CARLTON FIELDS

Fidelity Beats Back ERISA Challenge: Infrastructure Fee Complaint Dismissed

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The U.S. District Court for the District of Massachusetts recently granted Fidelity's motion to dismiss a lawsuit alleging that Fidelity and its affiliates violated ERISA's fiduciary duties by receiving "infrastructure fees" from mutual fund companies. Such fees have been the subject of significant regulatory scrutiny, as well as private litigation, for more than a year.

Fidelity charges infrastructure fees for making certain funds available through its FundsNetwork, including as investment options under 401(k) plans for which Fidelity provides services. The "infrastructure fees" are negotiated directly with the fund companies and are calculated based on plan assets invested in a fund. The fund companies allegedly passed on the infrastructure fees to the plans, and thus to plan participants and beneficiaries, through increases in their investment management fees.

The plaintiffs argued that Fidelity was a fiduciary because its decisions over the past several years to charge — and increase — the infrastructure fees showed that Fidelity had discretion over its own compensation. The court rejected this theory on the grounds that Fidelity negotiated the fees with the mutual funds and that the funds were not required to pass the fees on to the plans or participants.

The plaintiffs also argued that Fidelity was a fiduciary because it controlled the menu of investment options available to the plans. The court rejected this argument because having control over a broad menu of investment options from which plan sponsors may choose their plan's investment options does not transform a platform provider into a fiduciary. In support of their argument, the plaintiffs alleged that Fidelity "maintains complete discretion to substitute, eliminate and add mutual funds offered through its FundsNetwork" and that Fidelity exercised that discretion. The plaintiffs pointed to contractual language empowering Fidelity to unilaterally implement amendments "with prior written notice ... to comply with then current law, or to update services and procedures." The court concluded, however, that this language "on its own, without any specific factual allegations," did not plausibly suggest Fidelity's authority to alter specific investment options under the plans. Accordingly, the court also rejected this theory of fiduciary status.

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