CARLTON FIELDS

Third Circuit Limits ERISA Fiduciary Liability

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Former and current annuity holders sued John Hancock Life Insurance Company in New Jersey federal court several years ago, alleging that, as a service provider to their 401(k) plans, John Hancock was an ERISA fiduciary and breached its fiduciary duties by charging excessive fees. Both the district court and the Third Circuit Court of Appeals, however, rejected these claims in *Santomenno v. John Hancock Life Insurance Company.* John Hancock assembled several investment options, collectively known as the "Big Menu," for various 401(k) plans and reviewed the investment options on this menu periodically, adding and replacing funds. From the "Big Menu," plan trustees selected which investment options to offer to their plan participants on the "Small Menu." The plaintiffs, along with the Department of Labor, argued that John Hancock was acting as an ERISA fiduciary due to its discretion regarding the funds on the "Big Menu." The Third Circuit disagreed, aligning itself with other courts of appeal in holding that, because the plan trustee must be given notice and an opportunity to accept or reject any alteration to the "Big Menu" or John Hancock's fees, **"ultimate authority still resided with the trustees." Thus, only the plan trustees were the fiduciaries under ERISA.** Further, the court held that John Hancock's ability to substitute investment options was irrelevant to the challenged conduct of charging allegedly excessive fees. It explained that "this alleged basis of fiduciary responsibility bears no nexus to the wrongdoing alleged in the complaint: Participants allege the charging of excessive fees, not the rendering of faulty investment advice." Finally, the court held that John Hancock was not a fiduciary simply because it could change the fees it charged on its own funds. Yet again, it was the trustee who retained the "ultimate authority" required for a fiduciary designation.

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