plan's fiduciary committees breached their ERISA fiduciary duties in two ways. First, the plaintiffs alleged that defendants failed to monitor the fees paid by the plan to its financial advisor, which allegedly were excessive. In support of this claim, plaintiffs contended that competitor financial advisory firms charged lower fees than the plan's financial advisor for comparable services, and that the plan's advisor charged the plan higher fees than it did to comparable clients. Second, plaintiffs alleged that defendants imprudently retained four underperforming investments as plan investment options, including the BlackRock Target Date Funds, the plan's stable value fund option, and two small-cap funds. In support of this claim, plaintiffs identified discrete periods of time during which each challenged fund underperformed relative to alleged comparable investments.

The district court granted summary judgment for defendants, holding that even though plaintiffs raised genuine issues of material fact as to whether defendants breached their fiduciary duties, plaintiffs did not show that defendants' conduct was "objectively imprudent," and thus plaintiffs could not show that the alleged breaches caused them any financial loss.

## The Eleventh Circuit's Decision

The Eleventh Circuit affirmed. It first addressed the question of which party must prove that a fiduciary breach proximately caused a plaintiff's losses – referred to as "loss causation." Plaintiffs argued that if a plaintiff establishes that a fiduciary breached the duty of prudence and the plan suffered a loss, the burden shifts to defendant to prove that the loss was not caused by its breach. The court, acknowledging a circuit split on this issue, agreed with defendants and rejected the burden-shifting framework. As a threshold matter, the court concluded that it was bound by a 1992 decision that in its view "quite explicitly" held that plaintiffs must establish loss causation, irrespective of whether plaintiffs also establish a breach and loss to the plan.

However, the court also independently endorsed the holding of its earlier precedent, for several reasons. First, because ERISA does not assign the burden of proof on loss causation, the "default rule"—whereby plaintiffs bear the burden of persuasion on the essential aspects of their claims—applies to fiduciary breach claims in the absence of affirmative evidence that Congress intended to depart from it. The court found that ERISA lacked "any language suggesting that Congress's omission of . . . [a] burden-shifting framework was anything but deliberate." Second, although courts may make an exception to the default rule for an element of a claim that is more fairly characterized as an affirmative defense, the court viewed that exception to be inappropriate in this context because loss causation is an element of the fiduciary-breach claim. Finally, the court rejected the notion that burden-shifting principles from the common law of trusts warranted a departure from the default rule, as "ERISA is not the common law" and the stated rationale for burden-shifting—the informational advantage trustees have over beneficiaries—was not present here: ERISA imposes robust disclosure and reporting requirements on plan fiduciaries and, for cases reaching the summary judgment stage, ERISA plaintiffs have the benefit of discovery.

Having decided that plaintiffs must prove loss causation, the court explained what plaintiffs must establish to do so. Concluding that "liability turns not only on an imprudent process, but also on that process resulting in an imprudent investment," the court held that to recover damages a plaintiff must show that an investment or other fiduciary decision was not objectively prudent, meaning it falls "outside the range of reasonable judgments a fiduciary may make based on her experience and expertise, such that a hypothetical prudent fiduciary in the same circumstances as the defendant, armed with the information that a proper evaluation would have yielded, would not (or could not) have made the same choice." In so holding, the court emphasized that there often will be many objectively prudent decisions that a fiduciary could make, and that different prudent fiduciaries, "facing the same set of circumstances, can exercise their judgment and reach different conclusions."

Applying the objective prudence standard to plaintiffs' claims, the court held that plaintiffs could not establish that no prudent fiduciary in defendants' shoes would have retained the plan's financial advisor. The court based this finding on numerous factors: (i) that the plan's financial advisor's fees were higher than those charged by competitors for similar services did not mean that retaining the plan's advisor was unreasonable, given the plan's size and goals; (ii) the advisor was the most popular service provider for plans similar in size and complexity to the Home Depot plan, suggesting objective prudence because "many other sophisticated investment professionals managing similarly sized plans made the same choice as Home Depot"; (iii) the advisor had preexisting integration with the plan's recordkeeper that other financial advisors lacked; and (iv) the advisor's fees were "by no means an outlier" when compared to fees charged by the advisor to other plans with similar assets – "a fee somewhat higher than median a handful of years is a far cry from being such an objectively unreasonable charge for the providers' services that a prudent fiduciary would not have stayed the course."

Finally, the court held that plaintiffs failed to show that defendants were objectively imprudent in retaining the challenged investments.  In so holding, the court observed that the challenges to each fund suffered from a common defect – “the principal evidence is drawn only from short time periods during which the funds underperformed their peers,” in this case ranging from one quarter to a few years. In the court’s view, plaintiffs could not establish objective imprudence “by just pointing to another investment that has performed better in a five-year snapshot of the lifespan of a fund that is supposed to grow for fifty years.” With respect to the BlackRock TDFs specifically, the court also noted that the funds were popular among plans of similar size and complexity, and consistently received high ratings from industry analysts, and that the allegedly better performing, comparable investments proposed by plaintiffs were inappropriate because their glidepaths were different from those of the BlackRock funds.

**Proskauer’s Perspective**

The Eleventh Circuit’s decision may generate renewed interest in the existing circuit split on whether there is burden-shifting on loss causation when a plaintiff establishes procedural imprudence and loss to the plan, and presents another opportunity for the Supreme Court to weigh in on the issue. Although in some ways procedural in nature, the burden-shifting issue has the ability to materially impact the outcome of ERISA fiduciary-breach claims at the summary judgment stage or at trial. Furthermore, insofar as the court has placed the burden of proof with respect to loss causation and objective imprudence on the plaintiffs, it perhaps enhanced the prospects of obtaining dismissal of fiduciary-breach claims at the pleadings stage, for failure to plead facts that could support a finding of objective imprudence. Indeed, several of the facts underlying the court’s holding—affirming a decision on summary judgment—resemble arguments often made by defendants in motions to dismiss.

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