

COMPLIANCE May 9, 2023

Aon, Astellas Pay to Settle CIT Conflict of Interest Litigation

A 2020 case over the performance of proprietary CITs ends with a settlement.

By Alex Ortolani

Investment manager Aon Investment Consultants and plan sponsor Astellas Pharma US Inc. have settled a complaint brought by current and former participants in the pharmaceutical company's 401(k) plan, according to a Friday court filing.

The deal brings to a close litigation brought in [July 2020](#) in which the plaintiffs alleged that Astellas allowed 401(k) manager Aon to select its own proprietary collective investment trusts for the plan when cheaper, better-performing options were available. Terms of the settlement were not disclosed but should be filed before June 9, [according to the filing](#) in U.S. District Court for the Northern District of Illinois, Eastern Division.

"The parties have engaged in settlement discussions to resolve all claims and potential appellate rights, among other items," the two sides wrote in the filing. "The parties have now reached an agreement in principle on all salient terms of a settlement to fully and finally resolve all claims."

The plaintiffs were represented by Jerry Schlichter, a partner at St. Louis-based law firm Schlichter Bogard & Denton.

"We're seeing more CITs, presumably because of the lower cost, so they are in the mix," says Schlichter, who is founder and managing partner of the firm. "CIT's must be evaluated just as publicly traded mutual funds to determine if costs are reasonable and the investments are prudent. The analysis is the same, regardless of the structure of the investments."

Aon and Astellas did not respond to requests for comment.

Both sides requested that Judge Ronald A. Guzmán cancel a pretrial conference scheduled for July 11 and a bench trial scheduled for July 17.

Investments in Focus

Investment structure and fees have risen to become a top area of focus for defined contribution retirement plan committees due to consistent litigation regarding fee monitoring and conflicts of interest, according to consulting firm Callan's [most recent DC survey](#). Among plan sponsors' litigation concerns, plan governance and process ranked first among respondents, followed by investment structure evaluation and then investment fees, according to the survey of more than 99 large DC plan providers conducted in late 2022.

"CITs have become a tried-and-true platform for investment of retirement assets, including in the participant-directed arena," Andrew Oringer, partner and general counsel for the New York office of The Wagner Law Group, said via email. "There are 'prohibited transaction' exemptions that may cover certain conflicts of interest that could arise when a fiduciary uses an affiliated CIT, depending on the investment structure. However, these exemptions do not help with fundamental prudence and loyalty requirements."

Oringer, who was not involved with the Aon case, notes that the litigation shows that "fiduciaries using CITs are not immune from ERISA fiduciary suits."

"Sometimes, the special rules governing exemptions in the CIT context could make it harder for the plaintiffs to pursue the claim, but, as this litigation shows, the possibility of litigation is there with a CIT," he writes. "The litigation also highlights that there could be additional risk with where funds affiliated with a plan sponsor or manager are used, regardless of the form of the investment."

Menu Management

According to the initial class action complaint, London-based Aon allegedly replaced nine of the plan's 10 mutual fund options with its suite of collective investment trusts just two months after becoming a plan fiduciary. The CITs selected, according to the complaint, had been in place for three years, which the plaintiffs alleged was not enough time to report sufficient performance to be seen as the best option for participants.

Guzmán in [April 2021](#) had allowed to move forward claims made through the Employee Retirement Income Security Act against Astellas, its board of directors and its retirement plan administrative committee.

In addition to the use of proprietary CITs instead of other options, the plaintiffs alleged that Astellas failed to use the plan's bargaining power to negotiate reasonable fees for investment management services.

Aon had argued that the plaintiffs' comparisons of the Aon CITs to other funds were flawed because the funds used in the comparison had different investment strategies and asset allocations. Aon had also argued that a provision in its investment management agreement showed that its decision to offer its own CITs "could not have resulted in a penny of additional compensation" beyond its contractual fiduciary fee.

Guzmán rejected that claim in April 2021, noting that even if Aon did not receive direct compensation for its CITs from the plan, it would have gotten other benefits for the use of its own investment products. The case is filed under *Miller et al v. Astellas US LLC et al.*

In a separate case related to Aon and its CITs, Schneider Electric Holdings Inc. completed the terms of a settlement agreement with retirement plan plaintiffs, closing for \$200,000 a 2020 fiduciary breach lawsuit, according to a judge's order to approve the unopposed March motion from the plaintiffs. The lawsuit was brought by participants in the Schneider Electric 401(k) Plan, also represented by Schlichter Bogard & Denton, alleging that instead of acting in the exclusive best interest of plan participants, the defendants selected and retained proprietary Aon CITs.

U.S. District Judge Nathaniel Gorton, presiding in U.S. District Court for the District of Massachusetts, on Friday signed the order to allow the settlement agreement in *Turner v. Schneider Electric Holdings Inc.*

Tagged: 401(k) Litigation, Aon, CITs, Mutual funds, Schlichter Bogard & Denton