The Asset Management Industry
SERVING INDIVIDUAL INVESTORS
INVESTMENT COMPANY INSTITUTE

MEMO# 35437

September 15, 2023

Tenth Circuit Affirms District Court's Dismissal of Defined Contribution Plan Fee Case, Citing ICI Amicus Brief

[35437]

September 15, 2023

TO: ICI Members
Pension Committee
Pension Operations Advisory Committee SUBJECTS: Pension RE: Tenth Circuit Affirms District Court's Dismissal of Defined Contribution Plan Fee Case, Citing ICI Amicus Brief

In November 2022, ICI filed an amicus brief in Matney v. Barrick Gold,[1] urging the Tenth Circuit Court of Appeals to affirm the district court's dismissal of a retirement plan fee case.[2] On September 6, 2023, the Tenth Circuit issued an opinion (attached below) affirming the dismissal. The opinion directly references ICI's amicus brief.

This decision marks the first time the Tenth Circuit has opined on the issue of a plaintiff's pleading burden when alleging that plan fiduciaries breached their duty of prudence by offering more expensive investment options and charging fees higher than alternative plans in the marketplace.

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 (CITs);
- 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, with prejudice, 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 Tenth Circuit Court of Appeals, arguing that the district court erred in dismissing the case and restating the arguments they made in the district court.

Tenth Circuit Opinion

Since the Tenth Circuit had not yet considered the pleading standard for retirement plan fee cases, it began its opinion with a summary of several decisions from "sister circuits" on the issue. After this review, it adopted the approach to an ERISA plaintiff's pleading burden articulated by the Eighth Circuit in Meiners v. Wells Fargo & Company,[4] explaining,

as our colleagues in the Third, Sixth, Seventh, and Eighth circuits confirm, there is no doubt a claim for breach of ERISA's duty of prudence can be based on allegations that the fees associated with the defined-contribution plan are too high compared to available, cheaper options. But to raise an inference of imprudence through price disparity, a plaintiff has the burden to allege a "meaningful benchmark." [5]

On the question of when a cost comparison is meaningful, citing the Supreme Court in Hughes v. Northwestern University, the court explains that the answer "will depend on context because 'the content of the duty of prudence' is necessarily 'context specific.'"[6] For the questions raised in this case, the court reasoned,

when it comes to comparing investment management fees, a meaningful comparison will be supported by facts alleging, for example, the alternative investment options have similar investment strategies, similar investment objectives, or similar risk profiles to the plan's funds...Likewise, with recordkeeping fees, a comparison will be meaningful if the complaint alleges that the recordkeeping services rendered by the chosen comparators are similar to the services offered by the plaintiff's plan....A court cannot reasonably draw an inference of imprudence simply from the allegation that a cost disparity exists; rather, the complaint must state facts to show the funds or services being compared are, indeed, comparable. The allegations must permit an apples-to-apples comparison. [7]

Applying these principles to the allegations in the plaintiffs' complaint, the court found that the district court did not err in concluding the complaint failed to state a plausible claim for the reasons described below.

Investment Management Fees

The complaint alleged a breach of ERISA's duty of prudence because the plan offered funds with higher expense ratios, based on several cost comparisons. The district court found plaintiffs had misstated the expense ratios of certain plan investment options, because documents referenced in the complaint showed that the plan applied a revenue credit to the overall cost, making them less expensive than the stated comparators. In the appeal, plaintiffs argued that the district court had erred in considering the revenue sharing at the dismissal stage. The Tenth Circuit disagreed, noting that the issue of whether revenue sharing is an imprudent practice is not before the court in this case and that the documents referenced in the complaint unquestionably confirmed that the revenue credit used by the

plan yielded a lower cost for participants.

Further, the Tenth Circuit agreed with the district court that the complaint failed to plausibly allege imprudence because it lacked facts showing the remaining comparator funds were "meaningful benchmarks."

Regarding comparisons to CITs, the Tenth Circuit rejected "the notion that CITs could never be considered comparable to mutual funds" but concluded that the complaint had not sufficiently alleged that CITs were meaningfully comparable to the funds offered by the plan.

Regarding the claim that the district court had "brushed over" the allegations that passively managed funds outperform actively managed funds, the Tenth Circuit found that the complaint failed to supply a meaningful benchmark because it failed to show that the funds were similar enough to the plan's funds.

The complaint had compared several of the plan's investment funds in different investment categories against corresponding median expense ratios from the ICI Study.[8] The Tenth Circuit agreed with the district court's conclusion that it was not a meaningful comparison, noting that "[a] median expense ratio derived from a broad range of funds—for example, all funds within the domestic equity investment category—reveals no information about how the specific funds within that category operate" and did not compare how the funds in the study actually compare to the plan's funds.

Recordkeeping Fees

The plaintiffs argued that a prudent fiduciary would have conducted RFPs at reasonable intervals to determine whether the plan could obtain better pricing. The Tenth Circuit rejected this argument, noting that in this case, the plan "regularly re-negotiated their fee arrangement with Fidelity, resulting in lower costs for participants."

The plaintiffs used comparisons to the average recordkeeping fees from the 401k Averages Book to show that the plan was paying too much for recordkeeping fees. The Tenth Circuit noted, however, that plaintiffs did not offer comparisons about the services provided through the recordkeeping arrangements in the plan or in the 401k Averages Book. Citing ICI's amicus brief, the court noted the array of services that can be included, such as "recordkeeping, accounting, legal, and trustee services, as well as services that are provided directly to plan participants, such as educational seminars, access to customer service representatives, and the provision of benefits statements."

Shannon Salinas
Associate General Counsel - Retirement Policy

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 an overview of the amicus brief, see ICI Memorandum No. 34345, dated November 9, 2022, available at https://www.ici.org/memo34345.

[3] Page 20 of Order and Memorandum Decision in Matney v. Barrick Gold, Case No. 2:20-

CV-00275-TC (April 21, 2022).

[4] 898 F.3d 820 (8th Cir. 2018).

[5] Page 20 of opinion.

[6] Page 20 of opinion, citing Hughes, 142 S. Ct. at 742.

[7] Page 21 of opinion.

[8] The ICI Study refers 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."
