The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

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# ICI Files Amicus Brief in 401(k) Fee Case Involving Use of Proprietary Funds in In-House Plan

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January 29, 2018 TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Files Amicus Brief in 401(k) Fee Case Involving Use of Proprietary Funds in In-House Plan

ICI recently filed the attached amicus brief in ***Brotherston v. Putnam Investments, LLC***,[1] one of a growing number of ERISA fiduciary breach class actions against fund families regarding the inclusion of proprietary fund products in the 401(k) plans they sponsor for employees. More than a dozen fund families have been targeted by such suits.

The district court in *Brotherston* (after a seven-day bench trial) held that plaintiffs (Putnam employees) failed to identify any specific circumstances in which Putnam and its 401(k) plan put their own interests ahead of plan participants. The decision favoring Putnam is the first to be reached after trial.

The case is now before the First Circuit Court of Appeals, where plaintiffs are trying to convince the appellate court that Putnam's use of proprietary products constitutes prohibited self-dealing and therefore Putnam (not plaintiffs) should have the burden of proving no imprudence or other fiduciary breach relating to the inclusion of its funds.

In its amicus brief, ICI put the wide use of proprietary products in its proper historical and present-day context, as well as presented detailed analysis explaining that plaintiffs' burden shifting request was contrary to Congressional intent in enacting ERISA. As the original applicant behind PTE 77-3—the DOL class exemption that allows proprietary funds to be included in fund family plans—ICI has some gravitas in offering an opinion regarding the exemption's intended scope and intent. We noted that, in issuing PTE 77-3, DOL recognized that it would be contrary to normal business practice for a company whose business is financial management to seek financial management services from a competitor. We also were able to show that employer contribution levels associated with fund family plans (including the Putnam plan) exceed national averages—arguably an incidental impact of the application of PTE 77-3 and the ability of fund families to include their funds as plan investment options.

ICI also provided instruction on the pleading burden that should apply to such cases—explaining that the mere fact that funds offered through a plan are proprietary does not impose a presumption of prohibited self-dealing; rather, plaintiffs have the burden of proving imprudence and fiduciary breach under normal ERISA Section 404 standards.

We are hopeful that the appellate court will uphold the lower court's holding in favor of Putnam and, in doing so, will include language in its opinion that is helpful to other fund families targeted by these suits.

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Attachment

**endnotes**

[1] *Brotherston v. Putnam Invs., LLC* , 2017 BL 208765, D. Mass., No. 1:15-cv-13825-WGY (June 19, 2017), *available at* https://www.gpo.gov/fdsys/pkg/USCOURTS-mad-1_15-cv-13825/pdf/USCOURTS-mad-1_15-cv-13825-1.pdf.