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# Appeals court affirms dismissal of Fidelity ‘infrastructure fee’ lawsuit

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March 23, 2021

The 1st US Circuit Court of Appeals recently [upheld](#) the dismissal of a class action lawsuit against Fidelity over “infrastructure fees” charged to third-party mutual funds on the company’s FundsNetwork investment platform. Fidelity describes the fee as compensation for the costs of maintaining the platform. But the plaintiffs alleged the fee is a “pay-to-play” charge for access to Fidelity’s retirement plan investors that violates Fidelity’s ERISA fiduciary duties. The threshold question in the case concerned whether Fidelity was a functional fiduciary when negotiating the fee. If not, no fiduciary breach could have occurred.

The appellate court, like the lower court, rejected all of the plaintiffs’ theories for fiduciary status:

- **No control over compensation.** The plaintiffs argued Fidelity is a fiduciary because it controls how much compensation the company receives from the plans. The plaintiffs alleged Fidelity can unilaterally change the administrative and investment management fees it receives under the service contracts. But the court found the contract terms allow Fidelity to make unilateral changes only if doing so has no impact on fees.
- **Fees not paid by plans.** The plaintiffs claimed Fidelity acts as a fiduciary when setting the fee because the mutual funds pass on the cost to retirement plan investors. But the court likened the arrangement to a supermarket charging a vendor a fee for favorable shelf space and concluded no one would consider that fee paid by the supermarket’s customers. The court also noted that fund managers, plan investment advisors and plan participants would have to make a number of intervening and independent decisions before a fund’s payment of the infrastructure fee could have any effect on participants.
- **Choosing funds for platform.** The plaintiffs argued that Fidelity’s selection of funds for its investment platform is a fiduciary act because it dictates which funds can be made available under plans that use the platform. But this argument conflicts with several court cases that concluded Fidelity doesn’t act in a fiduciary capacity when selecting funds. The plans and their investment advisors — not Fidelity — decide which funds to offer participants.

## Related resources

### Non-Mercer resources

- [In re Fidelity ERISA fee litigation](#), No. 20-1286 (1st Cir., March 5, 2021)

## Mercer Law & Policy resources

- [Fidelity wins dismissal of ERISA lawsuit over 'infrastructure fees'](#) (March 12, 2020)
- [Fidelity faces lawsuits, investigations over 401\(k\) fees](#) (March 21, 2019)

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