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Seventh Circuit Provides Hope for ERISA Plan Sponsors and Fiduciaries Defending Investment Fee & Performance Litigation

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The Seventh Circuit recently provided a ray of sunshine in what has largely been a gloomy stretch for plan sponsors and fiduciaries defending ERISA breach of fiduciary duty claims based on allegedly excessive investment and administrative fees and investment underperformance. In this particular case, Oshkosh emerged victorious with the Seventh Circuit affirming the dismissal—at the motion to dismiss stage—of claims that it mismanaged its 401(k) plan by paying excessive recordkeeping fees, failed to ensure investment options were prudent, and unreasonably maintained high-cost investment advisors. The case is *Albert v. Oshkosh Corp*., No. 21-2789, 2022 WL 3714638, __F.4th __ (7th Cir. Aug. 29, 2022).

Background

Albert, a former employee and participant in the Oshkosh 401(k) plan, advanced several ERISA fiduciary-breach and prohibited transaction claims based on what have become relatively common allegations related to excessive fees and investment underperformance. First, Albert alleged that the plan paid excessive recordkeeping fees and failed to regularly solicit competitive bids. Second, he alleged that the plan paid excessive investment management fees and, in particular, that the plan would have paid lower fees by investing in a more expensive share class with a revenue sharing component that theoretically would rebate all revenue sharing fees to the plan participants. Third, Albert alleged that certain actively managed funds should not have been offered because they are more expensive than passively managed funds. Fourth, Albert alleged that the plan offered personalized investment advisor services that were unreasonably expensive. Lastly, in addition to these more commonly asserted claims, Albert also alleged that the plan failed to provide a detailed explanation of how revenue sharing payments were calculated in Form 5500 filings and that the plan's payment of fees to its service providers resulted in violations of ERISA's prohibited

transaction rules.

The district court dismissed the complaint prior to the Supreme Court's decision in *Hughes v. Northwestern University*, 142 S. Ct. 737 (2022), which notably vacated and remanded another Seventh Circuit ruling affirming dismissal of fee and investment claims.

The Seventh Circuit's Decision

The Seventh Circuit affirmed the dismissal of all claims. As a preliminary matter, the Court concluded that Albert had Article III standing to pursue his claims because his investment in "at least some actively managed funds" was sufficient to confer standing on a motion to dismiss, but the issue could be revived with additional discovery and on class certification.

Turning to Albert's substantive allegations, the Court made the following rulings:

- Allegations about recordkeeping fees, devoid of context regarding the actual recordkeeping services provided, did not move the "claim from possibility to plausibility." In so ruling, the Court explained that there is no requirement for fiduciaries to regularly solicit bids from service providers.

- Addressing Albert's novel share class theory, the Court observed that the complaint's basis for alleging that revenue sharing would have caused the plan participants to pay a lower amount of net fees was flawed because Albert had no basis for alleging that the revenue sharing proceeds would have actually been rebated to plan participants. The court observed that the plan's Form 5500 did not disclose to whom revenue sharing proceeds are paid—to the recordkeeper as profits, or to the plan participants. As revenue sharing proceeds do not always entirely redound to the investors' benefit, one cannot arrive at net cost figures simply by subtracting revenue sharing from the investment management expense ratio, and Albert did not allege more.

- Albert's allegation that certain actively managed funds in the plan were imprudent because they were more expensive than passively managed funds was threadbare and failed to provide a comparison to a meaningful benchmark.

- Albert provided no basis for comparison between the investment advisor service fees paid and fees paid to other service providers, and merely stating on information and belief that defendants did not solicit competitive bids from other service providers was insufficient to state a claim.

- Albert's prohibited transaction claims were circular. The Court explained that it would lead to absurd results and frustrate ERISA's purpose to hold that a viable prohibited transaction claim was asserted merely because an entity providing services to a plan (which definitionally is a party-in-interest) received a fee for those services.

- There is no requirement to disclose detailed information on how revenue sharing is calculated in Forms 5500.

Proskauer's Perspective

The ruling in *Oshkosh* tends to validate our previous advice that the Supreme Court's decision in *Hughes* was a much narrower decision than the plaintiffs' bar (and some in the defense bar) initially pronounced, and thus should not lead to a trend toward denying motions to dismiss. The Supreme Court did not address the plausibility of any of the underlying claims that the Seventh Circuit dismissed but merely held that the Seventh Circuit relied on an inappropriate "investor choice" theory to support dismissal. In so ruling, the Supreme Court also instructed courts considering motions to dismiss ERISA complaints to apply the pleading standard set forth in *Twombly*, which allowed for the consideration of obvious and lawful explanations for the alleged wrongdoing, and that "due regard" must be given to the "reasonable judgments a fiduciary may make based on her experience and expertise." Notwithstanding an initial set of discouraging post-*Hughes* opinions denying motions to dismiss, which we wrote about here, the more recent trend has turned in a more favorable direction. In addition to the ruling in *Oshkosh,* the Sixth Circuit (in two separate cases) and two district courts have affirmed dismissal of similar fee and investment claims (discussed here and here). These decisions show that in a post-*Hughes* environment, courts will still (and arguably must) dismiss complaints that fail to strictly adhere to the applicable pleading standards.

Nevertheless, many courts continue to deny motions to dismiss based on substantially similar allegations. In those instances where prevailing on a motion to dismiss remains unlikely, consideration should be given to filing instead an early motion for summary judgment, in which the court will have an opportunity to resolve factual issues that would otherwise have prevented the motion to dismiss from being granted.

In all events, with weekly (sometimes daily) class action complaints being filed, plan sponsors and fiduciaries are well advised to continue making sure that they have implemented appropriate procedures for monitoring plan administrative and investment management fees, and investment performance.

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