

First Round of Robo-Advisor Fee Litigation Goes to Record-Keepers

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Since 2016, record keepers for large 401(k) plans have been defending litigation over investment advice provided by the Financial Engines investment advice algorithm. (This kind of arrangement is commonly referred to as “robo-advice.”) The lawsuits claim, in essence, that fees collected by record keepers for investment advice were unreasonably high, because the fees exceeded the amount actually paid to Financial Engines. The suits claimed that the record keepers did not provide services of sufficient value to justify retaining the spread between the amount charged and the amount actually paid to Financial Engines.

In March, two federal courts dismissed claims against the record keepers, bringing the total to four similar cases that all have been dismissed. The courts ruled that the record keepers were not acting as fiduciaries in setting fees at a level that allowed them to retain an amount in excess of what was paid to Financial Engines and thus plaintiffs could not proceed with claims that the record keepers breached fiduciary duties or engaged in prohibited self-dealing.

Despite the record keepers’ success in this first round of litigation, the courts have not completely foreclosed plaintiffs’ claims. In three of the four cases, the courts gave the plaintiffs a chance to replead their claims. In addition, the courts noted the responsibility of plan sponsors or their designees to review fee arrangements for investment advice (as well as other services) to ensure that the total amount paid is reasonable. That said, the courts have not accepted the plaintiffs’ premise that the fees in any case were unreasonable.

The cases are: *Patrico v. Voya Financial, Inc.*, No. 16-7070, 2018 WL 1319028 (S.D.N.Y. Mar. 13, 2018) (denying leave to amend); *Scott v. Aon Hewitt Financial Advisors, LLC, et al.*, No. 17 C 679, 2018 WL 1384300 (N.D. Ill. Mar. 19, 2018); *Chendes v. Xerox HR Solutions, LLC*, 2017 WL 4698970 (E.D. Mich. Oct. 19, 2017); and *Fleming v. Fid. Mgmt. Tr. Co.*, No. 16-CV-10918-ADB, 2017 WL 4225624 (D. Mass. Sept. 22, 2017).

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