

# New England 401(k) Fee Suits Forge Employers' Longshot Bid

By Jacklyn Wille

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- 401(k) fee suits faring very well within First Circuit
- Immediate appeals hard to come by, attorneys say

Lawyers in class suits challenging retirement plan fees have noticed the cases are faring particularly well in New England, prompting some employers to look for a shortcut to get a friendly ruling from an appeals court.

Federal judges in Massachusetts and New Hampshire have allowed about a dozen retirement fee challenges to advance to discovery over motions to dismiss in the past few years. Employers defending their plans' fee levels have been virtually shut out, with no recent decisions going their way at the motion to dismiss stage.

Two Boston health systems that are accused of mismanaging their retirement plans through high fees and pricey funds recently asked Judge Angel Kelley of the US District Court for the District of Massachusetts to send her rulings against them directly to the US Court of Appeals for the First Circuit for an interlocutory appeal. This would give the appeals court—which oversees district courts in four New England states and Puerto Rico—a chance to consider Kelley's initial decisions and provide the court's first significant guidance on 401(k) fee litigation in nearly five years.

An immediate appeal to the First Circuit is an attractive option for employers on the losing end of motions to dismiss, because it would give the appeals court a chance to consider these initial rulings without the parties going through the lengthy and costly discovery process or presenting their cases at trial. It's also a longshot bid that requires the sign-off of both the district judge and the First Circuit, which hasn't allowed such an appeal in an ERISA case in decades.

## Worker Victories

Mass General Brigham Inc. and Boston Children's Hospital say it's uncertain when the First Circuit will consider a retirement plan fee challenge if they aren't allowed to mount an immediate appeal. That's because there are no district court decisions within the circuit that have granted a motion to dismiss in one of these cases, which have flooded federal courts over the past few years, they say.

Courts within the circuit have allowed litigation to advance against Biogen Inc., Liberty Mutual Group, MITRE Corp., PTC Inc., and several health systems. Decisions outside the circuit have been mixed, particularly in circuits where the appeals courts have expressed skepticism over these cases.

This string of First Circuit plaintiff successes may be partly due to timing, said Marcia S. Wagner, an ERISA attorney and founding partner of Boston's Wagner Law Group.

The appeals court hasn't issued a significant decision on the topic since its 2018 opinion reviving a class action against Putnam Investments LLC, Wagner said. That means the court hasn't considered a retirement plan fee challenge in the aftermath of the US Supreme Court's 2022 decision in *Hughes v. Northwestern University*, which held that workers' ultimate choice over their retirement investments doesn't excuse a plan's decision to offer expensive or poorly performing funds.

Another reason may be the First Circuit's long-standing practice of evaluating Employee Retirement Income Security Act lawsuits "almost on a case-by-case basis," Jonathan M. Feigenbaum, a Boston-based ERISA attorney, told Bloomberg Law.

The court has a "tendency not to make sweeping pronouncements" in ERISA cases, Feigenbaum said.

### **Longshot Bid**

There are several hoops the Massachusetts hospitals must jump through before they can present their cases to the First Circuit. The process they're pursuing—an interlocutory appeal—is limited in nature and "generally difficult to obtain," according to Wagner.

Interlocutory appeals are appeals from non-final decisions that don't fully resolve a case, like a decision denying a motion to dismiss or certifying a case for class treatment. In most cases, both the district judge and the appeals court must agree that the issue being appealed meets certain criteria before it can go forward.

Feigenbaum said he couldn't think of any time in the past 20 years that the First Circuit has agreed to take an interlocutory appeal in an ERISA case. The court was asked to do so about a decade ago in a lawsuit challenging an insurer's practices for paying life insurance proceeds, but it denied the request, Feigenbaum said.

### **'Cascade' of Lawsuits**

Boston Children's says an interlocutory appeal is warranted because of the massive number of retirement plan fee challenges that have been filed over the past few years. If the First Circuit doesn't weigh in, district courts within it will continue to see "a cascade of fiduciary-duty suits that will all proceed to burdensome class-wide discovery without satisfying the pleading standards that govern in other circuits," the hospital said.

Wagner called the appeal requests "reasonable," pointing out that if the lawsuits aren't dismissed, the defendants "will incur significant time and resources in defending the cases."

Feigenbaum disagreed, saying the requests face long odds and could slow down the litigation for as much as a year.

He also disputed the idea that the appeals presented controlling legal questions that merited an early look from the First Circuit.

“There just isn’t anything particularly unique to this litigation,” he said. “These aren’t huge-dollar cases. If there was some monstrous amount of money at stake, maybe it would be a little different.”

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