



3rd Circuit OKs ERISA class action over broad fiduciary investment claims

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Three defined contribution (DC) plan participants can proceed with their ERISA fiduciary breach lawsuit challenging the prudence of their plan's entire investment lineup, including funds in which the participants personally didn't invest, the 3rd US Circuit Court of Appeals recently ruled (*Boley v. Universal Health Services, Inc.*, No. 21-2014 (3rd Cir. June 1, 2022)).

The plaintiffs in this case made broad allegations that plan fiduciaries failed to implement a prudent process for selecting and monitoring investment options, resulting in excessively expensive funds across the entire lineup. The plaintiffs also alleged fiduciaries imprudently selected actively managed target-date funds instead of lower-cost index options. The three plaintiffs had collectively invested in only seven of the plan's 37 investment options, and each plaintiff invested in just one of the 13 funds in the plan's target-date series.

The plan sponsor argued the plaintiffs didn't have standing to challenge funds in which they hadn't invested. Citing the Supreme Court's reasoning in *Thole v. US Bank N.A.* (No. 17-1712 (US June 1, 2020)), which found defined benefit plan participants had no standing to sue for alleged fiduciary misdeeds that posed no risk to their monthly pension benefits, the sponsor argued the plaintiffs suffered no injury from the decision to offer funds in which they hadn't invested. The sponsor also argued that the class action was inappropriate because the plaintiffs couldn't adequately represent the interests of participants who had invested in the other funds.

The 3rd Circuit sided with the plaintiffs, emphasizing that the allegations involved conduct that affected all plan investments — including those in which the plaintiffs had invested — in the same way. The court also characterized the selection of the plan's target-date funds as a single decision and noted that the plaintiffs alleged "all of the funds in the suite were imprudent for the same reasons." Since each plaintiff had invested in at least one of the allegedly imprudent funds, the court determined the plaintiffs had standing to challenge the process used to select those funds. In addition, because the investment lineup was available to all participants, the plaintiffs' interests were consistent with those of other participants they sought to represent in the class action.

The 3rd Circuit is the first federal appellate court to consider *Thole* in the context of DC plan fee litigation. Other courts could reach a different conclusion, depending on the facts of a particular case. The case nevertheless underscores the critical importance of having a prudent process for selecting and monitoring investment funds.

Related resources

Non-Mercer resources

- [*Boley v. Universal Health Services, Inc.*](#), No. 21-2014 (3rd Cir. June 1, 2022)
- [*Thole v. US Bank N.A.*](#), No. 17-1712 (US June 1, 2020)

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- [High court nixes ERISA fiduciary case over DB plan investments](#) (June 4, 2020)

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