Dismissal Streak Continues in BlackRock Target Date Fund Litigation

A Practical Guidance® Article by
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A third district court has dismissed with prejudice a complaint alleging that defendants breached their fiduciary duties under ERISA by offering 401(k) plan participants the option to invest in BlackRock LifePath Index Target Date Funds (the "Funds"). Beldock v. Microsoft, Case No. 22-cv-1082 (W.D. Wash. Apr. 24, 2023). Although the outcome of the court's ruling here is consistent with earlier decisions, the rationale underlying the *Beldock* decision arguably goes further than in prior rulings, thus providing additional food for thought.

Background

As we discussed here, in the summer of 2022, one law firm filed virtually identical complaints against the fiduciaries of eleven different 401(k) plans for offering plan participants the option to invest in the Funds and designating them as the default investment for participants who do not select investment options. The complaints asserted claims for breach of the duty of prudence, breach of the duty of loyalty, failure to monitor, co-fiduciary breaches and knowing breaches of trust based on the Funds' alleged underperformance compared to four of the top-six largest target date fund suites. Two of the complaints already have been dismissed with prejudice, and plaintiffs have appealed. The court in this case previously dismissed the plaintiffs' first complaint, but with leave to refile. While the first complaint merely compared the performance of the Funds to the performance of the other large target date fund suites, the amended complaint sought to bolster the allegations of underperformance by: comparing the Funds' risk-adjusted returns to those of the other suites using Sharpe ratios; and adding performance comparisons to S&P Target Date Indices, a composite of target date funds.

The Court's Decision

The court held that, even as amended, the complaint's allegations failed to give rise to a plausible inference that defendants breached their fiduciary duty of prudence, because it remained limited to allegations that the Funds underperformed against various measures. In sum, the court concluded that the allegations, "which again are based solely on the [Funds'] alleged poor performance during a brief timeframe, are insufficient, without more,

to raise Plaintiffs' claim above the level of speculation and into plausibility." In support of its conclusion, the court cited authorities from "across the country" that, in the court's view, had held that allegations of poor performance alone are insufficient to state a claim for fiduciary breach. Plaintiffs' new measures of comparison thus did not cure the first complaint's deficiencies in failing to provide other grounds for inferring an imprudent decision-making process.

The court summarily dismissed the remaining claims. It dismissed the duty of loyalty claim because plaintiffs did not plead any facts giving rise to an inference that defendants engaged in self-dealing, faced conflicts of interest or sacrificed participants' interests in favor of their own. And it dismissed the claims for failure to monitor, co-fiduciary breach and knowing breaches of trust because they were derivative of the duty of prudence and duty of loyalty claims.

Proskauer's Perspective

The court's decision in *Beldock* extends defendants' victory streak in securing dismissals of complaints challenging the decision to offer the BlackRock Target Date Funds as investment options. It is the third dismissal granted with prejudice; to date, no motion to dismiss has been denied. Historically, defendants have not experienced this degree of consistent success in dismissing other categories of fee and investment performance complaints. By way of contrast, defendants have had only mixed results in defending against the wave of complaints filed against the fiduciaries of university 403(b) plans, with many complaints surviving dismissal, one going to trial and one reaching the Supreme Court, as we discussed here.

Apart from the unblemished success rate, the decision in *Beldock* may prove significant to the extent that the court applied a heightened standard for pleading a viable claim of imprudent selection and monitoring of investments. While the other two dismissals with prejudice held that performance-only allegations could not survive dismissal, they nonetheless analyzed plaintiffs' comparators and concluded that they were not meaningful, thus leaving open the possibility that a complaint that alleged underperformance alone might survive dismissal if the comparators were more meaningful. Unlike those and other rulings, the *Beldock* decision held for defendants without addressing the question of whether plaintiffs presented meaningful comparators to the Funds—even though the parties had spilled much ink doing so. The decision thus arguably could be construed as holding that performance-only allegations always are insufficient, irrespective of the duration or severity of the alleged underperformance, or how meaningful plaintiffs' proposed comparators are. At a minimum, the *Beldock* decision may be construed as concluding that allegations of poor performance over "brief"—here, three- and five-year—periods is insufficient to state a claim, consistent with an argument made by Amici in this case.

In short, the *Beldock* decision, coupled with the two prior rulings, suggests that a trend in favor of more defense-friendly rulings may finally be emerging, and with it the prospects of slowing down the onslaught of litigation in the 401(k)/403(b) arena.

Related Content

Resource Kits

- ERISA Claims and Litigation Resource Kit
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Practice Notes

- ERISA Litigation: Excessive Fees Class Actions Video

Cases

- Beldock v. Microsoft Corp., No. C22-1082JLR, 2023 U.S. Dist. LEXIS 71233 (W.D. Wash. Apr. 24, 2023)
- Hall v. Capital One Fin. Corp., No. 1:22-cv-00857-MSN-JFA, 2023 U.S. Dist. LEXIS 35391 (E.D. Va. Mar. 1, 2023)
- Smith v. CommonSpirit Health, 37 F.4th 1160 (6th Cir. 2022)
- White v. Chevron Corp., 752 F. App'x 453 (9th Cir. 2018)

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Myron D. Rumeld has over thirty-five years of experience handling all aspects of ERISA litigation at both the trial and appellate level. His broad experience includes numerous representations of 401(k) plan fiduciaries defending class action employer stock and excessive fee claims, and representations of large multiemployer pension and health fund trustees in the defense of a large assortment of fiduciary breach lawsuits. He has defended class action suits against Charles Schwab, Barnabas Health, Inc., Neuberger Berman, and the American Federation of Musicians Pension Fund, among many other clients; and he has tried cases for The Renco Group and Foot Locker, Inc., among others.

Chambers USA cites Myron as a "brilliant" and "sensational litigator," who is "sharp, articulate, clever, and deeply committed to the work he does." Similarly, *The Legal 500 United States* has called Myron an "outstanding ERISA lawyer."

Myron is presently co-chair of Proskauer's ERISA Litigation Group. He previously served as co-chair of Proskauer's nationally renowned Employee Benefits & Executive Compensation Group. He also served as the past co-chairman of the Board of Editors for the American Bar Association publication, *Employee Benefits Law (BBNA)*.

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Joe represents a diverse range of clients from the time a claim is asserted through trial or arbitration, whether it is defending plan fiduciaries against class action claims of fiduciary breach or prohibited transactions or in connection with government investigations, or defending employers against multiemployer pension plan claims for withdrawal liability. These clients include financial service providers, investment managers, Fortune 500 corporations, and benefit plan committees.

Outside of the context of litigation, Joe also advises fiduciary clients regarding their fiduciary responsibilities and employers regarding various withdrawal liability issues.

Co-editor and a frequent contributor to Proskauer's Employee Benefits & Executive Compensation blog, Joe has authored pieces on employee stock ownership plans, excessive fee claims, fiduciary breach, investigation and determination of benefits claims, and best practices for plan drafting. He has also published several articles regarding these issues in *BNA Insights*.

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Dan earned his B.A. from Northeastern University and J.D. from Georgetown University. During his first law school summer and the following semester, he served in the Department of Labor's Plan Benefits Security Division. He was a staff member of the Georgetown Journal on Poverty Law and Policy.

Prior to law school, Dan worked as a legal matter analyst on behalf of Fidelity Investments where he focused on complex litigation and regulatory affairs.