

New York Federal District Court Dismisses 401(k) Fee Class Action

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A New York district court recently dismissed, without prejudice, a 401(k) plan participant's putative class action complaint alleging breaches of fiduciary duty. The plaintiff alleged that the plan fiduciary-defendants breached their duties of prudence and loyalty by failing to properly monitor the plan's costs. *Cunningham v. USI Ins. Servs., LLC*, 2022 U.S. Dist. LEXIS 54392 (S.D.N.Y. Mar. 25, 2022).

First, the plaintiff alleged that the defendants allowed the 401(k) plan to pay recordkeeping fees that were nearly three times what an alleged prudent and loyal fiduciary would have paid for similar services. The plaintiff alleged that the fees were paid directly from the plan participants' accounts, and indirectly paid through revenue sharing with the recordkeeper. The court rejected that claim, finding that the plaintiff failed to allege how she calculated the plan's direct and indirect fees, and how the sum of those fees was excessive in relation to the specific services provided to the plan as compared to alleged "comparable plans." Although the plaintiff provided a table of alleged "comparable plans" and their recordkeeping fees, the defendants pointed to the publicly available Form 5500s, which demonstrated that the alleged "comparable plans" offered different services than that of the plan in this case. As such, the court held that the plaintiff failed to allege sufficient facts to allow for inferences that the "comparable plans" offered the same "basket of services."

Second, the plaintiff alleged that the defendants breached their duty of loyalty by employing their own subsidiary as the plan's recordkeeper and allowing the plan to pay the recordkeeper "multiples of the reasonable per-participant amount for the Plan's [recordkeeping] fees." The court held that the plaintiff's duty of loyalty claim was intrinsically dependent on her dismissed breach of prudence claim and therefore dismissed the breach of duty of loyalty claim.

Lastly, like the breach of duty of loyalty claim, the court found the failure to monitor claim depended on the breach of prudence claim. Because a claim for breach of the duty to monitor requires an antecedent breach to be viable and the plaintiff failed to plead a viable breach of prudence or breach of loyalty claim, the court dismissed the failure to monitor claim as well.

This decision is one of the first following the Supreme Court's [recent opinion addressing the pleading standards in these fee cases](#). As there have been more than 170 similar class action suits filed

around the country in the last few years, this decision may provide a roadmap on how district courts can address complaints alleging breaches of fiduciary duty which fail to explicitly provide the formula used to calculate the alleged imprudent recordkeeping fees.

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