

Third Circuit to Consider Class Certification Issues Percolating in ERISA Fee Litigation

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The Third Circuit will review a Pennsylvania district court's decision to certify a 60,000+ person class in an ERISA fiduciary breach lawsuit claiming mismanagement of a defined contribution plan's investments and recordkeeping fees. This appeal queues up guidance on a hotly litigated issue in recent ERISA cases: can defined contribution plan participants challenge the prudence and loyalty of retaining a plan investment option they never invested in? For example, in *Boley*, the named plaintiffs collectively invested in only seven of the plan's investments, but their lawsuit challenges all 37 investment options in the plan's portfolio at various points in the putative class period.

This issue has been recently litigated in the context of a motion to dismiss for lack of standing. The Supreme Court held in *Thole v. U.S. Bank N.A.* that defined benefit plan participants do not have standing to pursue a claim that the plan's fiduciaries mismanaged the plan if they did not suffer a loss. Based on *Thole*, defendants have argued that defined contribution plan participants similarly lack standing when challenging investments in which they did not invest because they could not have suffered a loss.

The district court in *Boley* rejected that argument in 2020. The defendants then raised a similar challenge to oppose class certification, arguing that plaintiffs' claim failed to meet FRCP 23's typicality standards because the named plaintiffs suffered no injury with respect to the performance or fees of the 30 investment options in which they did not invest. The district court disagreed, finding that plaintiffs' mismanagement claims challenge uniform conduct across the plan. Defendants sought immediate review of class certification under FRCP 23(f), and the Third Circuit granted the request.

That the Third Circuit granted the defendants' request is significant, especially in light of the rash of similar lawsuits pending in the district courts and heading towards motions for class certification. Recent statistics indicate that, in about half of the 23(f) petitions filed by defendants that were granted by the Third Circuit, class certification was reversed. See Bryan Lammon, *An Empirical Study of Class-Action Appeals* (April 30, 2020) available at SSRN: <https://ssrn.com/abstract=3589733>. The Jackson Lewis ERISA Complex Litigation Group is closely monitoring this appeal.

The referenced decisions are: *Boley v. Universal Health Servs.*, No. 20-2644, 2021 U.S. Dist. LEXIS

42257 (E.D. Pa. Mar. 8, 2021); *Boley v. Universal Health Servs.*, 2020 U.S. Dist. LEXIS 202565, 2020 WL 6381395 (E.D. Pa. Oct. 30, 2020); *Boley v. Universal Health Servs.*, No. 21-8014, Dkt. 12-1 (3rd Cir. May 18, 2021); *Thole v. U.S. Bank N.A.*, 140 S. Ct. 1615 (2020).

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