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Industry Coalition Unites to Support Dismissal of ERISA Fiduciary-Breach Claims Related To BlackRock Target Date Funds

Employee Benefits & Executive Compensation on **February 23, 2023**

The filing of a new 401(k) plan "excessive fee" or "investment underperformance" complaint is hardly "news" these days given the proliferation of suits that have been filed over the past several years. In fact, hardly a week goes by when at least one new lawsuit has not been commenced. Still, plan sponsors and fiduciaries were surprised when, in the summer of 2022, one law firm filed eleven class action complaints targeting 401(k) plan sponsors and fiduciaries for offering the BlackRock Life Path Index Target Date Funds—one of the most popular target date fund suites on the market—as investment options in their respective 401(k) plans.

These lawsuits also caught the attention of a number of trade organizations, many of whom decided to file amicus curiae briefs—friend-of-the-court briefs—to assist the courts in understanding the potentially devastating industry-wide impact that complaints such as these could cause were they not immediately dismissed. While there is much to be said about these lawsuits (and much already has been said), we take a look here at what the Amici had to say about the allegations and also provide a brief update on the status of these cases.

The Eleven Complaints

The allegations supporting the claims of fiduciary breach were simple and virtually identical in all of the complaints. The plaintiffs in each of these cases alleged that the BlackRock Target Date Funds were "significantly worse performing than many of the mutual fund alternatives offered by [other target date fund providers]," and further alleged that the plan fiduciaries chased the low fees associated with these funds without regard to whether they performed well. On the basis of these allegations, the plaintiffs asserted multiple claims for breach of fiduciary duty.

Defendants' Motions to Dismiss

In all eleven cases, the defendants filed motions to dismiss the complaints for failure to state a claim for relief and advanced several arguments in support thereof. Among the arguments advanced by the defendants was that the Supreme Court previously ruled that prudence is flexible and context-specific and thus courts "must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise." Here, the plaintiffs did nothing more than advance allegations of short-term, modest underperformance and, moreover, for various time periods the performance was frequently better than the plaintiffs' alleged comparator funds. Allegations such as these, the defendants argued, could not withstand dismissal in light of the Supreme Court's prior ruling.

Amici Briefs

As noted, the eleven copy-cat complaints caught the attention of the ERISA community. Many expressed the concern that if allegations such as those asserted here could survive a motion to dismiss and proceed into class action discovery, it would be open season on any 401(k) plan fiduciary for not making available at all times anything but the best-performing investment fund.

Four trade organizations thus banded together to submit an amici brief in support of the plan sponsors and fiduciaries and, in particular, to provide the courts with their views on why the complaints should be dismissed. These four organizations included the American Benefits Council, The ERISA Industry Committee, American Retirement Association, and The Committee on Investment of Employee Benefit Assets. Amici were represented by Proskauer.

Amici advanced several arguments, including the following:

- If allowed to proceed, the lawsuits would put plan fiduciaries in a no-win situation. The plaintiffs claim imprudence exclusively based on the fiduciaries' selection of the BlackRock Target Date Funds that allegedly underperformed a set of four so-called comparators funds having little in common with the challenged BlackRock funds.
- The plaintiffs' myopic fixation on a single variable among many that fiduciaries must consider in determining plan investment offerings creates a particularly menacing prototype for fiduciary strike suits. It translates into a request for a declaration that a fund suite is *per se* imprudent if it underperforms other funds, without regard to its fees, risk profile, or rating among market analysts.

- A finding that a claim of imprudence is sufficiently alleged based on the offering ofa fund that earned lower returns for specified past periods than the top performers in the same broad fund category would subject every plan that does not select the best fund in each asset category to costly litigation—a catastrophic outcome for both the court system and the private retirement system.

Status of the Cases

Thus far, courts have dismissed three of the cases. In two of the cases, the same judge granted the motions to dismiss immediately after oral argument without written opinions. Another judge dismissed the third case, holding that the plaintiffs' imprudence claim was speculative, *i.e.*, the plaintiffs failed to allege facts that would tend to exclude the possibility that defendants had lawful reasons to retain the BlackRock Target Date Funds. In so holding, the court explained that plaintiffs' allegations were merely consistent with their favored explanation of a fiduciary breach but they were also consistent with prudent explanations for the defendants' decisions. The allegations showed only that defendants could have chosen different investment vehicles, but the fact that different vehicles may have previously outperformed does not establish anything about whether the BlackRock funds were an imprudent choice. Amended complaints have been filed in all three of these cases. The motions to dismiss in the other cases are pending.

Proskauer's Perspective

The decisions dismissing the three complaints are welcome news to plan sponsors and fiduciaries. As Amici pointed out, any other result very well may lead to a flood of complaints accusing plan fiduciaries of breaching their duties whenever a plan investment option is not the best performing fund. We will continue to monitor developments in these suits and provide periodic updates.

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