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Tenth Circuit Adopts “Meaningful Benchmark” Pleading Standard in Dismissing Challenges to 401(k) Plan Fees

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In a case of first impression in the Tenth Circuit, the Court recently joined the chorus of circuit courts in holding that a 401(k) plan participant alleging excessive investment management or recordkeeping fees must assert a “meaningful benchmark” in order to survive a motion to dismiss. In addition to rejecting commonly pleaded “benchmarks” because they were not meaningful, the Court’s ruling is of particular significance because, unlike some other courts, it dismissed the participants’ “share-class claim”—ruling on a motion to dismiss that their allegation that cheaper share classes of the same mutual fund were available to the plan was demonstrably false. The case is *Matney v. Barrick Gold*, No. 22-4045, 2023 WL 5731996 (10th Cir. Sept. 6, 2023).

Background

Participants in the Barrick Gold 401(k) plan commenced a putative class action against the plan sponsor, board of directors, and plan fiduciaries alleging that (i) the plan’s investment menu contained investment options with unreasonably high fees, and (ii) the plan’s recordkeeping fees were excessive. In support of the first allegation, the participants relied on price comparisons between the plan’s investments, on the one hand, and, on the other hand: an ICI Study (a 2016 report compiling data to show median expense ratios for various investment categories), less expensive collective investment trusts (“CITs”), share classes of the same mutual funds and other mutual funds. With respect to the second allegation, the participants alleged that the plan fiduciaries failed to regularly issue requests for proposal and relied on the “401k Averages Book,” which purported to show that other retirement plans paid substantially less for recordkeeping services. On the basis of these allegations, the participants alleged that the defendants breached their fiduciary duties under ERISA.

The Tenth Circuit’s Decision

As a preliminary matter, the Tenth Circuit held that for plan participants to raise a plausible inference of imprudence of excessive investment management and administrative fees, they must allege meaningful benchmarks—a now well-established standard first adopted by the Eighth Circuit in a case the Proskauer ERISA litigation team successfully defended, and since adopted by several other circuit courts. Where, as here, there are allegations of excessive investment management fees, this means that the purportedly reasonable alternative investment options must have similar investment strategies, investment objectives, or risk profiles. With respect to allegations of excessive recordkeeping fees, participants must show that the services received by the purported comparator plans are similar to the services received by the challenged plan.

Applying these principles here, as well as other principles governing the adjudication of motions to dismiss, the Tenth Circuit affirmed the dismissal of the participants' allegations:

Investment Management Fees

- The Court rejected the participants' allegation that the plan imprudently offered high-cost share classes of mutual funds when cheaper, but otherwise identical, share classes were available. In so ruling, the Court explained that the documents referred to or incorporated by reference in the complaint indisputably established that the revenue share was rebated to plan participants, which reduced the net fee of the plan's investment options. The court distinguished other cases, such as one we blogged about in the Ninth Circuit, that rejected the same argument because of ambiguities in the documents concerning how revenue sharing affected the plan's costs.
- The Court rejected the participants' attempt to compare the challenged investments to other mutual funds because the complaint did not support the validity of their comparisons with well-pleaded factual allegations. While the participants stated in cursory fashion there were no material differences in risk/return profiles or underlying holdings between their preferred investments and the plan's investments, they failed to explain the risk/return profiles of these comparators or identify their underlying holdings.
- The Court similarly rejected the participants' attempt to compare the challenged investments to CITs because they did not provide information about the goals and strategies of the CITs.
- The Court also rejected the participants' reliance on the ICI Study because median expense ratios in broad investment strategy categories, without more, do not

provide meaningful benchmarks—they do not reveal any information about how specific funds operate.

Recordkeeping Fees

- The Court held there is no requirement for fiduciaries to obtain competitive bids for services at any regular interval. The Court also concluded that the participants' claim that the plan fiduciaries failed to control costs was undermined by the fact that the plan fiduciaries periodically negotiated with the recordkeeper to obtain lower fees and the plan's recordkeeping fees declined over time.
- The Court concluded that the participants failed to carry their burden of providing a meaningful benchmark to compare to the plan's recordkeeping fees because they did not offer allegations about what services were received by the plan or the plans in the 401k Averages Book.

Proskauer's Perspective

The Tenth Circuit joins a growing list of jurisdictions that have demanded that plan participants support their allegations of imprudence with complaints that the fees were excessive relative to "meaningful comparators." (*See also* our blogs on the other circuit courts' decisions here: Third, Sixth, Seventh and Eighth Circuits.) Equally important here was the Tenth Circuit's willingness to consider documents referred to or incorporated by reference in the complaint in connection with evaluating and ultimately dismissing plaintiffs' share-class claims. We are hopeful that the Tenth Circuit's decision persuades other courts to dig in and weed out meritless share-class claims on motions to dismiss.

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