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Alert | ERISA & Employee Benefits Litigation

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The Tide May Be Turning on Flood of ERISA Excessive Fee Class Actions

The contours of plaintiff pleading requirements for ERISA fiduciary breach claims sketched by the Supreme Court in *Hughes v. Northwestern University*[1] continue to evolve. Recent cases suggest that plaintiffs may find ERISA class action lawsuits increasingly vulnerable to motions to dismiss unless they allege context specific defects in the processes followed by defined contribution plan fiduciaries in choosing vendors or selecting investment vehicles for their plan's menu of offerings to participants.

In our August 2022 GT Alert we discussed the first application of *Hughes'* context-specific pleading formulation by a federal court of appeals in the Sixth Circuit's opinions in *Smith v. CommonSpirit Health*,[2] and *Forman v. TriHealth Inc.*[3]

Now the Seventh Circuit has joined the Sixth in sustaining a district court's dismissal of a class action in a case where plaintiff was challenging the fees and investments of an Oshkosh Corp. subsidiary's 401(k) plan.[4] The Seventh Circuit opinion emphasizes its alignment with the Sixth Circuit's reasoning in *CommonSpirit Health*, which previously rejected challenges to plan fiduciaries offering higher-cost and lower-performing actively managed mutual funds premised on a comparison of those funds to passively

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[1] U.S.S.Ct. No. 19-1401, Jan. 24, 2022.
[2] 37 F. 4th 21160 (6th Cir. 2022).
[3] 40 F. 4th 443 (6th Cir. 2022).
[4] *Albert v. Oshkosh Corp.*, No. 1:20-cv-00901 (7th. Cir. Aug. 29, 2022).

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managed ones. The Seventh Circuit also wrote that the *Oshkosh* plaintiff's pleadings failed to allege excessive costs based on the services actually rendered.

The Seventh and Sixth Circuit decisions collectively call for pleadings by plaintiffs that show the specifics of how a bad process was involved in fiduciary choices about vendors or investment vehicle offerings; this is in marked contrast to the complaints the Sixth and now Seventh Circuit decisions have found wanting. That may be welcome news to plan fiduciaries at a time when plaintiffs' attorneys are inundating employers with lawsuits alleging excessive fees and poorly performing investments in defined contribution plans based only on market comparators.[5]

Another sign that the tide of ERISA litigation may be turning is a Colorado district court's recent imposition of $1.5 million in sanctions against Schlicther Bogard (arguably the originator of excessive fee litigation against retirement plans) and co-counsel for their "reckless" lawsuit in the case of *Obeslo v. Great-West Life & Annuity Insurance Co.* and *Great-West Capital Management*.[6] The district court emphasized that the defendants presented persuasive and credible evidence that overwhelmingly proved that fees charged to the plan involved were reasonable and the plan fiduciaries did not breach their fiduciary duties. If the plaintiffs' attorneys had reviewed the evidence objectively, the court said, it would have been obvious to them that the plaintiffs should not have proceeded to trial, and that they should have dismissed the case voluntarily.

Seventh Circuit Decision

In *Oshkosh*, the Seventh Circuit affirmed the dismissal of a fee-and-expense suit against an Oshkosh Corporation subsidiary. Plaintiff alleged the subsidiary mismanaged its $1 billion 401(k) plan and charged participants excessive fees. The court ruled that the plaintiff did not allege concrete particulars to support his breach of fiduciary duty claims.

Importantly, it was the Seventh Circuit's opinion in the *Hughes* case that the Supreme Court had, prior to *Oshkosh*, vacated and remanded, rejecting the Seventh Circuit's categorical rule that plans offering low-cost investment options did not violate ERISA where higher cost options underperformed. The Supreme Court's *Hughes* opinion rests on the principle that ERISA requires a context-specific inquiry whether plan fiduciaries have performed their duty to monitor *all* investment offerings and remove imprudent ones on an ongoing basis. The *Oshkosh* plaintiff sought to take advantage of the Supreme Court's *Hughes* refusal to endorse the Seventh Circuit's reasoning.

But that line of argument did not avail the *Oshkosh* plaintiff. Taking account of the Supreme Court's rejection of the categorical rule it had applied in *Hughes*, in *Oshkosh* the Seventh Circuit noted that the Supreme Court's *Hughes* decision counseled that resolving fiduciary duty claims requires a more in-depth analysis than the *Oshkosh* plaintiff put forward and that "courts must give due regard to the range of reasonable judgments a fiduciary may make based on her experience and expertise."

Importantly, starting its discussion, the Seventh Circuit referred to the Supreme Court's decision in the leading ERISA stock drop pleading case, *Fifth Third Bancorp v. Dudenhoeffer*,[7] which teaches that Rule 12(b)(6) motions are an "important mechanism for weeding out meritless claims" of ERISA fiduciary breach.

[5] These new decisions are also consistent with law developing out of the Eighth and Third Circuits. *See* August GT Alert.
[6] Colorado Dist. Ct., Civil Action No. 16-ev-00230-CMA-SKG, Aug. 16, 2022.
[7] 573 U.S. 409, 425 (2014).

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The Seventh Circuit decided that Oshkosh did not breach its fiduciary duty to 401(k) plan participants, emphasizing that *Hughes* did not require plan fiduciaries to scour the market for the lowest-possible cost options.

"*Hughes* did not hold that fiduciaries are required to regularly solicit bids from service providers. . . . *Hughes* merely rejected this court's assumption that the availability of a mix of high-cost and low-cost investment options in a plan insulated fiduciaries from liability," the Seventh Circuit said. The Seventh Circuit also cited the Sixth Circuit decisions discussed in last month's GT Alert dismissing complaints where "the employees never alleged that these fees were high in relation to the services that the plan provided" and that plaintiffs need to provide "the kind of context that could move those claims from possibility to plausibility."

The Seventh Circuit noted this logic also applies to recordkeeping fees and that the *Oshkosh* plaintiff's recordkeeping claims did not provide enough context to make their claim plausible rather that circumstantial.

The Seventh Circuit was not persuaded plaintiff stated a good claim that Oshkosh had paid excessive fees for investment management services solely based on plaintiff's comparison of investment management fees the plan paid to what nine allegedly prudent plans paid. Finally, the Seventh Circuit concluded that plaintiff's investment adviser fee claims were "particularly thin," because the plaintiff never provided any investment adviser comparators to compare to the fees Oshkosh paid for its investment adviser services. Citing *Smith*, the court emphasized that "a complaint must provide a sound basis for comparison-a meaningful benchmark."

Sanctions of $1.5 Million Against Schlicther Bogard and Co-Counsel for "Reckless" Litigation

A Colorado district court has issued a sanctions order for $1.5 million against Schlicther Bogard and its co-counsel in a lawsuit targeting Great-West Life & Annuity Insurance Co. and Great-West Capital Management LLC.

The district court previously dismissed the case, finding that the plaintiffs did not establish that any actual damages resulted from defendants' alleged breach of fiduciary duty. The Tenth Circuit affirmed that ruling, and the courts declared that the plaintiffs' law firms Schlichter Bogard & Denton LLP and Schneider Wallace Cottrell Konecky LLP behaved "recklessly" in the matter.

The sanctions order provides that "any experienced plaintiffs' counsel who objectively assessed the merits of this case should have anticipated the result." The district court emphasized that the plaintiffs recognized, in their response to the defendants' motion for sanctions, that no plaintiff who has pursued a similar claim under Section 36(b) of the Investment Company Act has ever won in the 50 years of the section's existence.

The order awards $1.5 million in attorneys' fees and expenses against the two law firms, which have been declared jointly and severally liable for the payment.

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