FEDERAL DISTRICT COURT DISMISSES BREACH OF FIDUCIARY DUTY LAWSUIT AGAINST NORTHWESTERN UNIVERSITY'S 403(B) RETIREMENT PLANS

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Participants in two Northwestern University 403(b) retirement plans brought a class action lawsuit in Illinois federal district court against the university, investment committee members and other plan fiduciaries, alleging that the plans' investments had been mishandled, resulting in excessive fees and other harm to participants. In a massive complaint totaling 165 pages, the plaintiffs alleged that: (i) fiduciaries did not monitor investment options, provided too many investment options, and included poorly performing funds and funds with excessive fees in the fund line up; (ii) fees for recordkeeping were excessive, and were improperly paid through revenue sharing; and (iii) fiduciaries failed to use their bargaining power to negotiate more favorable investment fund expense ratios, including making institutional class funds available, rather than higher cost retail funds.

The defendants moved to dismiss under a procedural rule which required the federal district court to take as true the facts alleged in the compliant, and to draw reasonable inferences in favor of the plaintiffs. Despite the favorable legal standard for plaintiffs, the judge granted defendants' motion to dismiss all counts and refused plaintiffs' request to amend their complaint as untimely and futile, because their newly alleged facts would not alter the court's decision.

Dismissing plaintiffs' first fiduciary breach claim, the court emphasized that plan participants were not required to invest in the funds plaintiffs alleged were underperforming and charged excessive fees. The court noted that the mere presence of underperforming or more expensive investments, "does not a fiduciary breach make." Citing the Seventh Circuit decision in Loomis v. Exelon Corp., 658 F.3d 667, 673-4 (7th Cir. 2011), the judge stated that plaintiffs' theory that participants were incapable of choosing among multiple investment funds was "paternalistic", and that the plans did not violate ERISA by allowing participants to make their own choices among a variety of investment fund types.

Next, the court addressed the allegation that the plans' practice of paying recordkeeping expenses through revenue sharing violates ERISA, and that such fees were excessive. Citing the specific holding of another Seventh Circuit decision, Hecker v. Deere & Co., 556 F.3d 575, 585 (7th Cir. 2009), the court held that the use of revenue-sharing to pay plan expenses is permissible, and further held that ERISA's fiduciary standard does not require the plan fiduciaries to "scour the market" to find the cheapest possible funds. Examining the revenue sharing expense fees under the plans, the court specifically held that the ability of participants to select plan funds with expense ratios of 0.05%, 0.06% and 0.1%, which were "as a matter of law, low", defeated plaintiffs' claim that recordkeeping expenses charged were excessive, or constituted a breach of fiduciary duty.

The availability of low-cost index funds led the court to conclude that no fiduciary breach occurred under an amalgamation of similar assertions – e.g., that the range of investment options was too broad, that retail fund fees should not have been charged, and that the plan fiduciaries should have negotiated lower fees. Because the investment fees paid were reasonable as a matter of law and were within the control of participants, the court also dismissed claims that defendants engaged in ERISA prohibited transactions.

The complete vindication of the Northwestern University plans may give hope to other 403(b) plan sponsors defending similar claims of fiduciary breach, particularly in participant-directed plans where low-cost index funds are among the available investment options. *Divane v. Northwestern University* (N.D. Ill 2018).