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Two More District Courts Reject ERISA Fee and Performance Claims as Insufficient

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Two recent district court decisions add to the growing number of courts granting motions to dismiss putative ERISA class actions challenging defined contribution plan fees and investment performance. These decisions from the Eastern District of New York and the Eastern District of Wisconsin are the latest victories for defendants at the motion to dismiss stage in this arena, and come on the heels of multiple similar decisions in the Sixth and Seventh Circuits (discussed here, here, and here).

Gonzalez v. Northwell Health, Inc., No. 20-cv-3256, 2022 WL 4639673 (E.D.N.Y. Sept. 30, 2022)

In *Gonzalez*, a participant in Northwell Health's 403(b) plan sued plan fiduciaries on behalf of herself and a proposed class of other participants, alleging that defendants caused the plan to incur excessive recordkeeping fees and imprudently retain certain investment options despite the availability of cheaper and better performing alternatives. In particular, plaintiff alleged that the recordkeeping fees were higher than the average of those incurred by similar large plans, and that the plan offered several actively managed mutual funds that underperformed their benchmarks rather than index funds that tracked their benchmark indices while charging lower fees. Defendants moved to dismiss the complaint for both lack of standing and failure to state a claim.

After finding that plaintiff had standing, Judge Kovner dismissed the complaint in full for failure to state a claim. With respect to the challenged investment funds, the court found plaintiff failed to allege that the funds' underperformance relative to benchmark indices was both "consistent" and "substantial" because she made allegations based only on three- and five-year trailing averages and showed only "relatively modest" underperformance over those periods. Moreover, the court held that index funds were not "meaningful comparators" for the actively managed challenged funds. With respect to the recordkeeping fee claim, the court found plaintiff's allegations insufficient because they relied on faulty comparisons to average fees paid by smaller plans. The dismissal was without prejudice, and Judge Kovner gave plaintiff 30 days to amend the complaint.

Evans v. Associated Banc-Corp, No. 21-cv-60, 2022 WL 4638092 (E.D. Wis. Sept. 30, 2022)

In *Evans*, participants in Associated Bank's 401(k) plan sued the bank on behalf of themselves and a proposed class of employees, alleging that plan fiduciaries breached their duties of loyalty and prudence in the selection and retention of plan investment options. In particular, plaintiffs alleged that defendants included certain proprietary funds as both standalone plan investment options and underlying components of collective investment trusts ("CITs"), despite the availability of cheaper and better-performing alternatives from third-party managers.

Judge Greisbach rejected this claim, finding plaintiffs relied on periods of underperformance that were too short to support an inference of imprudence. The court also found that plaintiffs failed to show that the alleged comparators were in fact comparable to the challenged funds, and in this regard found that allegations that two funds are in the same Morningstar category are alone insufficient, given the considerable range of risks and returns within each category. Absent sufficient allegations of underperformance, the court held, plaintiffs' allegations that no other similarly sized plans included the challenged funds "add[ed] nothing," since nothing in ERISA prohibits the use of proprietary funds or funds not yet offered in other plans.

The court also dismissed an independent claim for breach of the fiduciary duties of prudence and loyalty with respect to management of the plan's CITs, including Associated Bank's LifeStage Funds. In particular, the court held that retaining a fund as one component of a CIT despite removing it as a standalone plan investment option was not itself evidence of an imprudent process, and that plaintiffs otherwise failed to "tell a plausible story" regarding defendants' management of the CITs.

The court's dismissal of the complaint was with prejudice, since plaintiffs had already amended their complaint in lieu of responding to an earlier motion to dismiss.

Proskauer's Perspective

There have now been at least six favorable decisions at the pleading stage for defendants in fee and investment litigation in the past three months across multiple jurisdictions. These decisions may be harbingers of a future wave of success for plan sponsors and fiduciaries who have weathered years of putative class action complaints based on hindsight and second-guessing of fiduciary decision making. *Evans* and *Gonzalez*, in particular, provide examples of courts applying a more exacting analysis to fee and investment claims and grappling with the sufficiency of factual comparisons of the challenged expenses and investments to alternatives. While it remains to be seen whether more courts will follow suit—notably, the Ninth Circuit has issued unfavorable decisions in this space—these recent cases provide guidance to litigants and courts in evaluating the sufficiency of these common copycat allegations, as well as hope to defendants seeking to avoid the time and expense of fact discovery.

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