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ICI Files Amicus Brief in Defined Contribution Plan Fee Case in Tenth Circuit

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TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: ICI Files Amicus Brief in Defined Contribution Plan Fee Case in Tenth Circuit

ICI recently filed the attached amicus brief in Matney v. Barrick Gold,[1] urging the 10th Circuit Court of Appeals to affirm the district court's dismissal of a retirement plan fee case. The brief addresses a number of the same issues ICI has addressed in other recent amicus briefs.[2] Simply put, and as the Supreme Court affirmed in Hughes v. Northwestern University, ERISA affords fiduciaries significant discretion to not only select an appropriate mix of investment options for participants, but to structure the plan in a way that fairly and efficiently provides for payment of third-party services (such as recordkeeping fees).

Background

The plaintiffs (employee-participants in the defined contribution retirement plan of Barrick Gold of North America, Inc.) filed a class action lawsuit in the United States District Court for the District of Utah, alleging that plan fiduciaries violated their duties by:

- not using their bargaining power to reduce investment expenses and recordkeeping fees;
- failing to utilize the lowest cost share classes;
- failing to consider collective investment trusts;
- selecting high-cost actively-managed funds; and
- maintaining certain funds in the plan despite the availability of similar investments with lower costs and better performance.

The district court granted the defendants' motion to dismiss, holding that the plaintiffs' allegations did not create a plausible inference that the defendants breached their fiduciary duties. In reaching its decision, the court found that the plaintiffs' allegations could not survive a motion to dismiss because they only focused on a few funds during a short window of time and relied on comparisons of dissimilar investment options. The court ruled that, "[s]howing that purportedly 'better' investment opportunities existed at the relevant times does not give rise to an inference that the Committee breached its fiduciary duties."[3]

The plaintiffs appealed the case to the 10th Circuit Court of Appeals, arguing that the district court erred in dismissing the case and restating the arguments they made in the district court.

Amicus Brief

ICI's brief urges the 10th Circuit to affirm the district court's dismissal and explains why the pleading standards suggested by appellants would be detrimental to plans and plan participants. Appellants misrepresent the Supreme Court's holding in Hughes v. Northwestern University,[4] wrongly asserting that it created a new standard for assessing prudence. Not only did Hughes not articulate a pleading standard, but the Court stressed that, "[b]ecause the content of the duty of prudence turns on the circumstances . . . prevailing at the time the fiduciary acts . . . , the appropriate inquiry will necessarily be context specific."[5]

The brief stresses the importance that fiduciaries maintain flexibility to select a variety of investment options based on a process that considers a wide variety of factors for an individual plan, not just the expense ratio. Both actively managed and index funds can be excellent investment options for inclusion in defined contribution plan line-ups. Further, when assessing cost, fiduciaries generally assess the all-in cost, not simply the expense ratio. Appellants do not address the fact that, depending on the recordkeeping arrangement, the fund/share class with the lowest expense ratio may not be the fund/share class that results in the lowest all-in cost.

The brief explains why appellants are misguided in their assertion that it was imprudent to include mutual funds in the plan rather than collective investment trusts (CITs) with similar investment objectives. The assumed premise of this argument—that mutual funds and CITs are interchangeable investment products available to plan sponsors, varying only in cost—is simply incorrect, and there is no basis for a court to credit the assertion that CITs are presumptively more prudent investment options simply because they may have a lower published expense ratio than an allegedly similar mutual fund.

Finally, the brief explains that appellants' attempt to benchmark the fees of plan funds, using data from an ICI publication,[6] is an improper interpretation of the data.

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Notes

[1] Case No. 22-4045, on appeal from the United States District Court for the District of Utah, Matney v. Barrick Gold, Case No. 2:20-CV-00275-TC (April 21, 2022).

[2] For a summary of ICI's amicus brief filed with the US Supreme Court in Hughes v. Northwestern University, see ICI Memorandum No. 33879, dated November 2, 2021,

available at https://www.ici.org/memo33879. For a summary of ICI's amicus brief filed in the First Circuit in Brotherston v. Putnam Investments, LLC, see ICI Memorandum No. 31059, dated January 29, 2018, available at https://www.ici.org/memo31059.

[3] Page 20 of Order and Memorandum Decision in Matney v. Barrick Gold, Case No. 2:20-CV-00275-TC (April 21, 2022).

[4] 142 S. Ct. 737 (2022). For a summary of the opinion, see ICI Memorandum No. 34008, dated January 25, 2022, available at https://www.ici.org/memo34008.

[5] Hughes, 142 S. Ct. at 742 (quoting Fifth Third Bancorp v. Dudenhoeffer, 573 U. S. 409, 425 (2014)) (internal citation and quotations marks omitted).

[6] Appellants cite to the BrightScope/ICI Defined Contribution Plan Profile: A Close Look at 401(k) Plans, 2016 (June 2019). The publication expressly cautions against the type of inferences appellants make, noting that the expense ratios applicable to funds within any "investment category" may vary based on, for example, whether they are actively or passively managed and the extent to which they invest in small-cap, mid-cap, or emerging market stocks." Thus, "it is important to examine different points in the distribution of expenses to understand the range of mutual fund expenses paid in 401(k) plans."