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Magistrate Recommends 180° Course Correction on Previously Denied Motions to Dismiss In ERISA Fee Litigation Cases

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In a pair of report and recommendations issued the same day, a Magistrate Judge in Wisconsin recently recommended that the district court (i) grant motions for reconsideration of prior denials of motions to dismiss claims challenging defined contribution plans' fees, and (ii) grant the motions to dismiss in their entirety. Underpinning the recommendations is the fact that after the motions to dismiss were denied, the Seventh Circuit decided *Albert v. Oshkosh Corp.*, 47 F.4th 570 (7th Cir. Aug. 29, 2022), which we wrote about here, and which the Magistrate concluded warranted dismissal of the claims. If the recommendations are adopted, these would be the third and fourth motions to dismiss granted in full, along with one that was granted in part, in the Seventh Circuit since *Albert*, representing a near 100% success rate for defendants since issuance of the decision.

Nohara v. Prevea Clinic, No. 2:20-cv-1079 (E.D. Wis. Oct. 27, 2022)

In *Nohara*, two participants in their company-offered 401(k) plan claimed that plan fiduciaries breached their duties of loyalty and prudence in connection with (i) excessive recordkeeping and administration fees and (ii) excessive investment management fees. The excessive investment management fee claim had two components: first, the plan included actively managed funds with higher fees than index funds; second, the plan failed to offer the cheapest share classes available after accounting for potential revenue sharing. They also made derivative claims for failure to monitor other fiduciaries.

In recommending dismissal of the recordkeeping and administration fee claim, the Magistrate found the claims materially identical to the claims dismissed in *Albert*. Like in *Albert*, the plaintiffs failed to articulate why the plan's recordkeeper fees were excessive relative to the services rendered, as they instead compared the plan's fees to average recordkeeping costs of other, allegedly similarly-sized plans.

Next, the Magistrate concluded that as a matter of law plaintiffs' "net cost" investment management fee claim failed in the wake of *Albert*. The Magistrate explained that no court has required such a net cost analysis, and regardless, potential revenue sharing proceeds do not necessarily redound entirely to participants' benefit. And with respect to the allegedly high-cost investment options, the Magistrate stated that plaintiffs failed to provide meaningful benchmarks for comparison. First, the challenged funds and comparators were offered by different providers, and the complaint provided no basis for the Magistrate to believe that the challenged funds and comparators were meaningfully similar. Second, plaintiffs mostly compared high-cost actively managed funds to low-cost index funds, which are not meaningfully similar comparisons due to the differing investment strategies.

Glick v. Thedacare, No. 20-cv-1236 (E.D. Wis. Oct. 27, 2022)

Plaintiffs' claims in *Glick* were similar to those in *Nohara*, including breach of the duties of loyalty and prudence in connection with excessive fees for (i) recordkeeping and administration, (ii) managed account services and (iii) investment management, as well as derivative monitoring claims.

In recommending the dismissal of all claims, the Magistrate stated that, under *Albert*, the failure to provide a meaningful benchmark doomed plaintiffs' excessive fee claims. Recordkeeping and investment management fees were disposed of mostly for the same reasons described in *Nohara*. However, the report also addressed two types of fees that were not specifically at issue in *Nohara* nor *Albert*: stable value fund fees and managed account services fees. Regarding the stable value fund challenge, the Magistrate extended *Albert*, finding that plaintiffs merely alleged that the comparator stable value fund was materially similar and less expensive than the challenged stable value fund, but failed to allege any details in support of the comparison. Similarly, the challenge to managed account service fees did not specify the services offered by the plan or plaintiffs' comparators, and failed to provide factual context about the comparisons, such as the respective plans' number of participants or amount of assets. Therefore, as with other challenged fees, the Magistrate was unable to draw an inference that defendants engaged in an imprudent process when selecting the challenged funds and services.

Proskauer's Perspective

The *Nohara* and *Glick* recommendations illustrate the influence of *Albert* in the Seventh Circuit. If adopted, the recommendations will continue a trend favoring the dismissal of ERISA fee claims in the Seventh Circuit after *Albert*, which contrasts sharply with the mixed results beforehand. Finally, *Glick* shows how *Albert's* context-sensitive analysis of fees and comparators can be extended to fees that were not specifically at issue in *Albert* , thereby providing defendants a versatile tool in defending all types of fee complaints.

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