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More excessive fee suits revived after high court's *Northwestern* decision

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The 9th US Circuit Court of Appeals recently revived two ERISA lawsuits by participants and beneficiaries in separate 401(k) plans challenging plan fiduciaries' decisions to offer retail share class mutual funds instead of cheaper — but otherwise identical — institutional share classes. In both cases, district courts dismissed the claims after finding the plaintiffs needed to allege more than the mere availability of similar lower-fee funds (for example, that the fiduciaries also failed to consider whether the more expensive funds offered benefits to the plan that the cheaper funds didn't). However, two different three-judge panels of the 9th Circuit disagreed with the lower courts, finding the plaintiffs' barebones allegations sufficed to survive a motion to dismiss. Both appeals had been on hold pending the US Supreme Court's recent decision in *Hughes v. Northwestern University*, No. 19-1401 (US Jan. 24, 2022), which involved similar claims about funds offered under 403(b) plans.

High court addresses the pleading standard

In the *Northwestern* case, the Supreme Court considered what the appropriate pleading standard is in ERISA excessive fee cases. The "pleading standard" refers to the factual threshold plaintiffs must meet for their complaint to survive a motion to dismiss: They must plead sufficient facts that, if assumed to be true, plausibly allege a fiduciary breach. Many employers were hoping the Supreme Court would set a high bar for excessive fee cases to survive a motion to dismiss, but that didn't happen. Instead, the justices concluded that the standard is context-specific. Citing its earlier case law, the high court explained that lower courts must consider a plaintiff's claims in light of the circumstances prevailing at the time of the alleged breach. The ruling also recognized that courts "must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise" but didn't explain how lower courts should apply this concept.

9th Circuit cases resume after high court ruling

The fiduciaries in both 9th Circuit cases attempted to leverage the "range of reasonable judgments" concept by arguing that the retail share class funds had revenue-sharing arrangements to offset the

plans' recordkeeping fees — a benefit not available with cheaper institutional share classes. While finding this might be a valid reason for selecting retail share class funds, the 9th Circuit concluded that because both the plaintiffs and plan fiduciaries had plausible arguments, the lawsuit should proceed.

Neither of the 9th Circuit's opinions discusses the Supreme Court's ruling in detail, but they signal that the "range of reasonable judgments" concept may prove more difficult to apply at the motion-to-dismiss stage than sponsors would like. One ruling suggests that the arguments raised by the fiduciaries in these cases require more factual development than what is generally appropriate at the motion-to-dismiss stage. Instead, said the court, those types of arguments are better suited for summary judgment (a later phase of a lawsuit when a court may rule on a claim's merits without a full trial). But that will likely come as unwelcome news to sponsors, who may face increased pressure to settle excessive fee lawsuits and avoid the expense of defending against these claims.

Will other courts agree?

Both decisions come only a few months after the Supreme Court's *Northwestern* ruling. But drawing conclusions about the broader implications for excessive fee cases may be premature. The 9th Circuit is the first appellate court to rule on motions to dismiss excessive fee cases since *Northwestern*, though the circuit's rulings are slim unpublished opinions that set no precedent for future cases. Other circuit courts could interpret the *Northwestern* decision differently and show more deference to fiduciary decision-making at the motion-to-dismiss phase. If so, this could create conflicts among the circuits and further complicate the tangled landscape of ERISA excessive fee litigation.

Related resources

Non-Mercer resources

- [Kong v. Trader Joe's Co.](#), No. 20-56415 (9th Cir. April 15, 2022)
- [Davis v. Salesforce.com, Inc.](#), No. 21-15867 (9th Cir. April 8, 2022)
- [Hughes v. Northwestern Univ.](#), No. 19-1401 (US Jan. 24, 2022)

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- [High court declines to raise the bar on excessive fee cases](#) (Feb. 8, 2022)

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