A Timely Analysis of Legal Developments

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The U.S. Court of Appeals for the Third Circuit has held in *Renfro v. Unisys Corp*. that where an ERISA fiduciary offers a sufficiently broad range of investment options with varying fee characteristics in a 401(k) plan, a district court can dismiss ERISA breach of fiduciary duty claims alleging that the fiduciary imprudently selected certain 401(k) plan investment options with allegedly excessive fee profiles under Federal Rule of Civil Procedure 12(b)(6).

The Latest Word on 401(k) Fee Litigation: Third Circuit Narrows Plaintiffs' Ability to Bring ERISA Breach of Fiduciary Duty Claims

By Richard Black

The U.S. Court of Appeals for the Third Circuit, relying on earlier decisions of the Seventh and Eighth Circuits, has held that a district court can dismiss breach of fiduciary duty claims brought under the Employee Retirement Incomes Security Act (ERISA) alleging that a fiduciary selected a mix of investment options available under a 401(k) defined contribution plan that included funds with allegedly excessive fee profiles, where the fiduciary selected a sufficiently broad range of funds with varying fee characteristics.[1]

Background Facts

In *Renfro v. Unisys Corp*., the plaintiffs brought suit against Unisys and the fiduciaries of its 401(k) Plan (the "Plan"), and Fidelity Management Trust Company and affiliated Fidelity entities, on behalf of a putative class of participants in Unisys's 401(k) Plan. The plaintiffs alleged that the Unisys and Fidelity defendants breached their fiduciary duties of loyalty and prudence under ERISA by including, within the range of investment options offered in the Plan, Fidelity retail mutual funds. Plaintiffs specifically contended that the fees associated with the retail mutual funds offered as options in the 401(k) plan were "excessive in light of the services rendered as compared to other, less expensive, investment options not included in the plan"[2] and that the Unisys defendants breached their fiduciary duties by failing to either select investment options with lower fees or to use the size of the Plan as leverage to bargain for lower fees on the retail mutual funds in question.

At the time the plaintiffs filed their complaint, Unisys's 401(k) Plan contained 73 different investment options into which Plan participants could direct their contributions. The 73 investment options consisted of a stable value fund, the Unisys [Company] Stock Fund, four different "commingled" pools (one invested in an S&P 500 index, and the other three invested in bonds), and 67 varied individual retail mutual funds. The investment options in the Unisys Plan, including the retail mutual funds, contained a "wide variety of risk and expense ratios."[3]

After the filing of the complaint, the Unisys and Fidelity defendants moved to dismiss the plaintiffs' claims under Federal Rules of Civil Procedure Rule 12(b)(6). Both groups of defendants argued that they could not be found to have committed a breach of fiduciary

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duty because a sufficient mix of investment options had been offered to participants under the Plan. The Unisys defendants alternatively moved for summary judgment, arguing that the "safe harbor" provision of ERISA Section 404(c) shielded them from liability because, given the full disclosure regarding fees, any alleged losses were the responsibility of Plan participants' individual investment decisions. The Fidelity defendants, for their part, also argued that dismissal was appropriate under Rule 12(b)(6) because they were not fiduciaries with respect to the conduct challenged by the plaintiffs (*i.e.*, the selection of investment options under the Plan). The United States District Court for the Eastern District of Pennsylvania agreed and dismissed all of the plaintiffs' claims.

The Third Circuit Upholds Dismissal of Plaintiffs' Breach of Fiduciary Duty Claims

The Third Circuit agreed that the plaintiffs had failed to state a plausible claim that the inclusion of retail mutual funds breached any fiduciary duties under ERISA. Importantly, the Third Circuit observed that each of the U.S. Court of Appeals to have previously considered the same issue (in the context of Rule 12(b)(6) motions to dismiss) employed "a similar analytical framework" in evaluating the sufficiency of such claims. That is, the Seventh Circuit, in *Hecker v. Deere & Co.*,[4] and the Eighth Circuit, in *Braden v. Wal-Mart Stores*,[5] "looked first to the characteristics of the mix and range of options and then evaluated the plausibility of claims challenging fund selection against the backdrop of the reasonableness of the mix and range of investment options."[6]

Noting that the Seventh Circuit in *Hecker* found no possible fiduciary breach where Deere's plan offered 23 Fidelity retail mutual funds, two investment funds managed by Fidelity, a Deere company stock fund, and a "brokerage window" providing access to thousands more investment options, while the Eighth Circuit reinstated fiduciary breach claims where the plaintiffs alleged that there were elements of collusion and/or non-disclosure, in addition to alleging that the Wal-Mart plan offered only 10 retail mutual funds, a collective trust, a Wal-Mart company stock fund, and a stable value fund, the Third Circuit held that:

> [T]he range of investment options and the characteristics of those included options—including the risk profiles, investment strategies, and associated fees—are highly relevant and readily ascertainable facts against which the plausibility of claims challenging the overall composition of a plan's mix and range of investment options should be measured.[7]

Applying that standard, the Third Circuit ruled that "[i]n light of the reasonable mix and range of investment options in the Unisys Plan, plaintiffs' factual allegations about Unisys's conduct do not plausibly support their claims" and "provide[] nothing more than conclusory assertions that Unisys breached its duty to prudently and loyally select and maintain the plan's mix and range of investment options."[8]

The Third Circuit also affirmed the dismissal of the plaintiffs' claims against the Fidelity defendants on the grounds that they were not fiduciaries for the purpose of selecting options.

The Third Circuit Declines to Address Applicability of Section 404(c)

One of the most eagerly anticipated portions of the Third Circuit's decision in *Renfro* was to have been its treatment of the applicability of Section 404(c), ERISA's "safe harbor" provision, as a defense to a claim that a plan fiduciary, like Unisys, imprudently selected plan investment options. Section 404(c), for its part, states that:

> (A) In the case of a pension plan which provides for individual accounts and permits a participant or beneficiary to exercise control over the assets in his account, if a participant or beneficiary exercises control over the assets in his account (as determined under regulations of the Secretary)—
>
> . . . .
>
> (ii) no person who is otherwise a fiduciary shall be liable under this part for any loss, or by reason of any breach, which results from such participant's or beneficiary's exercise of control . . . .[9]

Whether Section 404(c) can insulate a fiduciary like Unisys from liability has become a "hot button" issue in the ERISA breach of fiduciary duty arena in recent years as a result of the conflict between some prominent federal court rulings and the position of the U.S. Department of Labor ("DOL"). For example, in *Hecker*, the Seventh Circuit held that Section 404(c) may be a defense to a claim that

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investment options were selected imprudently where plan participants have sufficient options to control their risk of loss.[10] The DOL, however, has issued regulations (and argued in *amicus* briefs) that Section 404(c) provides no such defense.[11]

The Third Circuit in *Renfro*, however, declined to weigh in on this conflict, stating instead that "[b]ecause the District Court properly dismissed the complaint, we refrain from deciding whether Unisys was entitled to summary judgment on this defense."[12]

The Impact of *Renfro v. Unisys Corp*.

Although the Third Circuit declined the opportunity to join the fray over the proper scope of Section 404(c), its decision is nevertheless an important one within the ambit of fee litigation. At a minimum, the court's decision provides useful ammunition against claims attacking the prudence of offering retail mutual funds in large 401(k) plans. Additionally, although the court stopped short of devising any per se rules of prudence, its ruling that a plan's range of investment options and their characteristics establish a framework within which to evaluate the plausibility of fiduciary breach claims may pave the way for future motions to dismiss in this area. Nevertheless, the continued activity of the plaintiffs' bar along with the Department of Labor's active program of filing *amicus* briefs on behalf of plaintiffs, and the increasing awareness of mutual fund fee practices, cautions employers and fiduciaries to continue to review and monitor the available investment options for their defined contribution plans in light of the combination of investment performance and fee structure.

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[1] *Renfro v. Unisys Corp*., No. 10-2447, 2011 U.S. App. LEXIS 17208, at *30 (3d Cir. Aug. 19, 2011).

[2] *Id*. at *8.

[3] *Id*. at *6.

[4] 556 F.3d 757 (7th Cir. 2009), *supplemented by* 569 F.3d 708 (7th Cir. 2009).

[5] 588 F.3d 585 (8th Cir. 2009).

[6] *Renfro*, 2011 U.S. App. LEXIS 17208, at *27.

[7] *Id*. at *30.

[8] *Id*.

[9] 29 U.S.C. § 1104(c)(1)(A).

[10] *Hecker*, 556 F.3d at 589-90.

[11] *See* 29 C.F.R. § 2550.404c-1(d)(2)(iv) ("Section 404(c) does not serve to relieve a fiduciary from its duty to prudently select and monitor any service provider or designated investment alternative offered under the plan.").

[12] *Renfro*, 2011 U.S. App. LEXIS 17208, at *34.

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