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Two Recent Court Rulings Signal Important Developments in ERISA Excessive Fee Litigation

The Bottom Line

- *The recent decisions in Wells Fargo and Chevron offer plan sponsors and fiduciaries some guidance with respect to defending against ERISA fee litigation.*
- *Plan sponsors and fiduciaries need to continue to ensure that they engage in a deliberative and well-documented process with respect to their 401(k) plan.*
- *Plan sponsors and fiduciaries should discuss their process with ERISA counsel to determine whether additional steps may be prudent.*

In recent years, plan sponsors have seen a surge of litigation claiming that plan administrators breached their fiduciary duty by allegedly charging excessive 401(k) plan fees, a violation of the Employee Retirement Income Security Act of 1974, as amended (ERISA). Although these suits were initially filed against plans with assets in excess of $1 billion, suits against small plans have been on the rise as well.

These class action suits have consistently resulted in plan participants being awarded large settlements. Until recently, plan sponsors have generally been unsuccessful in convincing courts to dismiss these suits. However, two recent decisions in favor of plan sponsors demonstrate the importance of documenting 401(k) plan decisions and working with ERISA counsel to ensure a prudent process is in place.

Wells Fargo

On May 25, 2017, in *Meiners v. Wells Fargo & Co.*, a judge for the U.S. District Court for the District of Minnesota dismissed, with prejudice, a proposed class action alleging that Wells Fargo improperly enriched itself by offering in-house target date funds in its 401(k) plan when lower cost alternatives were available through comparable Vanguard and Fidelity funds.

In reaching its decision, the court noted that the plaintiffs' claim rested solely on the simple fact that the Vanguard and Fidelity funds had lower costs than the Wells Fargo funds and failed to plead additional facts to provide a meaningful benchmark against which the Wells Fargo funds could be compared. The court highlighted that ERISA does not require fiduciaries to offer the cheapest possible funds; investing in a more expensive fund does not equate to a breach, especially when the fee is not excessive when compared to the market as a whole. Without additional evidence, the mere fact that cheaper funds were available was insufficient to support a claim for breach of fiduciary duty. Moreover, the complaint failed to take into account the different investment strategies when alleging that the Wells Fargo funds underperformed competitors. The court noted that a fund is not substandard, nor is an investment strategy flawed, just because it underperforms another fund at any given point.

Chevron

On May 31, 2017, in the ongoing matter of *White v. Chevron Corp.*, the U.S. District Court for the Northern District of California dismissed the plaintiffs' first amended complaint.

The plaintiffs alleged that Chevron's selection of a money market fund over a stable value fund, which offered cheaper fees, was imprudent. As in *Wells Fargo*, the court noted that choosing a more expensive fund did not in and of itself qualify as a breach of fiduciary duty. The plaintiffs had to provide additional facts, such as proving that the fund selection process was flawed or not in the participants' best interests, to hold the plan sponsors liable. Furthermore, the court found that the plaintiffs failed to allege sufficient facts showing that Chevron took any action to benefit itself or Vanguard, the plan's recordkeeper. Instead, the allegations were conclusory and based on conjecture, with the court noting that no facts were alleged showing that Vanguard received any benefit from Chevron that it would not have received absent the recordkeeping relationship. Throughout its decision, the court emphasized that the plaintiffs failed to provide facts showing that the plan fiduciary's process was flawed or imprudent.

Takeaways for Plan Sponsors

The recent decisions in *Wells Fargo* and *Chevron* demonstrate the importance of having a well-documented process in place for making determinations regarding 401(k) plans.

For example, plan fiduciaries should:

- periodically revisit their funds and conduct benchmarking to determine whether a fund's fees remain reasonable,
- consult with an investment advisor and ERISA counsel when evaluating funds for inclusion in a 401(k) plan, including reasonable alternatives,
- document the basis for a fund's inclusion in their plan, including quantitative and qualitative investment information about the funds and consultations regarding the decision with an investment advisor and ERISA counsel, and
- periodically evaluate their relationship with any third-party administrators, including by sending their plan "out to bid" and engaging in a competitive bidding process to ensure that third-party administrator fees remain competitive.

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