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Khan v. PTC, Inc.—Three Important Lessons From An Otherwise Unremarkable 401(k) Fee Case

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According to **Bloomberg Law**, class actions challenging 401(k) plan fees are increasing at a record pace. The underlying claims in these class action suits fall into predictable categories that are all too familiar: excessive fees, poor fund choices, poor plan design, fiduciary neglect, and prohibited transactions. *Khan v. PTC, Inc*. fits the pattern. The plaintiffs claim that the fiduciaries of the PTC, Inc. 401(k) plan:

- Failed "objectively and adequately [to] review the Plan's investment portfolio with due care to ensure that each investment option was prudent, in terms of cost," and
- Maintained "certain funds in the Plan despite the availability of identical or similar investment options with lower costs and/or better performance histories."

The plaintiffs seek recovery against the plan's investment committee for breach of the fiduciary duties of prudence and loyalty and against PTC's board of directors for failing to adequately monitor the committee. A similar narrative might be found in any of the many dozens of such cases filed each year. Nevertheless, the case merits attention for three reasons.

Assets Under Management—Which Plans are Targets?

Quoting the complaint, the opinion reports that PTC, Inc.'s 401(k) plan had more than $450,000,000 in assets under management, which qualifies it "as a large plan in the defined contribution plan marketplace, and among the largest plans in the United States." That claim is wholly unnecessary and demonstrably false. It is unnecessary because the amount of the assets held in the plan is not relevant to the substance of the plaintiff's claims; and it is false based on readily available industry data. According to the Investment Company Institute (or **ICI**), there are about 600,000 401(k) plans that hold an estimated $6.7 trillion in the aggregate. Of these, **Morningstar** reports that 30.0% of all 401(k) participants are in plans with more than $1 billion in assets. What is notable, however, is that a plaintiff's law firm thought it worth the effort to bring suit against a plan of this size.

Litigation involving 401(k) plans commenced in earnest in or about 2006 with a series of lawsuits against plans maintained by Fortune 500 companies. And until recently, plaintiffs' attorneys have focused their efforts exclusively on "large" retirement plans. What is changing is what the plaintiff's bar views as large for this purpose. For many years, plan sponsors of plans with assets under $1 billion felt relatively safe. If that was ever the case, this case demonstrates that it is no longer so. Plans with assets on the order of half a billion dollars in assets (and perhaps less) now appear to be fair game.

Procedural Posture/Specificity of the Claims

The case was before the U.S. District Court for the District of Massachusetts on a procedural motion by PTC to dismiss for lack of subject-matter jurisdiction. The plaintiff's argument in support of its motion to dismiss was for "lack of subject-matter jurisdiction" based on Article III standing." PTC alleged that the plaintiffs in this instance failed "adequately to plead injury and redressability stemming from PTC's alleged mismanagement of the specific funds in which they invested." The basis of this claim is a 2020 Supreme Court case, *Thole v. U.S. Bank N.A.*, that dealt with a defined benefit plan and not a 401(k) plan. PTC's attempted to leverage this recent Supreme Court precedent by arguing that "a plaintiff cannot suffer an injury from an investment that he or she did not purchase." The court was not impressed. There is, said the court, no need for a plaintiff to prove individualized damages in an ERISA class action case.

While right in our view to sweep aside PTC's Article III claims, the Court nevertheless appears to leave in place a shockingly low bar for what a plaintiff must plead—not what they must prove—in order to survive a motion to dismiss and to proceed to a trial on the merits. This is important since serious settlement discussions generally take place only if there will be a trial on the merits. But plaintiff, it seems, need only claim that a 401(k) plan sponsor failed to adequately monitor the plan committee and that the committee acted without due care to ensure that each investment option was prudent. This seeming lack of required specificity could encourage baseless and speculative claims and actions.

401(k) Governance 101

The structure of the plaintiff's claims is notable: the 401(k) plan sponsor failed to adequately monitor the plan committee, and the committee failed to act prudently. For purposes of ERISA, the "plan sponsor" is usually the company that sponsors the plan, the control of which is vested in the company's board. Thus, it is the board that is at least presumptively obligated to comply with all of the ERISA fiduciary standards. But ERISA also liberally allows for the delegation of fiduciary responsibility, subject to a residual duty to monitor those to whom fiduciary duties have been delegated.

It is commonplace for boards to formally delegate the fiduciary duties for a company's plans to a fiduciary committee. This generally requires a vote by the board (of the members of an LLC), and it is often accompanied by the adoption of a committee charter and or bylaws. While not always undertaken, these steps are important. There is no way to know what prompted the plaintiffs in the PTC case to frame their claims in the manner described above. Perhaps they were able to determine that there was a proper delegation of authority, or perhaps they simply guessed. Either way, the structure of the claim highlights an important issue.

But consider this counterfactual: If there was no proper devolution of fiduciary authority to the committee, the complaint would allege that *the board and the committee failed to act prudently*. Thus, if (as happened here) the case survived preliminary procedural motions, during discovery and at trial, the individual board members could be interrogated about their compliance with the particulars of the ERISA fiduciary standards. In contrast, where there is proper delegation, individual board members could only be quizzed about their oversight of the committee.

We address the issue of the devolution of authority from a board or an LLC manager to a fiduciary committee in a previous **post**. The PTC case serves to reinforce our previous concerns. At a minimum, this is an item that is worthy of the a board's attention.

Conclusion

The lesson of the PTC case is that the stakes are getting higher for 401(k) plans and 401(k) plan governance. More plans are now in the sights of the plaintiff's bar, and the apparent trend toward more liberal pleading standards is worrisome. As a consequence, there is now an even greater need for plans to pay attention to the basic of fiduciary governance in addition to observing the ERISA standards of prudence and loyalty.

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