

TIAA Class Action Reversal May Impose Significant Procedural Hurdle for Future Cases

The 2nd Circuit Court of Appeals' reversal of class certification will likely make it more difficult for ERISA class action lawsuits.

Reported by [NOAH ZUSS](#)

TIAA may have [won a victory for defendants](#) in fiduciary breach lawsuits.

Retirement plan lawsuits brought by plaintiffs and their attorneys against retirement recordkeepers and administrative services providers, investment managers and employers could face a more rigorous standard to having their class certified in the wake of the 2nd U.S. Circuit Court of Appeals' December 2022 decision in *Haley et al v. Teachers Insurance and Annuity Association of America*, explains Drew Oringer, a partner and general counsel at the Wagner Law Group, which was not involved in the litigation.

In a December 1, 2022 decision by a three-judge panel, the 2nd Circuit overturned a class certification and ordered the retirement plan lawsuit be remanded back to the U.S. District Court for the Southern District of New York to proceed without the previous class certification.

"I really can't overstate the significance of class certification in the ERISA context, because the certification as a class is what often opens the door to launch potentially large recoveries, and potentially large recoveries is what encourages plaintiffs' lawyers to make the investment in these cases," Oringer explains. "For individual claims without the benefit of class status, it's much harder to get these large judgments, and therefore, the cases would become much less appealing to the plaintiffs' bar."

If the decision results in greater difficulty getting ERISA claims certified as a class, it will remove much of the appeal and monetary motivation for a significant percentage of ERISA cases, [which have proliferated](#) in recent years.

"Certainly the magnitude [in comparing] individual claims generating individual recoveries—each one of those individual claims may be relatively small," Oringer says.

The original Employee Retirement Income Security Act case focused on the legality of a loan program offered in the plaintiffs' retirement plan. The lower court had previously certified a class of retirement plan members whose fiduciaries had hired TIAA to offer the loan program. The appeals court accepted TIAA's defense, which challenged the class certification based on the lower court's failure to address "the effect of ERISA's statutory exemptions on liability class wide and without making any factual findings as to the similarities of the loans," according to the appeals court's decision.

"The 2nd Circuit focused on the intersection of the ERISA rules with the predominance requirements in the class action rules, and the gist of the 2nd Circuit's decision was that there was an inadequate consideration of the [affirmative] ERISA defenses, particularly regarding the prohibited transaction exemptions on the district court's part, when the district court decided that the class should be certified," Oringer says. "Essentially what they said is that the district court did not examine whether certain facts that are critical to the application of two prohibited transaction exemptions could be analyzed and assessed on a class-wide basis, and that should have been an essential part of the determination of whether class should be certified."

Following the appellate court sending the case back to the Southern District of New York, attorneys for both parties filed a statement with the district court stating the plaintiffs' plan to argue the case again to address the appeals court's decision, explains the lead attorney for the plaintiffs, John Nestico, an ERISA and consumer class action counsel at the firm Schneider Wallace Cottrell Konecky Wotkyns LLP.

The appellate court's approach is likely to be seen as an important precedent and influential decision because of the region from which the court hears appeals, Oringer adds.

"The case could prove significant in its own right, just because of TIAA's very significant footprint in the market," he says. "Even forgetting its precedential value, [the lawsuit] has direct importance, just because of the number of employees that are covered in plans that are administered by TIAA."

The district court had certified an 8,000-plan class in the lawsuit against TIAA for its participant loan practices.

The 2nd Circuit hears appeals from district courts in Connecticut, Vermont and New York, a jurisdiction that includes a robust number of insurers, investment management companies and banks. The 2nd Circuit is therefore seen as influential to setting precedent for other circuits, particularly in finance, banking and insurance, according to Oringer.

"This is a decision that will clearly be respected," he says. "It may not be followed—different courts take different approaches—but it will certainly not be lightly ignored."

The joint statement from the attorneys to U.S. District Judge J. Paul Oetken said the plaintiffs plan "to petition the court to allow targeted discovery focused on the affirmative defenses raised by TIAA to the extent they concern class certification."

"There's no reason why it can't go forward as a class of plans," Nestico says. "We've got to get past this hurdle [of] how we demonstrate that these particular details of two prohibited transaction exemptions can be determined on a class-wide basis."

The initial complaint was brought in 2017 and the class certified in 2020. The plaintiffs alleged TIAA pocketed portions of the interest participants had paid on loans from their retirement plans, in violation of ERISA's provisions against prohibited transactions.

TIAA declined to comment on the litigation.

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